

The Legality of Militarization of the South China Sea and Its Legal Implications

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ABSTRACT

Maritime entitlement associated with territorial boundaries in the South China Sea has been disputed for a long time, but until recently it does not seem settled. Despite the instability, China has continued expanding its military presence in disputed areas to enhance its maritime power. China has taken various methods to militarize the area, including unlawful restrictions, construction of military bases, and mobilization of maritime militia in an unreasonable manner. This paper aims to examine the legal ground upon which China has claimed its territorial sovereignty to assess whether they have such authority over the region in the South China Sea. Subsequently, the paper will closely analyse the legality of China's militarisation of the region under international law and suggest how international society would have to react to China's excessive domination.

Key words : South China Sea, militarization, maritime militia, sovereign right, United Nations Convention on the Law of the Sea (UNCLOS)

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1. Introduction

The South China Sea is one of the “zone-locked” areas by exclusive economic zone (EEZs) of different nations. It is surrounded by China, the Philippines, Vietnam, Malaysia, Indonesia, and Taiwan, meaning that some states cannot reach the high sea or enter the South China Sea without passing through at least one of these coastal states’ EEZs.¹ Therefore, it is particularly important to clarify the maritime boundary in the South China Sea to identify the coastal State’s rights associated with it. The problem is that China has continuously claimed its territorial sovereignty within the nine-dash line and tried to exercise its authority within it without reasonable legal grounds. Conflicts in the South China Sea contain some legal ambiguity concerning historic rights or limited sovereignty in the EEZ, and it leaves some room for different interpretations of relevant provisions depending on states’ own national interests. By taking advantage of such legal ambiguity, it appears that China has attempted to expand its presence in the South China Sea and territorialise or even militarise the area to reinforce its maritime power so that it becomes crucial to rightly investigate whether China’s attempts conform with the United Nations Convention on the Law of the Sea (UNCLOS). This paper is divided into three main parts: 1) The Status of the South China Sea and Historic Claims, 2) China’s Militarisation of the South China Sea, and 3) Regional and International Responses to China’s Militarisation. The first part highlights the tensions between China and neighbouring states concerning maritime entitlement associated with the occupation of the South China Sea. Part 2 is divided into three sections and each elaborates on different ways of militarizing the area: unlawful restrictions on freedom of navigation, military constructions, and maritime militia. Part 3 focuses on the responses of the international community to China’s actions from the view of Association of Southeast Asian Nations (ASEAN) and the US in particular and aims to suggest a possible direction that the international community ought to pursue to restrain China’s excessive military activities. Ostensibly, the South China Sea dispute may be seen as the tension created in the course of balancing between securing national security rights and ensuring the freedom of navigation. Yet, the matter in the South China Sea is not that simple. Given the growing maritime power of China and its influences on the world, the international community is required to pay great attention to China’s movement and react wisely and collectively.

¹ Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press 2011) ch1.

2. The Status of the South China Sea and Historic Claim

The South China Sea is a highly disputed area where numerous maritime boundary and entitlement disputes remain unresolved, and such disputes seem very likely to soon turn into warfare at any time. The major cause of the disputes is China's constant attempt to exercise its authority over the South China Sea. In 1948, China first issued a 'U-shaped' dotted line which occupied 80% of the South China Sea, which was immediately rejected by neighbouring countries such as Vietnam, Malaysia, Indonesia, and the Philippines.² Nonetheless, China unilaterally reaffirmed the extended EEZ and its authority by drawing so-called a "nine-dash line". As shown in figure 1 below, a nine-dash line is largely overlapped with other states' EEZs and China has nevertheless claimed its territorial sovereignty within the area without reasonable legal grounds.

In the past, the world's ocean was simply divided into territorial water and

Figure 1. The map of the South China Sea.³



2 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 313-354, 320.

3 BBC News. (2020). South China Sea dispute: China's pursuit of resources 'unlawful', says US' BBC News <<https://www.bbc.co.uk/news/world-us-canada-53397673>>.

international water. The latter was further divided into more specific water areas: a contiguous zone, exclusive economic zone, and high sea, as different national interests, such as fishing, or marine scientific research, were highlighted to be protected to some extent under the coastal state's authority. One of the fundamental principles under UNCLOS is the principle of "freedom of navigation". According to article 87, freedom of navigation shall be enjoyed by all States in the high sea, and such right is applied to the EEZ pursuant to article 58.⁴ China guarantees the right of freedom of navigation beyond its territorial sea under international and domestic law.⁵ However, it preserves its way out to deter this right by inserting article 14 in the Exclusive Economic Zone and Continental Shelf Act, stating that the "[t]he provisions of this Law shall not affect the *historical rights* of the People's Republic of China." (emphasis added)⁶ Moreover, given the use of the term 'relevant water' in China's Note Verbale submitted to the UN Secretary-General, which arguably means to refer to ocean area within the nine-dash line,⁷ it may well be said that China's position is rather ambiguous and its claims stem from both UNCLOS and domestic law in a somewhat inconsistent manner. Therefore, it is also important to keep an eye on the interaction of UNCLOS with Chinese domestic law and see how China tries to leverage these different bodies of law for the sake of their own interests and benefits.

In the *South China Sea Arbitration*, China claimed that they have established historic rights over the South China Sea over a long course of history since they first drew a dotted line, as what has become known as the nine-dash line, into the official map.⁸ Along with immediate objections by neighbouring states,⁹ the Philippines further challenged China's historic rights on the ground that whatever rights China may have enjoyed before the establishment of UNCLOS were extinguished since China's accession to the Convention.¹⁰ In addition, there was a lack of documented evidence showing China's intensive involvement in the disputed area, at least it failed to obtain international recognition, demonstrating a lack of connection between China and the area in dispute.¹¹ The document developed by the United Nation in the early 1960s about the Juridical Regime of Historic Waters would be one of the most useful sources to understand what constitutes a historic

4 United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) 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 [...].

