

On the Rights and Obligations of Military Activities in the Exclusive Economic Zone

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Abstract: To justify the expansion of military activities onto the exclusive economic zone of coastal States, some of the world's major maritime powers have adopted one-sided, extended interpretations over relevant provisions on the exclusive economic zone in UNCLOS, which go against the original intention of the Convention. According to this document, any military activity of any State in any exclusive economic zone of any coastal State shall be subject to restriction; any military activity must reflect "peaceful purposes" and mutual respect of legitimate rights; any military activity shall give "due regard" to the rights of coastal States; and in terms of allocating "residual rights", coastal States shall occupy the dominant and preferential position.

Key Words: UNCLOS; Exclusive economic zone; Military activity

The exclusive economic zone (EEZ) is a regime newly established by the United Nations Convention on the Law of the Sea (UNCLOS). In recent years a series of increasingly intense military crises and conflicts centering on the rights and duties regarding military activities in the exclusive economic zone have arisen between major maritime powers and many developing maritime States. In order to correctly interpret the rights and duties regarding military activities in the EEZ under UNCLOS, to maintain this convention's status as authoritative law, and to safeguard the legitimate rights and interests of develo-

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ping maritime States—such as China—in their EEZs, it is imperative to hold in-depth discussions on the rights and duties regarding military activities in the exclusive economic zone.

I. “Freedoms of Navigation and Overflight” in the Exclusive Economic Zone Are Freedoms Subject to Restriction

A. “*Freedoms of Navigation and Overflight*” Are Not Equivalent to “*Freedom of the High Seas*”

Though article 87 of UNCLOS grants warships and military aircraft of non-coastal States the “freedoms of navigation and overflight” in the EEZs of coastal States, such freedoms are not equivalent to “freedom of the high seas”.

The exclusive economic zone is a unique sea territory, not classified as either territorial waters or high seas. Therefore, in legal terms, “freedom” itself should denote a kind of legal state, subject to restrictions of legal factors.^① Paragraph 1 of article 87 of UNCLOS provides that the freedoms of “navigation and overflight” shall be exercised by all States “under the conditions laid down by this Convention and by other rules of international law”. Dovetailing off this principle, paragraph 3 of article 58 provides:

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

Article 58 points out that the “freedoms of navigation and overflight” in the EEZ are applicable to exclusive economic zones only “with due regard” to the rights and interests of coastal States. Therefore, such “freedoms” are subject to the constraints of relevant provisions of international law. Due regard must be given to the rights and duties of coastal States, and the relevant laws and regulations formulated by these States must be observed. On the other hand,

① Qin Xiaocheng, Several Issues of International Law in the Sino-US Collision Incident, *Journal of the China Foreign Affairs University*, No. 2, 2001, p. 27.

even the exercise of “freedoms of navigation and overflight” in the high seas must also be “peaceful” in nature, and any activity threatening the sovereignty of any State or regional safety and interests is prohibited. Therefore, the “freedom” enjoyed by other States in the EEZ of any coastal State does not embrace indiscriminate or encroaching use at will, but rather should be subject to strict restriction. The ships and aircraft of non-coastal States only enjoy the freedom of “passage” through the coastal State’s EEZ, naturally without the right to conduct military activities threatening the integrity of national sovereignty or safety interests, such as weapons testing and military intelligence gathering, without prior consent of the coastal State.

B. Non-coastal States Enjoy Freedom “Subject to Restriction” in the Exclusive Economic Zone

The navy is the sea-based branch of the military force, and maneuvering on vast sea areas is one of its specific military functions. Through maritime maneuvers, navies maintain and exercise their right of “freedom of navigation” on the high seas. However, the fact remains that navy vessels and warplanes are government property. They are militarily operational and battle ready, and dispatched abroad to represent the will of the State. This cannot but make coastal States exceedingly anxious, especially small and medium-sized coastal States not strongly allied with major powers. To safeguard their sovereignty, security and maritime rights and interests, coastal States have, in accordance with the UNCLOS provisions on restricting military activities in the EEZ, reasonably limited certain activities of foreign navies and air forces that could compromise their domestic security or interests. Such restrictions not only conform to the general provisions of international law, but also the relevant provisions of UNCLOS, all without unduly denying the “freedoms of navigation and overflight”.

