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The Law of the Sea and Grey Zone Operations in the South China Sea

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SYNOPSIS

Grey zone operations, especially in a maritime context, can have strategic and economic ramifications for the future global order. This makes the absence of so-called "rules of the game" all the more politically vexing. Nevertheless, past experience suggests that there are potentially useful counter-measures for states at the receiving end of such grey zone operations.

COMMENTARY

International law has — since 1945 — tended to continue the very bivalent approach to inter-state competition (including at sea) that characterised pre-UN Charter international law. This approach emphasises that unless a conflict situation between states is an armed conflict (which means that the specialised law of armed conflict applies), then competition and contest between states is governed by the "normal" "peacetime" rules of international law (e.g., as per the US DoD Law of War Manual, para 1.3.2.1). These rules — quite rightly — prioritise peaceful dispute resolution and de-escalation. International law also provides states with a common, agreed, baseline lexicon for describing the context of, the rights and obligations engaged in, and the framing and expressing of, disputes. That is, there is no in-between "status mixtus" or "third paradigm" that sets out different rules applicable to those grey zone situations that — as a matter of strategy and politics, but not necessarily law — appear to sit in between peace and armed conflict. That is, unless a situation between states is considered an armed conflict, then it is governed by the "peacetime" rules, which prioritise peaceful dispute resolution and de-escalation.

Grey Zone Operations at Sea and Associated International Law of the Sea Implications

This orthodox bivalency does not mean, however, that there are no susceptibilities in international law to grey zone exploitation. Indeed, as the most iconic of current and recent grey zone operations indicate — whether "little green men" in Crimea, PRC maritime militia operations in the South China Sea and East China Sea, use of deniable proxy force rebels in eastern Ukraine, recycling "former" military personnel to conduct arms-length operations in Syria through private military and security companies, or engaging in other forms of "lawfare" — international law is as subject to exploitation in grey zone operations as any other element of the international system.

It is within this context that the PRC's grey zone operations in the South China Sea tend to target, or seek to generate, seams or fracture points in the law of the sea. There are at least two ways in which these operations seek to achieve key grey zone or hybrid warfare outcomes — deleterious for their adversary — by exploiting legal seams to create alternative explanations and characterisations, uncertainties, and delays.

1. Using terms and claiming rights that are dissonant with, or cast doubt upon, the settled understanding of law of the sea (LOSC) regimes. Although the law of the sea is as replete with "constructive ambiguities" as any other component of international law, there are some systemic or regime-level elements of the constitution for the oceans (in Ambassador Tommy Koh's famous phrase) that are clearly settled and singular in their application. That is, there is, for all intents and purposes, an established orthodoxy on that matter, and any claims of an alternative or parallel legal regime covering that matter must be understood as insurgent. In this regard, the PRC's recent attempt to generate a parallel customary law of the sea version of archipelagic rights — the revitalised "Four Shas" claim — as a successor to its clearly rejected (and never clarified) nine-dash or ten-dash line claim is an indicative example. This new approach seeks to leverage concepts and rights flowing from the (quite narrowly available) LOSC archipelagic states regime in order to create a more LOSC-ish sounding (but nevertheless still LOSC incompatible) claim in the South China Sea. As Julian Ku and Chris Mirasola have argued,

> China may have concluded that it can better shape (or undermine, depending on your point of view) the law of the sea by adopting UNCLOS [United Nations Convention on the Law of the Sea] terminology. As a rising, revisionist power, China has an interest in reinterpreting the existing rules to better suit its interests. Winning support for straight baselines among international lawyers and governments may be easier than finding support for its Nine-Dash Line claim. China can count on a growing roster of Chinese international lawyers and scholars who could build support for this new approach in the global community. Some have called this strategy a form of "lawfare".

A second example of this grey zone tactic, as employed in respect of the law of the sea in the South China Sea context, is to claim the applicability of otherwise settled understandings of law enforcement rights at sea in situations where they factually do

not apply. One case study of this tactic is the PRC's illegitimate use of otherwise legitimate maritime law enforcement powers and justifications for action in places where — on any reasonable legal reading — it is unlawful to do so because the PRC does not have jurisdiction in that area. For example, whereas the South China Sea Arbitral Award in 2016 determined that regardless of sovereignty over Scarborough Shoal, many of the littoral states have LOSC-recognised historic fishing rights in the territorial sea associated with that feature (paras 805, 812), the PRC continues to assert an exclusive jurisdiction over the area and associated fishing rights and uses LOSC-referenced, but situationally unavailable, maritime law enforcement jurisdictions and authorities to press that claim.

