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The Law of Naval Warfare and China's Maritime Militia

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I. INTRODUCTION

China operates a distributed network of fishing vessels that are organized into a maritime militia to support the People’s Liberation Army Navy (PLAN). The militia is positioned to conduct a “people’s war at sea” in any

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The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

future conflict.¹ This strategy exploits a seam in the law of naval warfare, which protects coastal fishing vessels from capture or attack unless they are integrated into the enemy's naval force. The maritime militia forms an irregular naval force that provides the PLAN with an inexpensive force multiplier, raising operational, legal and political challenges for any opponent.

The sheer size and scope of the vast network of China's maritime militia complicates the battlespace, degrades any opponent's decision-making process and exposes adversaries to political dilemmas that will make them more cautious to act against China during a maritime crisis or naval war. The legal implications are no less profound. This article concludes that the maritime militia risks erasing the longstanding distinction between warships and civilian ships in the law of naval warfare. Although the law of naval warfare permits warships to engage civilian fishing vessels that assist enemy forces, it may be virtually impossible to distinguish between legitimate fishing vessels and those that are integrated into the PLAN as an auxiliary naval force. Regardless of whether the maritime militia plays a decisive combat role, its presence in the theater of war confronts opponents with vexing legal and operational dilemmas.

The maritime militia has emerged in parallel with China's ascent to great power status. As the world's newest major maritime power, China warrants close attention. The rapid growth in the size and quality of the PLAN has raised concern regionally, as well as in Delhi and Washington, D.C. Since China soon will have the second largest navy in the world, it is especially important to explore the implications of its auxiliary militia force under international law. The four hundred years of custom and State practice embedded in the law of naval warfare may be upended by China's unorthodox approach to maritime power.

II. CHINA'S MARITIME MILITIA

China operates the world's largest fleet of civilian fishing vessels and trawlers,² and many of their crews and ships form a maritime militia used to advance the country's geopolitical claims in the East China Sea and South

1. Alexander Huang, *The PLA Navy at War: 1949–1999*, in MARK A. RYAN, DAVID MICHAEL FINKELSTEIN & MICHAEL A. MCDEVITT, *CHINESE WARFIGHTING: THE PLA EXPERIENCE SINCE 1949*, 266 (2003).

2. 1 FOOD AND AGRICULTURAL ORGANIZATION, *WORLD REVIEW OF FISHERIES AND AQUACULTURE 2014*, at 36, available at <http://www.fao.org/3/a-i3720e/i3720e01.pdf> (last visited June 16, 2015).

China Sea. The hybrid civilian-naval forces, which are integrated as unofficial constabulary and military auxiliaries into the PLAN, have a role in peacetime to support coercive maritime diplomacy against Japan, Vietnam, and the Philippines. The ships enforce China's unilateral seasonal fishing ban in the South China Sea, and perform other support for the Chinese Coast Guard, such as resupply of Chinese artificial installations in the region. Furthermore, Beijing's maritime militia is designed to augment Chinese military power during any conflict at sea, and this utility has profound implications for the law of naval warfare.

A. Organization, Equipment and Training

The nearly two hundred thousand fishing vessels that comprise China's maritime militia are not formally integrated into the PLAN, but they operate in conjunction with the armed forces to promote Beijing's strategic objectives in the South China Sea and East China Sea. China has a large commercial fishing sector, with fourteen million people working in the industry—25 percent of the world's total.³ Fishermen are assigned to collectives or attached to civilian companies and receive military training and political education in order to mobilize and promote China's interests in the oceans.⁴

The fishing vessels of the militia are equipped with advanced electronics, including communications systems and radar that supplement the PLAN force structure and enhance interoperability with other agencies, such as the China Coast Guard. The maritime militia also provides logistics support to Chinese warships. In May 2008, for example, militia fishing craft transferred ammunition and fuel to two warships near Zhejiang Province.⁵ Many boats are equipped with satellite navigation and can track and relay vessel positions, and gather and report maritime intelligence.⁶ In peacetime, the ships provide an on-scene presence around reefs and rock features, natural islands, newly-created artificial islands, and shore side and offshore

3. *Id.* at 28.

4. Andrew S. Erickson & Conor M. Kennedy, *Meet the Chinese Maritime Militia Waging a "People's War at Sea,"* WALL STREET JOURNAL (Mar. 31, 2015), <http://blogs.wsj.com/chinarealtime/2015/03/31/meet-the-chinese-maritime-militia-waging-a-peoples-war-at-sea/>.