5 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), art 11. The People's Republic of China, Exclusive Economic Zone and Continental Shelf Act 1998, art 11 Any State [...] shall enjoy in the exclusive economic zone and Continental shelf of the People's Republic of China freedom of navigation and overflight [...].

6 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), art 14. The People's Republic of China, Exclusive Economic Zone and Continental Shelf Act 1998, art 14.

7 The South China Sea Arbitration (2016) PCA 2013-19, 184.

8 The South China Sea Arbitration. (2016) PCA 2013-19, 180-187.

9 The South China Sea Arbitration (2016) PCA 2013-19, 184.

10 The South China Sea Arbitration. (2016) PCA 2013-19, 188.

11 *Ibid.*, 194, 197.

title. It elucidates critical elements to make valid claims for a historic title, including acquiescence of foreign states, long and continued usage, the exercise of authority, and its effectiveness.¹² The requirements for such claims are well summarised by Kraska in his book, explaining that States must make historic claims *openly* and have exercised *exclusive authority* over the area throughout *an extended period of time*, and other states must have *acquiesced* in the exercise of authority.¹³

Among all the requirements proposed, the present paper concentrates on analysing the valid scope of exclusive authority as a means of deterring China's claim. Regarding exclusive authority, it can be argued that historic claims on the mere ground that a state has habitually engaged in fishing without any objections from other states would not be successful. It can be hardly said that the state has exclusive authority over the area when the activity (i.e., fishing in the high sea) is already considered the internationally lawful use of the sea which every state is entitled to exercise. There is simply no need for other states to object to such activity not because they respect the state's exclusive authority, but because it is a lawful use of the sea. On the other hand, assuming that a state has effectively *restricted* other states from fishing in a certain area without any objections, it may well be said that the state has exercised the exclusive authority, and accordingly, the state may issue a valid historic claim so far as the other requirements are also met. According to the aforementioned document, the exclusive authority can be even understood as the exercise of *sovereignty* if the claim to historic waters is in fact a claim to sovereignty over the area.¹⁴ It sheds light on the importance of perceiving the correct meaning of authority that is required for the test. Exclusive authority is different from and cannot be equated with a higher level of engagement in maritime activities over the region. Through this line of thinking, it appears that China, whose claim is more on factual activities not enforcement power against foreign vessels within the area, did not have exclusive authority over the region, therefore, as it was also decided in the *South China Sea Arbitration*, China's historic claim is invalid.

3. China's Militarization of the South China Sea

12 International Law Commission. (1962) Juridical Regime of Historic Waters, Including Historic Bays, UN Doc A/CN.4/143, 6-19.

13 Ashley Roach, J. and Smith, R. W. (2012) *Excessive Maritime Claims* (Publication on Ocean Development, Vol. 73, 3rd edn, Martinus Nijhoff 39-40; Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press), 314.

14 International Law Commission. (1962) Juridical Regime of Historic Waters, Including Historic Bays, UN Doc A/CN.4/143, 85.

Despite unsuccessful China's historic claims, China has sought to militarise the area in various ways in an attempt to expand its dominance over the South China Sea. Part 3 is divided into three sections, including unlawful restriction on freedom of navigation, construction of military bases, and mobilization of maritime militia and aims to examine the legality of such activities under international law.

3.1. *Unlawful Restriction on Freedom of Navigation*

The legality of the nine-dash line employed by China and other baselines claimed by Malaysia, the Philippines, Taiwan, and Vietnam does not only create tensions between China and states bordering the South China Sea but is also questioned by the third states, notably the US.¹⁵ Putting aside all these geological features and the legality of these 'inferred' baselines, a more critical question is whether the coastal states respect the principle of freedom of navigation consistent with UNCLOS within the disputed area. It is crucial to observe whether China has sought to unlawfully implement its domestic law on other vessels in the region. There are some incidents reported, both in aviation and maritime context, about China's unlawful restrictions on the freedom of navigation within the nine-dash line.¹⁶

In 2016, China seized a U.S. unmanned underwater vehicle launched by U.S. naval vessel, *USNS Bowditch*. The U.S. claimed that China's seizure was unlawful because China does not have jurisdiction over the water where the underwater vehicle was captured and it was conducting routine scientific research.¹⁷ The incident occurred outside of the area delimited by a nine-dash line, but within the Philippines' EEZ over which China has neither sovereign rights nor jurisdiction. Although the dispute was resolved when China returned the vehicle, this incident highlights China's vigorous attempt to expand its maritime power. China sought to justify their action by stating that it seized the drone to ensure that the device was not causing any harm to the safety of navigation.¹⁸ China also insisted that the device could have been used for gathering intelligence for military purposes.¹⁹ However, China's counterclaims are not supported by UNCLOS or any other international regulations. First of all, China does not have sovereign rights or jurisdiction over the water where the incident occurred which was the Philippines' EEZ

15 Ashley Roach, J. and Smith, R. W. (2012) *Excessive Maritime Claims* (Publication on Ocean Development, Vol. 73, 3rd edn, Martinus Nijhoff, 80-101.

16 The EP-3 Incident 2001, The USNS Impeccable Incident 2009, The USNS Bowditch Incident 2016.

17 Kraska, J. and Pedrozo, R. (2016) China's Capture of U.S. Underwater Drone Violates Law of the Sea (Lawfare, 16 December 2016) <<https://www.lawfareblog.com/chinas-capture-us-underwater-drone-violates-law-sea>>; Valencia, M. J. (2017) US-China Underwater Drone Incident: Legal Grey Areas (THE DIPLOMATE) <<https://thediplomat.com/2017/01/us-china-underwater-drone-incident-legal-grey-areas/>>.

18 Daugirdas, K. and Mortenson, J. D. (2017) United State Confront China over Seizure of Unmanned Drone in the South China Sea, 111(2) *American Journal of International Law* 513.

