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Military Activities in the Exclusive Economic Zone

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There are two views regarding the lawfulness of States conducting military operations within the exclusive economic zones (EEZ) of coastal States.

Majority View. All nations have an absolute right under international law, as reflected in the United Nations Convention on the Law of the Sea (UNCLOS), to conduct military activities beyond the territorial sea of another nation. The EEZ was created for the sole purpose of granting coastal States greater control over the resources adjacent to their coasts.¹ Efforts by a handful of nations to expand coastal State authority in the EEZ to include residual rights were rejected by a majority of the States participating in the UNCLOS negotiations.² Most nations agreed with the position that “military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the EEZ.”³

Minority View. Dissatisfied with the outcome of the negotiations, 17 nations—Bangladesh, Brazil, Burma, Cape Verde, China, India, Indonesia, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Thailand, and Uruguay—have sought to unilaterally expand their control in the EEZ by imposing restrictions on military operations and other lawful activities. In the Indo-Pacific region, these illegal restrictions take different forms including: (1) prior notice or prior consent to conduct military activities; (2) application of domestic environmental laws (resource-related concerns) (3) restrictions on military marine data collection (military surveys) and hydrographic surveys; and (4) restrictions on non-peaceful purposes, such as intelligence, surveillance and reconnaissance operations (ISR) (national security concerns). None of these claims have a basis in customary international law, State practice or UNCLOS, and have been challenged diplomatically and operationally by the United States.

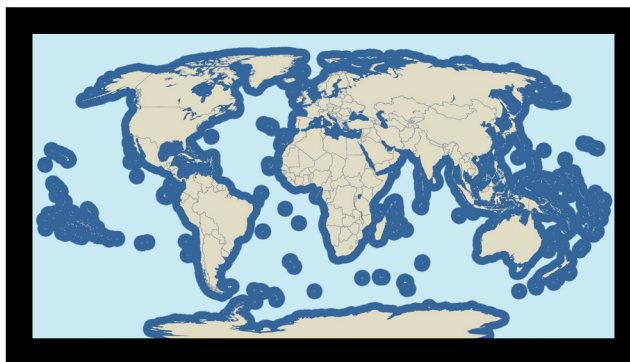
General Restrictions on Military Activities. UNCLOS provides coastal State authority over certain foreign military activities; however, none of these limitations apply in the EEZ. Ships in innocent passage in the territorial sea may not engage in certain military activities, including: threat or use of force, use of weapons, intelligence gathering, acts of propaganda, launching and landing of aircraft and other military devices, military oceanographic surveys, and intentionally interfering with communication systems.⁴ The same

restrictions apply in archipelagic waters.⁵ Submarines and other underwater vehicles engaged in innocent passage in foreign territorial seas and archipelagic waters must navigate on the surface and show their flag.⁶ Ships engaged in transit passage or archipelagic sea lanes passage may not conduct survey activities, and may not threaten or use force.⁷ Similar restrictions are not found in Part V of UNCLOS, and therefore do not apply to warships, military aircraft and other sovereign immune ships and aircraft operating in or over the EEZ.

Environmental/Resource-Related Concerns. Some coastal States purport to apply their domestic environmental law to limit foreign military activities in the EEZ citing Article 56, which grants coastal States exclusive resource rights and jurisdiction over the protection of the marine environment. China has also argued that use of sonar by U.S. Special Mission Ships (SMS) in its EEZ harms marine mammals and disrupts fishing stocks, and that China therefore has authority to regulate such activities. China's cites a 2007 U.S. district court ruling against the U.S. Navy that restricted the use of mid-frequency active sonar during naval exercises off California. China's reliance on this case is misplaced, however, as the U.S. Supreme Court overturned the district court opinion in 2008, holding that there was no evidence marine mammals were being harmed by the Navy's use of sonar during the exercises.⁸ These environmental arguments also ignore a plain reading of UNCLOS, which specifically provides that the environmental provisions of the Convention do not apply to warships, naval auxiliaries or other government-owned or operated non-commercial ships or aircraft. The Convention merely requires that sovereign immune ships and aircraft make best efforts to act consistent with the Convention, but only as long as such actions are reasonable and practicable and do not impair the operations or operational capabilities of the ship or aircraft.⁹

Restrictions on Military Marine Data Collection.