5. Edward Wong, *Chinese Civilian Boats Roil Disputed Waters,* NEW YORK TIMES, Oct. 5, 2010, at A6.

6. Erickson & Kennedy, *supra* note 4.

facilities.⁷ The ships also supply construction materials for building China's notorious artificial islands in the South China Sea—at least some 2.65 million tons since the 1990s.⁸

Maritime militia training includes ship identification, use of light weapons and military organization.⁹ The fishermen receive political indoctrination and civil defense training, sometimes delivered by Communist Party apparatchiks while at sea. Furthermore, some fishermen are trained to interact with and confront foreign vessels in disputed waters.¹⁰ As part of state agitprop for promotion of Chinese maritime claims, fishing vessels could become the tail wagging the dog and drag China into conflict with its neighbors. On September 8, 2010, for example, a Chinese fishing trawler rammed two Japanese Coast Guard vessels near the Senkaku Islands.¹¹ The vessel's captain, Zhan Qixiong, and the crew of fourteen sailors were detained by the Japan Coast Guard. The sailors were released two weeks later, but the incident severely damaged Sino-Japanese relations. In a meeting last year, a former admiral of a blue water naval force in Northeast Asia said off the record that Chinese fishing vessels operate with military personnel on board—a point seconded by the retired chief of navy of a Southeast Asian State now at odds with China over maritime claims.¹²

The heady mixture of economic integration with the State and the banner of nationalism form an effective patron-client relationship that benefits both the Chinese fishing community and the Chinese Communist party. For fishermen who face increased competition from foreign vessels amid declining fish stocks in the region, the militia is a new way to ensure survival. In June of 2012, He Jianbin, the chief of the State-run Baosha Fishing Corporation in Hainan province, encouraged the government to transform Chinese fishing vessels and their crews into a militia for the PLAN:

If we put 5,000 Chinese fishing ships in the South China Sea, there will be 100,000 fishermen. . . . And if we make all of them militiamen, give them weapons, we will have a military force stronger than all the combined forces of all the countries in the South China Sea. . . . Every year, between

7. *Id.*

8. *Chinese Tanmen Militia Fought the Foreign Police*, XINHUA, (Apr. 30, 2014), <http://www.wenxuecity.com/news/2013/04/30/2368448.html> (Original in Chinese), rough translation available at <http://www.fixdllfile.com/news/000455.html>.

9. Erickson & Kennedy, *supra* note 4.

10. *Id.*

11. Wong, *supra* note 5.

12. Authors personal off the record conversations with the individuals.

May and August, when fishing activities are in recess, we should train these fishermen/militiamen to gain skills in fishing, production and military operations, making them a reserve force on the sea, and using them to solve our South Sea problems.¹³

Jianbin also noted that in Hainan province on the northern edge of the South China Sea, there are more than 23,000 fishing vessels available for these purposes.¹⁴

B. Use of the Militia for Peacetime Power Projection

As guardian of China's audacious maritime claim to over 90 percent of the South China Sea,¹⁵ the vast maritime militia is becoming a key lever for peacetime power projection in the region. As tensions escalate over China's overlapping maritime claims with Vietnam, the Philippines, Malaysia, Indonesia and Brunei, Beijing's maritime militia is a powerful non-forcible method of coercion to dominate the seascape without the risk of open conflict.

China employs the same strategy against Japan in its dispute over the Senkaku Islands in the East China Sea. Chinese government surveillance vessels in the waters around the islands are being replaced with militia fishing vessels in order to maintain a presence, while reducing the likelihood of a war with Japan. For the first nine months of 2014, for example, the average monthly number of Chinese government surveillance ships in Japanese waters surrounding the Senkaku Islands was 7.1, down from 17.6 for the same period in 2013.¹⁶ In contrast, during the first nine months of 2014, the Japanese coast guard ordered 208 Chinese fishing vessels to leave the area.¹⁷ This figure is 2.4 times the number encountered during the same

13. Miles Yu, *Inside China: Armed Fishermen*, WASHINGTON TIMES (July 18, 2012), <http://www.washingtontimes.com/news/2012/jul/18/inside-china-armed-fishermen/?page=all>.

14. *Id.*

15. BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEPARTMENT OF STATE, CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (2014) (Limits in the Sea No. 145), available at <http://www.state.gov/documents/organization/234936.pdf>.

16. Hiroyuki Akita, *China's New Senkakus Tactic? Fleets of Fishermen*, ASIAN REVIEW, (Oct. 10, 2014), <http://asia.nikkei.com/Politics-Economy/Policy-Politics/Chinas-new-Senkakus-tactic-Fleets-of-fishermen>.