19 *Ibid.*, 517.

so it certainly has no right to take enforcement measures, such as the seizure of the device. Nevertheless, China exercised excessive territorial rights as if the incident occurred in their territorial sea. UNCLOS allows coastal states to restrict innocent passage in the territorial sea only if the passage of a foreign ship is prejudicial to the peace, good order or security of the coastal state, and that includes ‘any act aimed at collecting information to the prejudice of the defence or security of the coastal state’ and ‘carrying out of research or survey activities.’²⁰ In addition, Article 21 permits the coastal state to adopt the law and regulations in respect of the safety of navigation.²¹ However, the application of those articles is firmly limited to the territorial sea, not the EEZ of the coastal state, and certainly not the EEZ of the foreign state. Thus, the seizure of the U.S. device may be well understood as China’s desire to expand its maritime power, and a bold attempt to challenge the status quo to gradually turn their unlawful activities into a new norm in a way that they can obtain more maritime power. Moreover, given that the drone was not fully autonomous but was being remotely operated by U.S. navy personnel and research scientists on Bowditch and there was a radio communication available between Bowditch and China’s PRC Navy ship, China should have given a warning and demanded the U.S. to cease the operation despite its unqualified status to do so. Even if military surveillance were suspected, the proper action should have been taken in due regard under international law, which China has clearly failed to do so in the *Bowditch* incident.²² As examined earlier, China is not entitled to claim territorial sovereignty within a nine-dashed line. Therefore, the Chinese restriction on the freedom of navigation of other states is surely incompatible with UNCLOS, and even if State thinks such restriction is needed for whatever reasons, necessary steps should be taken in a proper and reasonable manner.

In fact, China is not the only country that has increased its military profile other bordering states have also been expanding their military capability and imposed restrictions on military activity within their area. For example, Vietnam and Malaysia have also made excessive maritime claims over their territorial sea and the EEZ based on security concerns, imposing restrictions on the passage of warships through their water area.²³ However, why does China’s action particularly matter? It is partly because of its maritime power, influences and the scale of activity. It is an undeniable fact that China has rapidly grown their political, economic and maritime power and become one of the countries whose influence has had a great impact on the world order followed by the US. In addition, China has increased their military budget and demonstrated its willingness to use force against whoever goes against the will of China. Article 11 of China’s EEZ Law specifies

20 UNCLOS. (1982) art 19(2)(c) and (j).

21 UNCLOS. (1982) art 21(1)(a).

22 Ku, J. (2016) The Non-existent Legal Basis for China’s Seizure of the U.S. Navy’s Drone in the South China Sea (Lawfare) <<https://www.lawfareblog.com/nonexistent-legal-basis-chinas-seizure-us-navys-drone-south-china-sea>>.

23 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 312-314.

the condition for compliance with the Chinese domestic law in the course of exercising the freedom of navigation and Article 14 recognises “historic rights” as the right to be preserved, which is again not consistent with the international law.²⁴ As already discussed in Part 2, China’s claims seem to have been strategically developed in a way they can leverage both international law and domestic law depending on their interests, which makes China’s claim rather ambiguous. This can be understood as ‘strategic ambiguity’ which China would like to seek for their benefit.²⁵

3.2. *Construction and Installation of Military Bases*

In the *South China Sea Arbitration*, one of the claims that the Philippines brought against China concerns China’s construction of artificial islands and installations on the Mischief Reef.²⁶ In determining the legality of such activities, article 56 and article 60 should be first examined to identify the extent of sovereign rights that the coastal state has in the EEZ. According to Article 56, the coastal state has sovereign rights over living and non-living resources and other activities for economic exploitation and exploration in the EEZ as well as the jurisdiction regarding the establishment and use of artificial islands, installations, and structures.²⁷ Article 60 also grants the coastal State the exclusive right over artificial islands, installations, and structures in the EEZ as below.²⁸

24 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), art 11. The People’s Republic of China, Exclusive Economic Zone and Continental Shelf Act 1998, art 11. “Any Country shall enjoy the freedom of navigation in and overflight over the Exclusive Economic Zone ... of the People’s Republic of China and the expediency of other lawful uses of the sea related to the above freedom, under the condition that the laws and regulations of the People’s Republic of China are complied with”.

25 Beckman, R. (2013) The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea (2013) *The American Journal of International Law* 107(142), 142-156.

26 The South China Sea Arbitration. (2016) PCA 2013-19 [399].

27 UNCLOS. (1982) art 56(1)(b).

28 UNCLOS. (1982) art 60.

Article 60

Artificial islands, installations and structures in the exclusive economic zone.

In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

- (a) Artificial islands;
- (b) Installations and structures for the purposes provided for in article 56 and other economic purposes;
- (c) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

Before getting into the issue in more detail, it should be determined to which state Mischief Reef legally and geographically belongs and its legal status under UNCLOS. The Tribunal concluded that the Mischief Reef is a low-tide elevation,²⁹ located within the Philippines' EEZ, and accordingly, the Philippines shall have maritime entitlement over the area.³⁰ China's mere reiteration that "China has indisputable sovereignty over the Nansha Islands and its adjacent waters. The development of any facility in the Nansha Islands falls within the scope of China's sovereignty" is just too weak to make difference in the decision.³¹ It seems therefore apparent that China has violated international law regarding the construction of artificial islands in the Philippines' EEZ without the consent of the Philippines under article 60.

A subsequent question is followed as to whether building 'military' installations or structures are permissible under UNCLOS. Article 60(1)(b) grants the coastal state the right to authorise and regulate the construction and the use of installation or structures on one condition, for *economic purposes*, which arguably would not cover military-related concerns. In the initial submission of the Philippines, they expressed serious concerns about China's activities on Mischief Reef because the activities involved Chinese warships and military personnel.³² On this matter, as China has repeatedly stated in the first place that structures were to protect Chinese fishermen and their production, it was accepted by the Tribunal that such structures were for civilian uses, not for military purposes.³³ However, China's constructions on Mischief Reef might not be solely focused on civilian

29 UNCLOS. (1982) art 13(1) A low-tide elevation is a naturally formed area of land which is surround by and above water at low tide but submerged at high tide.; art 13(2) [It] has no territorial sea of its own.