Some coastal States argue that all marine data collection in the EEZ is equivalent to marine scientific research (MSR), and is therefore subject to coastal State control under Article 56. To the extent coastal State laws purport to regulate hydrographic surveys



Exclusive Economic Zone. Coastal States may claim a 200-nm exclusive economic zone (EEZ) measured from the baseline. The EEZ is not subject to coastal State sovereignty. EEZs comprise 38 percent of the world's oceans that three decades ago were high seas.

and military marine data collection activities (military oceanographic surveys and ISR), they are inconsistent with UNCLOS, State practice, and customary international law. UNCLOS clearly differentiates between MSR, surveys, and military activities in various articles, and prohibits ships engaged in innocent passage to conduct “research or survey activities.”¹⁰ Likewise, ships engaged in transit passage and archipelagic sea lanes passage may not conduct MSR or hydrographic surveys.¹¹ In contrast, Article 56 and Part XIII only grant coastal States jurisdiction over MSR, and Article 87 refers only to “scientific research.” Thus, while coastal States may regulate MSR and surveys in the territorial sea, archipelagic waters, international straits, and archipelagic sea lanes, they may not regulate military oceanographic and hydrographic surveys in the contiguous zone and the EEZ.

Restrictions on Non-Peaceful Purposes. Some States argue that military activities are inconsistent with the peaceful purposes provision of UNCLOS, which provides that States shall “refrain from any threat or use of force against the territorial integrity or political independence of any State.”¹² UNCLOS, however, distinguishes between “threat or use of force” on the one hand, and other military-related activities, on the other. Article 19(2)(a)

repeats the language of Article 301, prohibiting ships in innocent passage from engaging in “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State.” The remaining seven subparagraphs of Article 19(2) restrict other military activities (for example, use of weapons, intelligence collection, flight operations, etc.) in the territorial sea.¹³ The distinction between “threat or use of force” and other types of military activities in Article 19 clearly demonstrates that UNCLOS does not automatically equate use of force with other military acts. Most experts that have examined this issue agree that the peaceful purposes provision only prohibits military activities that are inconsistent with Article 2(4) of the U.N. Charter, and that all other military activities are therefore permitted in the EEZ.¹⁴ The U.N. Security Council likewise concluded that military activities consistent with Article 2(4) and Article 51 of the U.N. Charter are not prohibited by UNCLOS,¹⁵ and the International Court of Justice ruled that U.S. naval maneuvers conducted off the coast of Nicaragua from 1982-1985 did not constitute a threat or use of force against Nicaragua.¹⁶ A number of multilateral instruments similarly recognize that military activities at sea are lawful and do not, per se, constitute a “threat or use of force against the sovereignty, territorial integrity or political independence” of other States.¹⁷

Restrictions on ISR. A corollary argument is that close-in ISR operations in the EEZ violate coastal State sovereignty and threaten the State’s national security interests. This position is not supported by State practice or a plain reading of UNCLOS, the Chicago Convention, or any other applicable international instruments. UNCLOS addresses intelligence collection in Article 19(2)(c), and restricts ships engaged in innocent passage from “collecting information to the prejudice of the defense or security of the coastal State.” An analogous provision does not appear in Part V of the Convention regarding the EEZ. Moreover, neither UNCLOS nor the Chicago Convention allows coastal States to regulate military aircraft seaward of national airspace.¹⁸ Thus, States may lawfully engage in ISR seaward of the territorial sea or national airspace without providing the coastal State notice or obtaining its consent.¹⁹

A number of nations, including the United States, China, Russia, Japan, Australia and others, routinely conduct ISR missions in international airspace, and in most cases these missions occur without incident or adverse political repercussions. With the exception of China, most coastal States that object to foreign ISR flights off their coast do so on the grounds that the

aircraft intruded into their “national” airspace, rather than questioning the legality of intelligence collection generally.²⁰ For example, between 2004 and 2014, over 50 Russian aircraft have been intercepted in the U.S., Canadian, Japanese, South Korean, and British air defense identification zones. In each case, the Russian aircraft were intercepted and monitored, but were permitted to continue their mission when it was determined that they would not penetrate the national airspace of the coastal State.²¹