17. *Id.*

period in 2013, and twenty-six times the number for the same period in 2011.¹⁸ China is substituting fishing vessels for Chinese government ships as a way to maintain a presence in the waters surrounding the Senkaku Islands, while reducing the chance that an incident could spark armed conflict. Chinese fishing vessels in the waters near the islands serve China's interest by challenging Japan's claims without having to resort to warships or other government vessels. Japan, also recognizing the reduced risk of conflict, prefers Chinese fishing vessels rather than Chinese warships in close proximity to the Senkaku Islands. Japan also prefers that China does not constrain its own fishing fleet, as doing so would require Chinese Coast Guard ships to enter the area and therefore confer some level of legitimacy on their presence. Tokyo does not want China to send warships into the waters of the Senkaku Islands, and it also does not want China to try to patrol Chinese fishing vessels in the area since such official action bolsters Beijing's claims.¹⁹

In addition to its peacetime role in bringing peacetime pressure to bear in the East China Sea and South China Sea, Beijing's maritime militia is also positioned to play a major role in any future naval war in the region.

C. Use of the Militia in Naval Warfare

The philosophical foundation of China's maritime militia is the concept of the "people's war," in which civilian and military sectors are integrated. The people's war doctrine was set forth in a 2006 Chinese government White Paper.²⁰ Dennis J. Blasko, a former military attaché at the U.S. Embassy in Beijing, suggests that the maritime militia is an extension of the concept of a people's war "under modern conditions."²¹

A multitude of military and civilian forces allows China to "flood the zone" with activity, confusing and complicating opponents' intelligence collection and targeting capacity. Massive deployments may also divert attention from the main effort, perhaps permitting certain movements to occur undetected. Could the harassment of the *USNS Impeccable* and *USNS Victorious* have been conceived to mask other activity happening at the same time? Indeed, these events took place as the People's Liberation

18. *Id.*

19. *Id.*

20. Wong, *supra* note 5.

21. *Id.*

Army (PLA) Navy's South Sea Fleet was conducting exercises involving destroyers, submarines, and helicopters in the South China Sea. . . .²²

China believes that a civilian militia composed of fishing vessels may be a less provocative means of promoting its strategic goal of regional hegemony. During peacetime, this approach is likely correct since fishing vessels are not instruments of war. Opposing States are less inclined to mobilize to resist fishing vessels in the same way they would resist foreign warships. The use of fishing vessels as a maritime militia during armed conflict, however, runs counter to the protected status in customary international law such craft enjoy.²³

During armed conflict, the vessels could be used to conduct reconnaissance and collect intelligence for the PLAN, and participate in military deception, jamming, sealift, ship repair and emergency rescue. The forces are also armed and may participate in more challenging maritime security operations, such as ship boarding of foreign flagged fishing vessels in contested waters.

III. USE OF FISHING VESSELS FOR INTELLIGENCE COLLECTION

The use of fishing vessels as an adjunct to naval forces is not new, although the scope and depth of China's effort is unprecedented. During the Vietnam War, for example, Hanoi used civilian ships as scouts to try to locate U.S. forces. One of the most remarkable occasions occurred in the immediate ramp up to major U.S. combat involvement in the war. In September 1964, North Vietnam used its fishing vessels to report the position of U.S. warships in the Gulf of Tonkin. A declassified National Security Agency report of the incident notes that a message was sent from "an unidentified vessel to an unidentified shore based shipping net control station" at the same time that the *USS Maddox* passed two fishing vessels at a distance of two thousand yards.²⁴ Soon thereafter the *Maddox* engaged in a naval battle with three North Vietnamese gunboats. The ensuing "Gulf of Tonkin In-

22. Dennis J. Blasko, *Chinese Strategic Thinking: People's War in the 21st Century*, 10(6) CHINA BRIEF, Mar. 18, 2010, at 5, available at http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=36166&no_cache=1#.VTZQu2RVikp.

23. Wong, *supra* note 5.

24. NATIONAL SECURITY AGENCY, ROLE OF THE DE SOTO PATROL, 16–20 SEPTEMBER 1964, at 118 (1964), available at https://www.nsa.gov/public_info/_files/gulf_of_tonkin/chrono/rel2_lang.pdf.

cident” resulted in a congressional resolution championed by President Lyndon Johnson authorizing American entry into the Vietnam War.²⁵ The Gulf of Tonkin resolution later was criticized as the “blank check” that opened the door to a decade of U.S. combat operations in Indochina.²⁶

Four years later the American spy ship *USS Pueblo* was tracked by two North Korean ships as it transited outside Pyongyang’s territorial sea. The *Rice Paddy 1* and *Rice Paddy 2* were North Korean vessels that conducted surveillance against *Pueblo*. The ships were identically painted haze gray and closely resembled Soviet *Lentra*-class intelligence collection trawlers. They also, however, “appeared heavily laden and fishing nets and lines were stowed neatly on each.”²⁷ The *Pueblo* was subsequently captured by North Korea and, although the crew was released, even today the ship is kept as a museum in North Korea.²⁸

The Soviet Union used fishing trawlers as intelligence gathering platforms during the Cold War. The U.S. Office of Naval Intelligence believes Russia still maintains merchant ships, including fishing vessels, that gather and report maritime intelligence. The operations are directed from the General Staff and the Navy Staff.²⁹ The Russian ship, *Kapitan Man*, for example, was a fishing vessel that was searched in 1993 by U.S. government agents. Sonobuoys capable of tracking submarines and expendable bathythermographs were found on board the ship.³⁰

During the Falklands War in 1982, the Royal Navy bombed and strafed the Argentine fishing trawler *ARA Narwhal*, which was shadowing British naval movements and passing electronic intelligence to Argentine forces. The *Narwhal* was captured by British forces and sank from damage incurred in the attack.

25. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971).

26. U.S. Reaction to Events in the Gulf of Tonkin, August 1-10, in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968, VIETNAM, 1964, at 589-664 (Edward C. Keefer & Charles S. Sampson eds., 1992); *The Gulf of Tonkin, the 1964 Incidents: Hearing before the S. Comm. on Foreign Relations*, 90th Cong. (1968) (statement of Robert S. McNamara, Secretary of Defense).

27. ROBERT E. NEWTON, NATIONAL SECURITY AGENCY, THE CAPTURE OF THE USS PUEBLO AND ITS EFFECT ON SIGINT OPERATIONS 51, 52 (1992).

28. *Id.*

29. BILL GERTZ, ENEMIES: HOW AMERICA’S FOES STEAL OUR VITAL SECRETS—AND HOW WE LET IT HAPPEN ch. 5 (2006). See also *Russian Merchant Ships Used in Spying*, WASHINGTON TIMES (Nov. 6, 2000), <http://www.washingtontimes.com/news/2000/nov/6/20001106-013115-2864r/?page=all>.

30. *Id.*

IV. THE LEGAL STATUS OF FISHING VESSELS IN THE LAW OF NAVAL WARFARE

A. The Principle of Distinction

One of the key tenets of international humanitarian law (IHL) is that civilians and civilian objects should be protected from armed attack. The entire purpose of the principle of distinction is to protect civilians and ameliorate the effects upon them of warfare. In its 1996 advisory opinion on nuclear weapons, the International Court of Justice identified this rule as one of two “cardinal principles” constituting “the fabric of humanitarian law”:

The first [principle] is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.³¹

Given that the central purpose of the principle of distinction is to protect civilians and ameliorate the effects of warfare upon them, China’s maritime militia risks blurring beyond recognition the line between fishing vessels and naval functions.

The application of the principle of distinction to fishing vessels in the law of naval warfare has a deep and storied lineage. For centuries State practice has recognized that fishing vessels may not be attacked during time of war. The U.S. Supreme Court carefully recounts the five-hundred year emergence of the rule in the seminal 1900 case *The Paquete Habana*.³² The case is a landmark feature of U.S. foreign relations law because of this famous statement from Justice Gray’s majority opinion: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”³³ In substantive law, however, the case is best known for its holding in the field of the law of

31. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

32. *The Paquete Habana*, 175 U.S. 677, 689–90 (1900).

33. *Id.* at 700. The importation of international law into U.S. law has been recognized subsequent to *The Paquete Habana* most notably in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004), *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 880, 886–87 (2d Cir. 1980).

naval warfare concerning the protection of coastal fishing vessels during periods of armed conflict.³⁴

The case of *The Paquete Habana* sprang from U.S. interdiction of Cuban shipping during the Spanish-American War. Two boats—the *Paquete Habana* and the *Lola*—were captured as prize and brought into Key West in 1898. The *Paquete Habana* was a 43-foot sloop displacing 25 tons, and operated out of Cuba under a Spanish fishing license.³⁵ The *Lola* was a 51-foot schooner displacing 35 tons, and was unlicensed, and also operated out of Cuba.³⁶ American naval forces seized the *Paquete Habana* on April 25, 1898 and the *Lola* on April 27, 1898. The vessels were sold upon auction for \$490 and \$800, respectively.³⁷ After dispensing with jurisdictional matters, the court addressed the issue of capture of the fishing “smacks.” The court held: “By ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”³⁸

The following section of this article relies on the history of State practice and the development of the norm against targeting fishing vessels set forth in *The Paquete Habana*.³⁹ Tracing the evolution of State practice laid out in the U.S. case underscores the depth of commitment States have had to protect coastal fishing vessels, and it crystallizes the dilemma posed by China's maritime militia today.

B. *Contours of Customary Law*

The rule to protect coastal fishing vessels emerged during the wars of medieval Europe. On October 26, 1403, Henry IV of England decreed that French fishermen were permitted to fish “from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hau-

34. See *Fishing Vessels Exempt from Capture*, 13 HARVARD LAW REVIEW 594, 594–95 (1900).

35. *The Paquete Habana*, *supra* note 32, at 679.