30 The South China Sea Arbitration. (2016) PCA 2013-19, 1025.

31 *Ibid.*, 1006.

32 *Ibid.*, 997.

33 *Ibid.*, 1028.

uses indeed. Such constructions may have mixed purposes, surely including military purposes. The investigation has released that a 3,000-metre-long airstrip which would be long enough to accommodate most Chinese aircraft was built on the Mischief Reef.³⁴ Aquilino, US Indo-Pacific commander, expressed his concern that military facilities on Mischief Reef, Subi Reef and Fiery Cross, such as radar systems and missile arsenals, appeared to have been completed and the function of those islands would significantly advance the offensive capability of China, which, in the US view, is certainly a threat.³⁵ Regarding this, Hong Lei, a Chinese Foreign Ministry Spokesperson, declined to answer the question, but merely repeated the statement that China's activities are "completely lawful, reasonable and justified".³⁶ China's construction of military installations and structures is not only limited to Mischief Reef. China also built military structures on Subi Reef at the Spratly Islands with the aim of regional dominance and has gradually expanded its military presence on numerous islands in the South China Sea.³⁷ However, China continues denying the intention to militarize and territorialize the area, repeatedly stating that such construction is only for civilian uses and search and rescue operations and is to enhance national security which would eventually contribute to international peace.

Precisely speaking, states are not necessarily forbidden to build military bases within the EEZ, or on the Continental shelf, of the coastal State. According to articles 56 and 60 of UNCLOS, China may have the right to construct military installations or structures in the EEZ of the coastal state since neither article specifies military elements. Article 56 only gives the coastal state sovereign rights over living and non-living resources and other activities concerning the coastal state's 'economic benefit'. Article 60(1)(b) also confines the scope of installations and structures under the coastal state's exclusive jurisdiction to those "for the purposes provided for in article 56 and other economic purposes". It indicates that as long as the other states' activity does not derogate the coastal state's living and non-living resources or their economic benefits, it may be permissible to construct installations and structures in the EEZ of a coastal state even when they are for military purposes. The same logic applies to article 60(1)(c). Construction of military installations and structures is permissible to the extent such construction may not interfere with the exercise of the rights of the coastal state in the EEZ.³⁸ To sum

34 The Guardian. (2015) Third South China Sea airstrip being built, says expert, citing satellite photos (The Guardian) <<https://www.theguardian.com/world/2015/sep/15/third-south-china-sea-airstrip-being-built-says-expert-citing-satellite-photos>>.

35 The Guardian. (2022) China has fully militarized three islands in South China Sea, US Admiral says (The Guardian) <<https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says>>.

36 The South China Sea Arbitration. (2016) PCA 2013-19, 1009.

37 Romaniuk, S. N. and Burgers, T. (2019) China's Next Phase of Militarization in the South China Sea (The Diplomat) <<https://thediplomat.com/2019/03/chinas-next-phase-of-militarization-in-the-south-china-sea/>>.

38 UNCLOS. (1982) art 60(1)(c).

up, UNCLOS does not necessarily forbid the state to construct military installations and structures in the EEZ unless such activity immensely infringes on the coastal State's economic benefits within the area.

There are two possible ways to make the construction of military bases impermissible. In order to make a valid claim against the construction of military bases, the coastal state should be able to prove the immense effects of military construction on its living and non-living resources or economic benefits in its EEZ.³⁹ On the other hand, the coastal state may seek its national security right by demonstrating the immense scale of military structure that might cause a sufficient level of a threat directed at the coastal state. Clearly, the second approach will be more debatable and difficult to prove since UNCLOS does not say much concerning security issues and there is a lack of standards in assessing the level of threat. The closest provision concerning security issues is Article 301, "[refraining state parties] from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodies in the Charter of the United Nations."⁴⁰ While the use of force can be understood more straightforwardly, there still exists ambiguity in terms of assessing what constitutes a threat. The coastal state may want to take 'the scale of military bases (e.g., the size of military construction or emplacement of a military device)', 'consequences', 'reasonableness', and 'international responses' into account in determining the level of threat or the level of disruption. However, the assessment of threat is quite subjective and vague without certain legal guidelines because it can be varied depending on the political situation, international relationship, technological development, or diplomatic relations between states. Providing the guideline for the level of threat or the level of disruption is beyond the objective of this paper; however, the paper warns that when there is a legal ambiguity, it is likely to be abused by powerful maritime states in a way to benefit themselves. The more excessive maritime claims are made but tolerated without proper dispute settlement or at least without much criticism, the more likely they will be heading into gradually forming a new state practice. The proper and timely reaction to challenge excessive claims is required.

3.3. *China's Maritime Militia*

China's maritime militia refers to Chinese fishing fleets integrated into or controlled by the People's Liberation Army Navy (PLA-N), as an auxiliary naval force.⁴¹ They are operating in conjunction with Chinese warships or government

39 Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press 2011) 221.

40 UNCLOS, art 301.

41 Kraska, J. and Monti, M. (2015) The Law of Naval Warfare and China's Maritime Militia 91 *International Law Study* 450.

vessels, providing the PLA-N with various supports. The maritime militia can conduct a variety of missions from domestic security missions (e.g., search and rescue) to national defence missions (e.g., logistic support, concealment operation, surveillance, and harassment). More recently, China's militia has been assigned a special role, called "Maritime Right Protection Force System", which entails its presence in disputed water, protecting its territorial sovereignty, and supporting law enforcement action.⁴² In 2009, for example, USNS *Impeccable* was harassed by two Chinese fishing vessels which were apparently under the control of PLA-N while it was conducting a routine surveillance operation 75 nautical miles off Hanoi Island.⁴³ Merchant vessels can be utilized to support armed forces, but such mobilizations are only allowed during armed conflict.⁴⁴ It is peculiar that China has used militia fishing vessels during peacetime, being routinely used within a nine-dash line despite the role as a reserve force.⁴⁵ During peacetime, militia fishing vessels are normally substituted for Chinese government vessels, playing a significant role in strengthening China's position in the South China Sea through its presence and coercion.⁴⁶ Some states would rather want fishing vessels than warships to maintain their presence and patrol around the water area. However, this is not to say that states can afford to lower the guard against Chinese maritime militia. They should carefully observe the presence of militia fishing fleets and their capability should not be underestimated.