The validity of aerial reconnaissance was brought before the U.N. Security Council by the Soviet Union in 1960. Following the shoot down of an American U-2 spy plane near Sverdlovsk in May, the Soviets requested that the Security Council adopt a resolution that would have labeled the U-2 flights as “acts of aggression” under the Charter. The draft resolution failed by a vote of 7 to 2 (with 2 abstentions).²² Two months later, the Soviets shot down an American RB-47H spy plane while it was conducting a reconnaissance mission over the Barents Sea near the Kola Peninsula. Again, the Soviets introduced a draft resolution that would have labeled the surveillance mission an “act of aggression,” but the resolution was rejected by a vote of 9 to 2.²³ These decisions arguably confirm that peacetime intelligence collection is consistent with the U.N. Charter.

Despite the abundant evidence of State practice that permits intelligence collection beyond the territorial sea and national airspace, China stands alone in its continued harassment and interference of U.S. SMS operations in the EEZ and U.S. reconnaissance flights in international airspace. Without question, intelligence collection seaward of the territorial sea is not subject to coastal State control. These activities are consistent with long-standing State practice and international law, including UNCLOS and the Chicago Convention. If China wishes to intercept and query a ship or aircraft operating off its coast in order to determine its intentions, it may do so. However, such intercepts must be carried out in a safe and responsible manner, consistent with the Collision Regulations, and with due regard for the rights of ships and aircraft to operate in and over the EEZ.



Exclusive Economic Zones and China's Nine-Dash Line. The 2016 Philippines v. China Arbitration Tribunal unanimously concluded that UNCLOS comprehensively allocates rights to maritime areas, and that any historic rights China may have had to the resources in the South China Sea were extinguished by the EEZ provisions of UNCLOS.

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1. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 529–44 (Satya N. Nandan & Shabtai Rosenne eds., 1993).
 2. *Id.* at 529–30.
 3. 17 OFFICIAL RECORDS OF THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA 244 (Plenary Meetings, Summary Records, and Verbatim Records) 240 (2009) (U.N. Doc. A/CONF.62/WS/37 and ADD.1–2).
 4. United Nations Convention on the Law of the Sea art. 19, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
 5. *Id.* art. 52.
 6. *Id.* arts. 20, 52.
 7. *Id.* arts. 39, 40, 54.
 8. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).
 9. UNCLOS, *supra* note 4, art. 236.
 10. *Id.* arts. 19(2)(j), 52.
 11. *Id.* arts. 40, 54.
 12. *Id.* art. 301.
 13. *Id.* art. 19(2).
 14. *See* Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123 (2005).
 15. 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 88–89 (Satya N. Nandan & Shabtai Rosenne eds., 1995).
 16. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 227 (June 27).
 17. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA at 8, ¶ 10; at 14, ¶¶ 34–35 (Louise Doswald Beck ed., 1995); IMO/IHO World-Wide Navigational Warning Service Document, annex 1, ¶ 4.2.1.3.13; Convention on International Civil Aviation (Chicago Convention), annex 15, ¶ 5.1.1.1, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].
 18. UNCLOS, *supra* note 4, arts. 2, 3; Chicago Convention, *supra* note 17, arts. 1, 3.
 19. The Lotus Principle provides that States may act in any way that does not involve an express prohibition of international law. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 20 (July 8).
 20. Oliver J. Lissitzyn, *The Role of International Law and an Evolving Oceans Law*, 61 INTERNATIONAL LAW STUDIES 566–67, 574–75, 578–79 (1980).
 21. Bill Gertz, *Russian Bombers Fly Within 50 Miles of California Coast*, NATO SOURCE (June 12, 2014), <https://www.atlanticcouncil.org/blogs/natosource/russian-bombers-fly-within-50-miles-of-california-coast/>.
 22. U.N. SCOR. 15th Sess., 860th mtg., at 16–17, ¶ 87, U.N. Doc. S/PV.860 (May 26, 1960).
 23. U.N. SCOR. 15th Sess., 883rd mtg., at 39, ¶ 187, U.N. Doc. S/PV.883 (July 26, 1960).