36. *Id.*

37. *Id.*

38. *Id.* at 686.

39. Where possible, the original sources relied upon by the Court have been identified online, and verified and cited to make them available to contemporary scholars and practitioners. In some cases, we have substituted later editions for works cited by the court, or supplemented the court's sources with additional contemporary works.

tuone.”⁴⁰ One hundred years later, the treaty between Spain and France exempted fishermen from “any molestation or hindrance” by either side.⁴¹ Similarly, in 1536 and 1554, the French and Dutch issued declarations to protect herring fishermen.⁴² Likewise, the practice was adhered to in wars between the Spanish, Portuguese, and English in 1653, 1665, and 1672, as well as in the French war in 1672, 1689, and 1702.⁴³ In 1675 France and Holland reached agreement regarding the protection of fishermen from war on the coasts of France, Holland and England.⁴⁴ The French broke the accord, however, and it was terminated in 1681 and 1692.⁴⁵

During the U.S. Revolutionary War, King Louis XVI of France directed on June 5, 1779 that English fishermen were to be protected under the principal of humanity.⁴⁶ The King hoped that French compliance with the rule might promote his enemies to do the same.⁴⁷ On April 11, 1780

40. *De Securitate pro Piscatoribus in Captione Halecum*, Westm. O. viii. 336. H. iv. p. i. 58 (Oct. 26), reprinted in 8 RYMER'S FOEDERA WITH SYLLABUS 336 (Thomas Rymer ed., 1739–1745), (Original in French), <http://www.british-history.ac.uk> (search “Thomas Rymer,” then follow “Rymer’s Foedera Volume 8” hyperlink). See *The Paquete Habana*, *supra* note 32, at 687.

41. Treaty between Charles V, Emperor, and Francis I, King of France, for the Freedom of Fishing, Oct. 2, 1521, reprinted in 4 J. DUMONT, CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS 352–53 (1776) (Original in French), available at <http://babel.hathitrust.org/cgi/pt?id=nyp.33433090755004;view=1up;seq=372>. See *The Paquete Habana*, *supra* note 32, at 687–88.

42. 2 CORNELIUS VAN BYNKERSHOEK, QUAESTIONES JURIS PUBLICI LIBRE DUO 276 (James Brown Scott ed., Tenney Frank trans., Clarendon Press 1930) (1737), available at <http://www.constitution.org/bynk/bynk.htm>. See *The Paquete Habana*, *supra* note 32, at 688.

43. BYNKERSHOEK., *supra* note 42, at 276–77. See *The Paquete Habana*, *supra* note 32, at 688.

44. 2 ALEXANDRE MAURICE BLANC DE LAUNAUTTE HAUTERIVE & FERDINAND DE CUSSY, RECUEIL DES TRAITÉS DE COMMERCE ET DE NAVIGATION DE LA FRANCE 278 (1844), available at <https://archive.org/details/recueildestrait02hautuoft>. See *The Paquete Habana*, *supra* note 32, at 689.

45. 2 RENÉ JOSUÉ VALIN, NOUVEAU COMMENTAIRE SUR L’ORDONNANCE DE LA MARINE, DU MOIS D’AOÛT 1681, at 689–90 (1766), available at <https://archive.org/details/tails/nouveaacommenta02vali>; 2 THÉODORE ORTOLAN, RÈGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 52 (4th ed. 1864), available at <http://catalog.hathitrust.org/Record/001158699>; CHARLES DE BOECK, DE LA PROPRIÉTÉ PRIVÉE ENNEMIE SOUS PAVILLON ENNEMI § 192, at 217–20 (A. Durand et Pedone-Lauriel, eds., 1882), available at <https://books.google.com/books?id=c6MoAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false>. See *The Paquete Habana*, *supra* note 32, at 689.

46. *The Paquete Habana*, *supra* note 32, at 689–90.

47. *Id.*

the English High Court of Admiralty, exempted from prize capture fishing vessels under fifty tons and fewer than six.⁴⁸ On November 6, 1780 a French royal decree pronounced that seizure by a French warship of the *John and Sarah*, an English vessel traveling from Holland and carrying fish, was illegal.⁴⁹

Subsequently, John Adams, Benjamin Franklin and Thomas Jefferson suggested in the treaty between the United States and Prussia that unarmed fishermen in unfortified areas should be free from molestation by the enemy, and the provision was included in the text.⁵⁰ Treaties in 1799 and 1828 between the two nations reaffirmed this approach.⁵¹ On October 2, 1793, during the French Revolution, the governing National Convention authorized reprisals in response to English captures of French fisherman. Three years later, however, in July 1796, France released the English fishermen that had been seized, since the ruling Committee of Public Safety did not view them as prisoners of war.⁵²

On January 24, 1798, however, the English authorized the capture of French and Dutch fishermen.⁵³ In both *The Young Jacob and Johanna* (vessels

48. *The Young Jacob and Johanna* (1798), in 1 CHRISTOPHER ROBINSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ADMIRALTY 20 (1853), <https://archive.org/details/reportscasesarg00nichgoog>; ORTOLAN, *supra* note 45, at 53; WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 449–52 (5th ed. 1904), available at <https://archive.org/details/atreatiseoninte01atlagooq>. See *The Paquete Habana*, *supra* note 32, at 690.