China's militia fishing vessels are equipped with an advanced communication system to enhance the interaction between them and Chinese warships. Besides, militia fishermen receive national defence and political training and some are even trained to conduct reconnaissance and use a light weapon to confront other vessels in disputed water.⁴⁷ More importantly, a number of militia fishing vessels are equipped with Beidou's Vessel Monitoring System, which allows them to track and relay vessels' position, to build a firm information-sharing system between militia fishing vessels and Chinese navy.⁴⁸ It should also be aware that China established an integrated information-sharing system which is closely related to Intelligence, Reconnaissance and Surveillance (IRS) operations. IRS operation is a

42 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

43 Kraska, J. and Pedrozo, R. (2009) *International Maritime Security Law* (BRILL 2013) 315; Pedrozo, R. (2009) Close Encounter at Sea, *Naval War College Review* 62(3), 101.

44 Sato, K. (2020) China's Maritime Militia: a Legal Point of view (The Maritime Issues) <<http://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html>>.

45 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

46 Kraska, J. (2020) China's Maritime Militia Vessels May Be Military Objectives during Armed conflict (The Diplomat) <<https://thediplomat.com/2020/07/chinas-maritime-militia-vessels-may-be-military-objectives-during-armed-conflict/>>.

47 Erickson, A. S. and Kennedy, C. M. (2015) Meet the Chinese Maritime Militia Waging a 'People's War at Sea' (The Wall Street Journal, 30 March 2015) <<https://www.wsj.com/articles/BL-CJB-26372>>.

48 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

sensitive activity since it is hard to be distinguished from other data collection activities. Mobilizing militia fishing vessels would highly improve China's accessibility to the area over which Chinese government vessels would not have been able to conduct surveillance operations. Besides, selected militia fishermen are trained as reporting specialists to ensure that the collected information is correctly sent to the navy.⁴⁹ If militia fishing vessels that are already widely dispersed in the South China Sea can conduct IRS operations on their own and share the information with the Chinese navy through the network they have established, that could be a huge threat.

Moreover, it should be given more attention to the fact that the Chinese government provides an increasingly well-funded maritime militia in defence of their maritime interest. The provincial government covers the costs associated with special missions allocated to militia fishermen, and they are compensated for damage and costs incurred in the course of their operation.⁵⁰ Also, the local government guarantees generous salaries and monetary compensation to the maritime militia to encourage them to be at the head of venturing disputed areas, such as the South China Sea, and they are also provided with relevant training.⁵¹ For all the benefits the Chinese government provides, China's maritime militia will continue expanding and the quality of maritime militia will be improved and upgraded over time. Fishing vessels that are equipped with an advanced communication system, auxiliary military devices, trained fishermen and even small weapons are surely intimidating and will certainly raise tensions in the South China Sea. In this regard, Chinese maritime militia throw some questions as to the status of militia fishing vessels and how to determine whether they are mobilized legitimately.

3.3.1. The Ambiguous Status of China's Militia

Warships, auxiliaries vessels, and general vessels all have different rights and duties associated with their status under international laws. First of all, militia fishing vessels are clearly not a warship under article 29 of UNCLOS which defines a warship as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."⁵² Normally, militia fishing vessels do not have external marks unless they are publicly converted into a warship during wartime and hoist naval ensigns. In fact, it is entirely contrary to what China

49 *Ibid.*, 15.

50 Erickson, A. S. and Kennedy, C. M. (2015) Meet the Chinese Maritime Militia Waging a 'People's War at Sea' (The Wall Street Journal) <<https://www.wsj.com/articles/BL-CJB-26372>>.

51 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

52 UNCLOS. (1982) art 29.

has attempted to do by utilizing militia fishing vessels because they aim to conduct activities at the same level as military activities in disguise. For example, maritime militia at the time of operation in the South China Sea disguised themselves as private fishermen by taking off their uniforms.⁵³ As such, the question can be narrowed down to whether China's militia fishing vessel is an auxiliary vessel or a general fishing vessel. It is a crucial distinction because only the latter is guaranteed to be protected during the armed conflict by the principle of inviolability under International Humanitarian Law.

According to San Remo Manual, the auxiliary vessel is defined as "a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service"⁵⁴ Article 65 of San Remo Manual regards enemy auxiliary vessels as military objectives, subject to the limited application to objects "which by their nature, location, purposes or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage".⁵⁵ It seems that article 40 indicates the importance of understanding the nature, purpose, and consequences of activity in determining the status of an object. It may also indicate that when the status is unclear it can be determined by assessing the level of involvement and contributions they can provide. However, given the large number of Chinese militia fishing fleets that are usually in disguise, it is virtually impossible to distinguish militia fishing vessels from general fishing vessels in practice.⁵⁶

Lastly, the fact that auxiliary vessels will be subject to the military objective during wartime may imply that Chinese militia fishing vessels, as auxiliary vessels, can be as intimidating as warships during peacetime. Even so, it is difficult for other states to take action against China's behaviours when their status is uncertain because it tends to become a more sensitive issue when civilian vessels or civilian actors are involved. For example, the U.S. hesitates to confront China's maritime militia due to political sensitivity, especially when those Chinese fishermen are supported by China's naval force.⁵⁷ Such a dilemma becomes apparent when it comes to the grey situation which is neither peacetime nor wartime but in tension, such as the situation in the South China Sea. In the meantime, Chinese militia fishing vessels are excessively operated in the South China Sea with ambiguous status. Ambiguity makes other states hesitate to respond to China's maritime militia, es-

53 Kennedy, C. M. and Erickson, A. S. (2017) China Maritime Report No.1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA, CMSI China Maritime Reports 1, 15.