Under international law of the sea, there are several regimes of passage through sea areas, such as “licensed passage”, “innocent passage”, “transit passage” and “free passage”. “Licensed passage” mainly applies to a State’s internal waters (including “inland waters” and “ocean internal waters”). As the name suggests, to navigate in the internal waters of a coastal State, foreign vessels must first request permission and obtain approval.

“Innocent passage” applies within the territorial sea or archipelagic waters of coastal States, as well as certain “straits used for international navigation” in which transit passage does not apply. The regime of innocent passage provides

that vessels of non-coastal States, as long as they are not prejudicial to the peace, good order or security of a given coastal State, may continuously and expeditiously pass through the territorial waters of said coastal State without having to obtain approval through prior request. But this regime also carries some strict restrictions; for example, foreign submarines and other similar vessels that are submerged in their normal mode of operation are required to “navigate on the surface and to show their flag”. Furthermore, aircraft are not granted the freedom of “innocent overflight”.

The regime of transit passage is mainly applicable to “straits used for international navigation” and sea-routes through archipelagic waters. Under this regime, foreign vessels and aircraft may, provided they do not jeopardize the sovereignty or interests of the coastal State, proceed “without any delay” and expeditiously along the route in question, without first having to request or obtain approval. Unlike “innocent passage”, the transit passage regime does not restrict the overflight of aircraft or require that foreign submarines and other underwater vehicles “navigate on the surface and show their flag”.

“Free passage” applies to the high seas and waters such as the EEZ and contiguous zone. Though not areas over which coastal States enjoy complete sovereignty, they nonetheless possess certain sovereign rights in these zones. “Free passage” is not subject to restrictions such as obtaining approval through prior request, continuous and expeditious transit or transit without delay and expeditious navigation, and naturally it is not expected that foreign submarines and other underwater vehicles navigate on the surface and show their flag.^①

Article 58 of UNCLOS provides that in the EEZ, non-coastal States enjoy the freedoms referred to in article 87 of navigation and overflight, subject to the relevant provisions of the Convention. Paragraph 1 of article 87 of the Convention provides that all States enjoy the freedom of navigation and overflight, subject to “the conditions laid down by this Convention and by other rules of international law”. As UNCLOS does not qualify the nature or category of vessels that may exercise these rights, it follows that all vessels, including military vessels and aircraft, enjoy the right to free navigation in the EEZ.^② So, al-

① Ding Chengyao, On the Incident of US Survey Vessel Intruding into China's EEZ from the Perspective of International Law, *Journal of East China College of Political Science and Law*, No. 2, 2003, p. 80.

② Zhang Haiwen ed., *Collection of Interpretation of the United National Convention on the Law of the Sea*, Beijing: Maritime Press, 2006, p. 108.

though the military ships and aircraft of non-coastal States enjoy the freedom of navigation in the EEZ of the coastal State as recognized by UNCLOS, this “freedom” is subject to reasonable and lawful restrictions.

C. The Airspace of the Exclusive Economic Zone Is Not Open Airspace, and the Coastal State Has Limited Jurisdiction

When UNCLOS established the new EEZ regime, the legal status of the superjacent airspace did not receive adequate attention at the 3rd Conference on the Law of the Sea. Lack of clarity on this neglected issue has led to the formation of three distinct interpretations regarding the legal status of EEZ airspace. The first may be called the “sovereignty view”, namely the stance that a state enjoys the sovereign right over the EEZ, with the only exceptions being foreign vessels’ right to navigation and overflight. Some commentators have also asserted that the EEZ airspace should maintain the legal status of open airspace.^① In open airspace, non-coastal States have the right to conduct military activities such as reconnaissance, conveyance of manpower resources and equipment, setup of warning systems, tactical maneuvers, testing guided missiles and other weapons, among others. Australia, in its Operations Law for RAAF Commanders, holds that the EEZ airspace comprises international airspace, and that within the EEZ, non-coastal States enjoy the freedom to conduct activities such as flight operation (“overflight”), weapons exercises, intelligence gathering and monitoring; moreover, such freedoms and rights shall not be impinged upon by other States.^②

Another view contends that the EEZ airspace should conform to the principle of “consistent status”, that is, the legal status of the airspace should be consistent with the ground beneath it and subject to the constraints of land law. US Air Law Professor Cooper maintains that “[i]f any place on the sur-

① Qin Shuming, A Tentative Discussion on the Jurisdiction of the Coastal State over Its Exclusive Economic Zone and Free Relationship with Other States, *Journal of the Guangxi Administrative Cadre Institute of Politics and Law*, No. 2, 2002, p. 25.