49. 2 FRANÇOIS NICOLAS DUFRICHE-FOULAINES, CODE DES PRISES, ET DU COMMERCE DE TERRE ET DE MER 721, 901, 903 (4th ed. 1804), <http://gallica.bnf.fr/ark:/12148/bpt6k6572553t>. See *Paquette Habana*, *supra* note 32, at 690.

50. HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA: FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842, at 306, 308 (1845), <https://play.google.com/books/reader?id=lqgBAAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PP3>. See *The Paquete Habana*, *supra* note 32, at 690. See also HENRY WHEATON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 563–65 (5th ed. 1916).

51. Treaty of Amity and Commerce art. 23, U.S.-Prussia, July 11, 1799, 8 Stat. 162; Treaty of Commerce and Navigation art. 12, U.S.-Prussia, May 1, 1828, 8 Stat. 378. See *The Paquete Habana*, *supra* note 32, at 691.

52. La Nostra Signora de la Piedad (1801); 2 FERDINAND DE CUSSY, PHASES ET CAUSES CÉLÈBRES DU DROIT MARITIME DES NATIONS 164, 165 (1856); 1 GABRIEL MASSÉ, LE DROIT COMMERCIAL DANS SES RAPPORTS AVEC LE DROIT DES GENS ET LE DROIT CIVIL 266, 267 (1844), cited in *The Paquete Habana*, *supra* note 32, at 691.

53. 8 GEORGE FREIDRICH VON MARTENS & FRÉDÉRIC SAALFELD, NOUVEAU RECUEIL DES TRAITÉS 505 (1817), available at <https://archive.org/details/recueildetraitt08martuoft>; 4 FRÉDÉRIC SCHOELL, HISTOIRE ABRÉGÉE DES TRAITÉS DE PAIX ENTRE LES

captured in April of 1798 and under a decree issued 13 November of that year) and *The Noydt Gedacht* (a decree issued August 23, 1799), the English High Court of Admiralty declared small Dutch fishing boats to be prizes of war.⁵⁴ While the existence of an exemption of fishing vessels from capture was discussed in *The Young Jacob and Johanna*, Sir William Scott regarded this to be an issue of “comity only, and not of legal decision.”⁵⁵

During the Revolutionary period, France was committed to this approach. However, on March 27, 1800, Paris announced its renewed commitment to Louis XVI’s direction from 1780 regarding the neutrality of fishermen unless they were armed or engaged in intelligence gathering. Likewise, two months later, England abandoned its policy to allow seizure of fishing vessels as war prize. This situation did not endure, however, because the English alleged that French fishermen were armed.⁵⁶ On January 21, 1801 England issued an order to permit seizure of boats. In protest, Napoleon withdrew his commissioner in London, but declined to initiate reprisal.⁵⁷ The English policy to exempt French fishermen from capture was resumed on March 16, 1801, when the Addington Ministry changed course.⁵⁸

Despite these sporadic incidents, coastal fisheries largely were unharmed throughout the Napoleonic Wars.⁵⁹ During the Mexican-American War, U.S. Commodore David Conner held the same view. Connor was in command of the U.S. Navy’s Home Squadron, which operated in the Gulf of Mexico and blockaded Veracruz, Alvarado, Tampico and Matamoros.

PUISSANCES DE L’EUROPE DEPUIS LA PAIX DE WESTPHALIE; OUVRAGE ENTièrement REFONDU, AUGM. ET CONTINUÉ JUSQU’AU CONGRÈS DE VIENNE ET AUX TRAITÉS DE PARIS DE 1815, at 119 (1838), <https://archive.org/details/histoireabrg04kochooft>; ORTOLAN, *supra* note 45, at 53. See *The Paquete Habana*, *supra* note 32, at 692.

54. See *The Young Jacob and Johanna*, *supra* note 48.

55. *The Young Jacob and Johanna*, *supra* note 48, at 21.

56. *Id.* (Neither decision makes reference to the vessel being armed.) See also MARTENS & SAALFELD, *supra* note 53, 503–12; SCHOELL, *supra*, note 53, at 118–20; ORTOLAN, *supra* note 45, at 53–54. See *The Paquete Habana*, *supra* note 32, at 692.