54 International Committee of the Red Cross [ICRC] (1995). San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1995, art 13(h).

55 *Ibid.*, art 40.

56 Kraska, J. and Monti, M. (2015) The Law of Naval Warfare and China's Maritime Militia, 91, *International Law Study* 450, 465.

57 Erickson, A. S. and Kennedy, C. M. (2015) Meet the Chinese Maritime Militia Waging a 'People's War at Sea' (The Wall Street Journal) <<https://www.wsj.com/articles/BL-CJB-26372>>.

pecially when they do not necessarily want to escalate the situation into real combat. On the contrary, such ambiguity makes it easier for powerful maritime states, such as China, to leverage legal discrepancies. Moreover, China has established a so-called “three lines defence” project, that is, the militia will be on the front line and backed up by the China coast guard and navy in order.⁵⁸ It may indicate China’s intentional desire, by having militia vessels harassed or intercepted by other states, to provoke political problems and discourage other states to take further action.

Militia fishing vessels are a new threat, and it can be China’s intentional military strategy. It will be too late to confront China once a number of China’s militia vessels are fully equipped, trained, improved, and prepared for future warfare, guarding the front line of protecting China’s territorial sovereignty. To prevent China from excessively leveraging the maritime militia, such activities should be internationally identified as wrongful acts under international law.⁵⁹ The nature of activities they are conducting for the navy and their level of involvement need to be assessed in determining their status. For example, if they are conducting excessive law enforcement activity, pointing weapons at another state’s warship, or entering another state’s territorial sea with a threat of coercion, such actions should be considered wrongful acts. China will continue expanding its presence in the South China Sea and accelerate challenging the status quo if the rest of the world remains silent. The international community, therefore, needs to keep an eye on China’s movement and properly react in a timely manner. Otherwise, China’s militia fishing vessels will eventually be in the best position during both peacetime and wartime, being protected under the principle of inviolability while flourishing their military capability.

4. Regional and International Reactions toward South China Sea Disputes

Regarding China’s militarisation of the South China Sea, it is crucial to identify how other states and regional organisations have been and should be reacting to China’s actions over this sensitive water area. Part 4 specifically focuses on the responses of the ASEAN, neighbouring states and the U.S. as another major power in the world.

58 Erickson, A. S. and Kennedy, C. M. (2021) China’s Maritime Militia, <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

59 Sato, K. (2020) China’s Maritime Militia: A Legal Point of View (The Maritime Issues) <<http://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html>>.

4.1. Joint Effort Made by Association of Southeast Asian Nations (ASEAN) and Its Limited Effect

ASEAN was established in 1967 to manage conflicts in Southeast Asia and maintain regional peace. As the tension in the South China Sea has become significant, ASEAN has sought to manage the South China Sea through its declarations, statements, the ASEAN Regional Forum and the China-ASEAN Joint Working Group to Implement the Declaration on Conduct of Parties in the South China Sea.⁶⁰ New progress, such as ASEAN-China Single Draft Negotiating Text of the Code of Conduct (COC), as the dispute management mechanism, has also been made.⁶¹ However, despite such efforts, there are some sceptics, as this paper is also pointing out, doubting the effectiveness of ASEAN and China-ASEAN cooperation in managing the sovereignty dispute in the South China Sea.

Firstly, ASEAN member states which consist of both claimant states (e.g., Vietnam and the Philippines) and non-claimant states (e.g., Cambodia and Thailand) are having a hard time reconciling their claims.⁶² There is no shared interest in resolving sovereignty disputes in the South China Sea because such dispute is not every state's concern but is limited to claimant states.⁶³ This creates a major obstacle for ASEAN to play the role in managing sovereignty disputes as a complete third party. Additionally, since ASEAN's system of conflict management is consent-based, all member states must arrive at a consensus which also makes it difficult to formulate ASEAN's position to act effectively.⁶⁴ Even among claimant states, there exist some challenges to compromising their claims since they have different economic, diplomatic, and political interests in relation to China. Thus, ASEAN could not act effectively in managing sovereignty disputes in the South China Sea unless they achieve an agreement on that matter. Secondly, a strategic reason for China's cooperation with ASEAN may exist. Having considered the COC, ASEAN member states seem to have a shared interest in de-escalating tension in the South China Sea, maintaining benign relations with China, and arguably reducing US involvement in the dispute.⁶⁵ Interestingly enough, limited US involvement in the dispute completely met China's interest. Thus, China may strate-

60 Majumdar, M. (2015) The ASEAN way of Conflict Management in the South China Sea, *Strategic Analysis* 39(1), 73-76.

61 Nasu, H. (2019) Rob McLaughlin, Donal R Rothwell and See Seng Tan, *The Legal Authority of ASEAN as a Security Institution* (Cambridge University Press 2019) 130-137.

62 Kusuma, W. (2021) Cery Kurnia and Rio Armanda Agustian, South China Sea: Conflict, Challenge, and Solution, *Lampung Journal of International Law* 3(1), 51:58-59.

63 Nasu, H. (2019) Rob McLaughlin, Donal R Rothwell and See Seng Tan, *The Legal Authority of ASEAN as a Security Institution* (Cambridge University Press 2019) 137.

64 Majumdar, M. (2015) The ASEAN way of Conflict Management in the South China Sea, *Strategic Analysis* 39(1), 73:76-77.