Chinese fishing vessel. Aggressive behaviour by Chinese fishing vessels in the South China Sea are often supported by Chinese Coast Guard and PLAN vessels in the vicinity. *The appearance of U.S Department of Defense (DoD) visual information does not imply or constitute DoD endorsement.*

2. Exploiting (or engineering) uncertainties with respect to specific terms and concepts within the LOSC 1982. As with constructive ambiguities and inappropriate use of (in this case, LOSC) concepts embedded within particular legal regimes, international law also admits of a range of introduced interpretive uncertainties in respect of the application of key schematic concepts at sea. One example is the confusion that has attended how we understand the operation of the UN Charter's Article 2(4) concept of threat or use of force at sea in relation to maritime law enforcement operations, in light of the challenging Guyana v Suriname Arbitral Award (paras 439-440).

There are two clear examples of such international law-derived "own goals" — effectively an invitation to exploitation — that are of relevance to PRC grey zone operations in the South China Sea. The first is the open invitation to exploit

uncertainties related to the concept of “military activities” as found in LOSC 1982 Article 298(1)(b). This provision allows states to exclude “military activities” from otherwise compulsory dispute resolution mechanisms. The problem is that the situational definition given this term in the 2016 South China Sea Arbitral Award (which concluded that certain Chinese–Philippines vessel interactions were military activities and therefore beyond jurisdiction — para 1161) is almost 180 degrees opposite the approach taken by the International Tribunal for the Law of the Sea (ITLOS) in the 2019 Kerch Strait case (which found interactions between Ukraine navy warships and Russian coast guard and security service vessels to not be military activities — paras 68–77).

The second example is uncertainty in relation to the status of “maritime militia” vessels under the law of the sea (leaving aside the separate issue of characterisation of these vessels under the law of naval warfare). The legal opacity that exists around the sovereign status (or otherwise) of some of the sub-categories of such vessels — particularly the fishers on Monday, harassers on Tuesday category, as opposed to the clearly sovereign People’s Armed Forces Maritime Militia (PAFMM) — brings with it uncertainties as to how to legally characterise their conduct (private, or attributable to the state?). This in turn has significant implications for what legal rule-set should be applied in developing a response: Was it an act of private criminality at sea, or does it need to be assessed as against the law on state responsibility? Are counter-measures against the state available, or are response options limited to requesting (unlikely to be fulfilled) mutual legal assistance from that very same state in the hope of gaining investigative and prosecutorial access to the alleged perpetrator?

What Is to be Done?

One way of reducing the effect of grey zone operations that engineer or leverage legal uncertainties is to take a clear, communicated, pre-emptive legal position on issues of status and incident characterisation. If the scope for exploiting legal terminological or conceptual uncertainty is narrowed, then the risks of blowback and escalation can to some extent be turned back upon the perpetrator of the grey zone operation. For example, if a group of states were to clearly communicate that maritime militia vessel conduct of types X and Y (e.g., fishing vessel harassment operations of transiting warships or auxiliaries carried out in situations where nearby Chinese Coast Guard or PLA-N vessels are clearly directing the operation) will henceforth be considered to be state-directed and state-attributable, this places the perpetrator on notice that those states have predetermined the availability of more forcible and broadly targeted response options as per (for example) the law on state responsibility and the law of self-defence. This is, in effect, what the US Navy recently did when it declared that maritime militia vessels would, in the event of armed conflict at sea, be considered as prima facie targetable auxiliaries rather than as merchant vessels (which can only be targeted in certain situations).

Ultimately, PRC grey zone operations in the South China Sea are not simply a political and strategic challenge; they are also a worrying legal development. Continued use of lawfare over a long period — when not called out, legally critiqued, and denounced — will ultimately undermine the broader stability of the finely balanced package deal that is the “constitution of the oceans”. Piecemeal erosion of the universality and viability

of such fundamental and hard-fought-for pillars of the international legal order is really not in anyone's — including the PRC's – interest.

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