57. *Id.*

58. MARTENS & SAALFELD, *supra* note 53, 514; SCHOELL, *supra*, note 53, at 121; ORTOLAN, *supra* note 45, at 53; WILLIAM OKE MANNING, COMMENTARIES ON THE LAW OF NATIONS 206 (1875), <http://gallica.bnf.fr/ark:/12148/bpt6k93626w/f1.image.r=new%20york.langEN>. See *The Paquete Habana*, *supra* note 32, at 693. The British, however, viewed the issue as a concession rather than an obligation. *Id.*

59. CHARLES DE BOECK, DE LA PROPRIÉTÉ PRIVÉE ENNEMIE SOUS PAVILLON ENNEMI, § 193; ORTOLAN, *supra* note 45, at 54; HALL, *supra* note 48, at § 148. See *The Paquete Habana*, *supra* note 32, at 696.

On May 14, 1846 he wrote, "Mexican boats engaged in fishing on any part of the coast will be allowed to pursue their labors unmolested."⁶⁰ In June of the same year, the Navy approved the edict.⁶¹ In March 1847, Conner led the brilliant amphibious assault on the city of Veracruz. In 1848, the peace treaty with Mexico contained the same words as the United States' prior treaties with Prussia which leaves fishermen protected.⁶²

Similarly, during the 1854 Crimean War, the 1859 French-Austrian War and the 1870 Austrian-German War, belligerents protected coastal fisheries.⁶³ The United States also applied the rule during the Civil War. Citing historical French and British practice, Union General Henry Halleck stated that fishing vessels were immune from molestation by naval forces.⁶⁴ The records of Japan's prize courts during the Sino-Japanese war in 1894 are preserved, and they also demonstrate that the Imperial Japanese Fleet exempted from detention Chinese coastal fishing boats, as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission."⁶⁵

When the U.S. Supreme Court surveyed English practice in *The Paquete Habana*, it found that since the orders in council of 1806 and 1810 there had not been a single instance in which a fishing vessel had been captured by enemy naval forces. The rule persisted "independently of any express treaty or other public act," as a matter of customary international law, and was based upon "considerations of humanity to a poor and industrious order of men."⁶⁶ The norm persists to this day.

The protection afforded to fishing vessels ceases to apply if they are operating for a "war like purpose," or if they give aid or information to the enemy.⁶⁷ While their continued protection is contingent upon their actual conduct, the boundary between mere fishing and belligerent support has not always been clear. During the Spanish-American War, for example, the Secretary of the U.S. Navy permitted capture of Cuban fishing vessels if

60. *The Paquete Habana*, *supra* note 32, at 696.

61. *Id.* at 696–97.

62. *Id.* at 699.

63. HALL, *supra* note 48, at § 148. See *The Paquete Habana*, *supra* note 32, at 699.

64. 1 HENRY WAGER HALLECK, INTERNATIONAL LAW, OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 493 (1861), <https://archive.org/details/internationallaw00hall>. See *The Paquete Habana*, *supra* note 32, at 699.

65. *The Paquete Habana*, *supra* note 32, at 700.

66. *Id.* at 708.

67. *Id.*

they were “likely” to assist the enemy.⁶⁸ The Supreme Court, however, walked back the standard, and found that neither the *Paquete Habana* nor the *Lola* actually had armaments or munitions on board, and therefore were exempt from capture.⁶⁹

The decision of *The Paquete Habana* was featured in the first code of naval warfare, which was published in 1901 by Charles H. Stockton at the U.S. Naval War College. Like its predecessor, Lieber’s 1863 Code, the Naval Code was promulgated as a General Order to U.S. armed forces, and became reflective of customary IHL.⁷⁰ The Stockton and Lieber Codes were recognized by Theodore S. Woolsey in the first volume of the *Columbia Law Review* as “modern, clear, enlightened and rationale” restatements of the law suitable for scholars and practitioners.⁷¹ One of the core rules of the naval code is protection from attack by belligerents of “coastal fishing vessels innocently employed.”⁷² Just one year before Stockton produced his seminal code, the U.S. Supreme Court recognized the special protections afforded to fishing vessels during conflict in *The Paquete Habana* case.⁷³

This lineage of customary international law was incorporated into Hague Convention XI of 1907.⁷⁴ Article 3 of the Convention states:

Vessels used exclusively for fishing, along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The Contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

68. *Id.* at 714.

69. *Id.*

70. See George B. Davis, *Doctor Francis Lieber’s Instructions for the Government of Armies in the Field [General Order 100]*, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 13 (1907). The Stockton Code was prescribed for the guidance of the U.S. Navy by General Order 551, which is comparable to its predecessor.