65 Hu, L. (2021) Examining ASEAN's effectiveness in managing South China Sea disputes, *The Pacific Review* 1:10.

gically need to maintain the South China Sea peaceful, at least seemingly, by developing benign relationships with neighbouring states, in order to avoid intensive involvement of the US in the region accordingly.⁶⁶ It is still controversial whether US involvement would aggravate or alleviate the tension in the South China Sea. Be that as it may, it is certain that China would not welcome the US's expanded military presence and involvement in the disputed waters. Lastly, although ASEAN eventually managed to compel China into the COC, it failed to make it legally binding as China initially wished.⁶⁷ It is thus likely that China may not be willing to fulfil the agreement if they think it is limiting any of its rights or infringing on its benefits.

4.2. *The Rivalry between China and the US*

China's excessive restriction of freedom of navigation can also be understood from the view of rivalry between China and the US, as two major powers in the world.⁶⁸ As China has rapidly developed and become one of the most powerful maritime countries following the US, the US could not help but have to keep its eyes closely on China's movement. In such efforts, the US navy has been engaging in freedom of navigation operations throughout the region.⁶⁹ The US warship performed close-range surveillance operations in the South China Sea and deliberately entered the sensitive water area over which China claimed their sovereignty, raising security concerns and tensions between China and the US.⁷⁰ Interestingly, it is observed that the US has only deployed warships to patrol the region conducting military operations without any claims of its own, and it may be understood as the US strategy to avoid unnecessary conflict while planting ideas to China that the US and the rest of world are aware of what they are up to. Such position of the US is not only derived from the principles of international law, but also to some extent represents their own national concerns that China may become a leading maritime power. Therefore, when challenging the legality of China's claims and activities, it should be equally examined whether the US operations to confront Chinese excessive maritime claims are being conducted in a manner consistent with international law.

66 Qi, H. (2019) Joint development in the South China Sea: China's Incentives and Policy Choices, *Journal of Contemporary East Asia Studies* 8(2), 220-239.

67 Hu, L. (2021) Examining ASEAN's effectiveness in managing South China Sea disputes, *The Pacific Review* 1:16.

68 Majumdar, M. (2015) The ASEAN way of Conflict Management in the South China Sea, *Strategic Analysis* 39(1), 73-75.

69 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 201-214.

70 Qi, H. (2019) Joint development in the South China Sea: China's incentives and policy choices, *Journal of Contemporary East Asia Studies* 8(2), 220-225.

4.3 Possible Future Directions Regarding the South China Sea Dispute

When there is a legal conflict associated with legal ambiguity, the easiest and fairest way to resolve it is often to strictly stick to the existing rules. This tendency is observed in some coastal states, for example, Malaysia, the Philippines and Vietnam have determined to bring their claims exclusively based on UNCLOS.⁷¹ Claimant states or any other states who wish to restrain china's excessive maritime claims must make sure their operations are consistent with UNCLOS to make their counterclaim more valid and persuasive. Otherwise, it would be contradictory and unreasonable to impose strict standards of law on China and expect it to be consistent with UNCLOS. If a state seeks to expand its right beyond what is essentially granted under international law, the burden of proof is hugely on a claimant state and it must provide sufficient evidence valid enough to make a deviation from international law, taking such as circumstances, geographical or geopolitical dynamics, historical uses, or technological developments into account. If it fails to do so, international law needs to take priority.

In addition, the positions of neighbouring states, who are geographically close to the South China Sea but do not take part in the dispute such as South Korea and Japan, are also important. In the case of South Korea, it has been generally in a position in favour of demilitarizing the South China Sea and supported the view that the freedom of navigation should be guaranteed and the disputes should be resolved in a peaceful manner according to international law, which is often interpreted as reflecting US's position.⁷² Nevertheless, the position of South Korea has been quite vague in a way that it avoids direct involvement or statement as regards the matters in the South China Sea.⁷³ To understand one's position regarding the militarisation of the South China Sea, it is fundamental to identify what rights would be at stake if China sought to militarise the South China Sea. For example, South Korea is highly dependent on oil imported from overseas mainly passing through the South China Sea. Consequently, any undesirable events that may prevent the flow of international commerce in this region would have a huge impact on the economy of South Korea. Besides, it has been reluctant to take a side due to fear of any diplomatic backlash from either two key maritime powers – China and the United States. Overall, it is observed, as also identified in section 4.1., that reluctance to respond against Chinese behaviour is derived from the fear of China's economic or military retaliation. This shed the light back on the US's position in dealing with the issue.

71 Beckman, R. (2013) The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea, *The American Journal of International Law* 107(142), 142-152.

72 Office of the Press Secretary. (2015) Remarks by President Obama and President Park of the Republic of Korea in Joint Press Conference (The White House) <Remarks by President Obama and President Park of the Republic of Korea in Joint Press Conference | whitehouse.gov (<https://www.archives.gov>)>.

73 Jackson, V. (2015) The South Cina Sea Needs South Korea: Why Seoul can no longer stay on the sidelines of maritime disputes in the South China Sea (The Diplomat) <The South China Sea Needs South Korea – The Diplomat>.

The most dramatic measure was taken by the Philippines by requesting for international decision. However, even though the case was held strongly in favour of the Philippines, it failed to pressure China effectively. In other words, it may have succeeded in gaining public recognition of China's excessive claims, however, it failed to invalidate them in practice. When the decision of Permanent Court of Arbitration was released, the US did not firmly endorse the ruling even though it had strongly endorsed the Philippines' right over China's claims.⁷⁴ Besides, China explicitly announced that they would not comply with the decision of the Arbitration. Although states, taking part in the arbitration, agree to be legally bound by the outcomes of it, there are a few cases, including the present case, that a state that was imposed the obligations from the court rejected to perform them, and it is often due to a lack of enforcement mechanism for non-compliance. In such a case, a state in which the court was in favour wished to enforce the decision and several efforts had been made to a varied extent. For example, Nicaragua, in the *Nicaragua case*⁷⁵, had sought international recourse by requesting draft resolutions to UN Security Council and UN General Assembly for further decision upon measures to be taken to give more effect to the decision from the court.⁷⁶ Nicaragua's attempts were not as successful as it was intended in securing the US's compliance but it was not useless. It does have left an important legal implication that an active engagement in seeking further measures can have effects to a certain extent. It is also observed in a few cases that it is mostly the powerful states, such as the US, China, or Russia, who often defy the decision of the court.⁷⁷ Thus, it may be a reasonable expectation for the US, as probably the only state whose power and influences are equivalent to China's, to be at the forefront of taking more forcible, but not coercive, action against China's excessive claims, for example by increasing military patrol. The US seems to shift their neutral position to a more direct position on maritime issues in the South China Sea, once describing China's behaviour as 'bullying'.⁷⁸ The US can play a crucial role in supporting smaller states to build their economy and military capacity and this will eventually contribute to developing an international coherent voice about the illegality of China's militarisation in the