71. Theodore S. Woolsey, *The Naval War Code* 1 COLUMBIA LAW REVIEW 310 (1901).

72. CHARLES H. STOCKTON, LAW AND USAGES OF WAR, part 3 (Belligerent and Neutral Vessels) (2d ed. 1898).

73. *The Paquete Habana*, *supra* note 32, at 700.

74. Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct 18, 1907, 36 Stat. 2396, T.S. No. 544.

The proscription against attack of fishing vessels has since entered into the canon of contemporary IHL. It is incorporated into the naval doctrine of major maritime powers⁷⁵ and is reflected in the most comprehensive restatement of the law of naval warfare.⁷⁶

V. PROBLEMS RAISED BY CHINA'S MARITIME MILITIA

While the legal principle of inviolability of coastal fishing vessels endures in contemporary law of naval warfare, China's maritime militia poses a special set of quandaries. The fleet support missions being undertaken by China's maritime militia may make the fishing vessels lawful targets during armed conflict, with potentially tragic consequences for legitimate fishermen from China and nearby States. First, the customary rule exerts great pressure on the United States and its allies to give wide effect to the inviolable status of China's fishing vessels. The principle of distinction is afforded tangible weight in numerous historical precedents that have solidified into customary international law, and the norm is therefore binding on all States. American naval forces have a legal obligation to avoid the use of force against China's militia so long as they are not integrated into the order of battle. Yet distinguishing between legitimate fishing vessels and those militia boats supporting the PLAN will be virtually impossible because of the large number of vessels, the vast expanse of ocean space, and the lack of sensors on the U.S. side.

Second, during any conflict, China is almost certain to exploit as a force multiplier the thousands of fishing vessels engaged in paramilitary activities. These forces will serve as "eyes and ears" of China's burgeoning naval fleet and land-based force structure, and augment PLAN operations and intelligence activities, including support to complement the warship "kill chain" from target acquisition to putting ordnance on target. The militia will form part of China's network of intelligence, surveillance, and reconnaissance (ISR), "hiding in plain sight." While China's naval forces operate within a broadly enhanced sensor network to more efficiently and accurately target

75. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.6.3 (2007); U.K. ROYAL NAVY, BR 3012, HANDBOOK ON THE LAW OF MARITIME OPERATIONS ¶ 0903 (3d ed. 2005); GERMAN NAVY, SM 3, COMMANDER'S HANDBOOK: LEGAL BASES FOR THE OPERATIONS OF NAVAL FORCES ¶ 270 (2002).

76. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 47.45(g) (Louise Doswald-Beck ed., 1995).

U.S. assets, the United States would struggle against detection by an omnipresent paramilitary force that is ubiquitous throughout the battlespace.

Third, while the law has long removed the exemption of inviolability from fishing vessels that contribute to an adversary's war effort, the problem of distinction between legitimate civilian craft and those engaged in military support is extremely difficult in practice. With the combination of advanced communications and electronics, including mounted radar and sonar, and extensive paramilitary training, the maritime militia effectively circumvents the meaning and intent of the law of naval warfare by making distinction virtually impossible.

Fourth, these circumstances make it likely that vessels of the maritime militia that are destroyed in naval combat will be the centerpiece of political and public diplomacy efforts by China to undermine enemy resolve. Even non-kinetic responses, such as electronic jamming of fishing vessel transmissions, will be incorporated into China's propaganda campaign to generate sympathy, particularly among other states in East Asia. In order to avoid being overwhelmed by the sheer number and scope of the maritime militia, the U.S. Navy and the forces of its allies and friends in the region will have to hone tactics, techniques, and procedures (TTP) to address the new threat of a massive, distributed network of civilian fishing vessels that are equipped and ready to participate in hostilities. The law of the sea and the law of naval warfare are a critical component of developing the TTP.

Finally, it is unavoidable that, as a force multiplier, the maritime militia poses an operational challenge that will require an expansion in U.S. and allied force structure, including warships, submarines and, especially, unmanned drones and unmanned subsurface vehicles, to manage the threat.

China's employment of a maritime militia complicates U.S. and allied naval operations during peacetime, in the "gray zone" between peace and war, and in periods of armed conflict at sea. During peacetime, the militia can perform State-sponsored agitation and low-level coercion in waters claimed by China or that are associated with China's numerous maritime boundary disputes with its neighbors. Throughout the "gray zone," which refers to maritime actions in peacetime, but often with strategic consequences that go beyond criminal activities, the maritime militia provides a distributed, networked operational presence that can collect and disseminate intelligence information about the types, location, and activity of U.S. and allied warships and military aircraft. The militia is positioned to make its greatest contribution during armed conflict at sea because it serves as a force multiplier. As Beijing further integrates the maritime militia into its

naval force structure, the line between civilian fishing ships and military vessels erodes.