74 Poling, G. B. (2020) How Significant Is The New U.S. South China Sea Policy? (CSIS) <How Significant Is the New U.S. South China Sea Policy? (<http://www.csis.org>)>.

75 ICJ. (1984) *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America).

76 Nguyen, L. and Yu, M. T. (2016) After the Arbitration: Does Non-Compliance Matter? (Asia Maritime Transparency Initiative) <After the Arbitration: Does Non-Compliance Matter? | Asia Maritime Transparency Initiative (<http://www.csis.org>)>.

77 South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China); International Tribunal for the Law of the Sea [ITLOS] (2013). The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation); ICJ. (1984) *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America).

78 Cooper, Z. and Glaser, B. S. (2020) What Options Are on the Table In the South China Sea? (Texas National Security Review) <What Options are On the Table in the South China Sea? - War on the Rocks>; U.S. Embassy in Laos (2020). Statement by Secretary Michael R. Pompeo, U.S. Position on Maritime Claims in the South China Sea.

South China Sea. In doing so, the US as well as other like-minded states first need to coherently perceive China's claims as 'illegal', 'violation', or 'wrongful act'. The use of stronger terms in joint statements in a regional or international forum would help pressure China to stick to international law and international ruling. It may be true that stronger physical or verbal responses could accelerate the tension between the US and China or between China and other relevant states, however, in the longer term, China needs to realise that their illegal activities are no longer tolerated or ignored but subject to forceful critique and responses from international society.

5. Conclusion

China once described the South China Sea as 'China's core interest'.⁷⁹ It may indicate their willingness to take aggressive actions to dominate the South China Sea. Besides, regarding Chinese maritime militia, the possibility of 'legal warfare' that China abuses legal grey areas to utilise fishing vessels for strategic military purposes should not be overlooked.⁸⁰ Undoubtedly, China is gaining more naval power in the South China Sea despite constant disputes in the region. Even the court decision has not been able to defeat China's desire to expand its power over the area. As discussed, such desires can be observed through China's constant claims for the EEZ on the historical ground, unlawful restrictions on freedom of navigation, military construction in the disputed EEZ, and the operation of a massive maritime militia. It seems that China tries to take advantage of divergent interpretations of UNCLOS and legal loopholes to make such excessive claims. Yet, the rules are settled. In principle, there are no additional rights that coastal states can exercise authority beyond what is granted under UNCLOS, especially when the EEZ arguably belongs to another state as is the case here. Some scholars may emphasise the need for guidelines in determining the contemporary scope of the coastal states' rights within EEZ. Indeed, such guidelines might be useful, for example, when it comes to new advanced technology and emerging threats associated with it. In this regard, it may well be said that a further guideline for the assessment of a new threat in line with technological development would be a great supplement to current international law. However, the dispute in the South China Sea is too complicated to be defined as a dispute regarding the scope of states' rights within the EEZ. As examined, there are more significant aspects entangled with each other making the dispute more complicated: China's enormous regional

79 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 313-354, 318.

80 Since 2003, the Chinese Communist Party Central Committee and the Central Military Commission in Beijing adopted the concept of 'three warfares', consisting of psychological, media and legal warfare. Legal warfare means seeking to employ international and domestic laws to gain international support and manage the political repercussions of China's military actions.

and international influences on other states, severe competition between China and the US, incapability and reluctance of other states and China's lack of awareness of the problem.

The more fundamental problem as identified in Part 4 is that China's influences are putting direct or indirect pressures on other states not to react against China's claims. Besides, although most states share the inclusive interest of ensuring the freedom of navigation, they have at the same time different national interests to protect especially in relation to China. This seems to be a major hurdle preventing collective effort. In this regard, the paper emphasises the role of the US maintaining a forceful position against China's claims which would eventually help rally international support and develop coherent reactions against China's attempts at deterring the long-standing principles. International society can build a strategic shared interest to counter China's growing expansion by strictly sticking to international rules.

What China might be afraid of might be shared responses. This is probably why China has worked assiduously with some ASEAN states to encourage them not to stress the need for shared responses.⁸¹ Thus, the paper again underscores the importance of an international coherent reaction with the US at the forefront of maintaining a forceful position against China's behaviour and encouraging like-minded states to engage more actively in promoting freedom of navigation. The dispute in the South China Sea can be described as a competition between power and plurality. However, plurality here will only be able to win if the majority manages to build a coherent strategic shared interest to counter China's illegal activities and take more forceful action collectively. To sum up, China has attempted to distort the interpretation of long-standing principles and make efforts toward the way of increasing its authority over the disputed area by gradually shaping a new norm. Changing the international norm would probably be very slow, nevertheless, China's constant attempts should not be underestimated. Silence or ignorance will only promote China's continuous expansion and individual claims will not be strong and effective enough to discourage China's behaviour. The international community needs to collectively observe and keep challenging China's excessive claims with one coherent voice and put more effort to make such claims publicised at the international level.

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81 Jennings, P. (2015) *The International Community and the Strategic Balance in the South China Sea in Murray Hiebert and others* (eds.), *Examining the South China Sea Disputes: paper from the fifth annual CSIS South China Sea Conference* (Center for Strategic & International Studies 2015) 55.

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