② International airspace is that airspace over the high seas [and] EEZs ... Accordingly; military aircraft are free to operate in international airspace without interference from any other State. While in international airspace, military aircraft are free to engage in flight operations, including weapons testing and firing, surveillance, intelligence gathering, and support of naval activities. — See Section 2. 13 of Part II of Australian Operations Law For RAAF Commanders.

face of the earth, whether on land or water, is recognized as the territory of a state, the airspace of that surface shall also be part of the territory of that state. On the contrary, if any place on the surface of the earth is not part of the territory of any state, such as the waters included by the high seas, the space above that surface shall not be subject to the sovereignty control of any state, but may be freely used by any state.”^① Cooper has also argued that “[t]he surface of the earth and the airspace above it shall not be treated separately, but must be regarded as a single political entity.” He believes that the legal status of airspace is determined by the ground beneath it; this is to him the “basic principle of the law of international navigation”. According to this line of thinking, the airspace above the exclusive economic zone would be vested with the same legal status as the EEZ itself, meaning it would constitute neither international nor territorial airspace. It rather would be a special airspace over which the coastal state in question enjoys jurisdiction.

The authors are of the opinion that the legal status of the EEZ airspace should be established according to the principle of “consistent status” and that there is sufficient historical evidence to support the position that the EEZ airspace constitutes a special zone whose status is consistent with the EEZ itself, meaning that the coastal State has jurisdiction over it. Long before the advent of the aviation age, Roman law had extended state sovereignty to include the airspace above its territory, conferring upon it the same legal status as the land. After the First World War, three conventions dealing with air traffic, the Paris Convention of 1919, the Havana Convention of 1928 and the Chicago Convention of 1944, all held that the sovereignty of airspace should accord with the sovereignty of the State beneath it.^② Therefore, the legal status of airspace is determined by the legal status of the land or waters beneath it. Since coastal States enjoy sovereign rights and jurisdiction in its EEZ(s), the freedom of the airspace above the exclusive economic zone is different from the freedom of the high seas. Drafters of the conventions, while preserving the freedoms of the high seas, did not neglect to insert qualifying clauses such as “under the restriction of relevant regulations in this Convention”, and “so long as it does not con-

① Cooper, *Airspace Rights over the Arctic*, *Air Affairs*, No. 3, 1950, p. 517.

② Articles 1 and 2 of the Chicago Convention recognize State sovereignty over its airspace; Article 1 The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory. Article 2 For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

flict with this section". Article 58, paragraph 3 of UNCLOS provides that all states "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part." These terms substantively restrict the freedoms enjoyed by foreign aircraft in the EEZ airspace.

It should also be noted that a coastal State's jurisdiction over EEZ airspace is limited. The overflight behavior of foreign military aircraft cannot be absolutely forbidden; otherwise, the exclusiveness of the exclusive economic zone would be enhanced and jurisdiction expanded. Compared with the territorial seas, while the non-coastal state exercises the "freedom of overflight" in the airspace above the exclusive economic zone, the jurisdiction of the coastal State over the "freedom of overflight" will be smaller than that over the "freedom of navigation". Firstly, the coastal State's right to construct artificial islands and installations in the EEZ may affect the right of foreign aircraft to fly at a low altitude near the airspace above such structures. Secondly, the coastal State has jurisdiction over the behavior of foreign aircraft in the EEZ that could impact the marine environment, such as dumping. For the present discussion, the theoretical dispute over the legality of establishing air defense identification zones (ADIZs) will be set aside; most countries generally do not perceive the establishment of an ADIZ as an expansion of territorial air space or extension of sovereignty over airspace. ADIZs can effectively identify intruding aircraft before their entry into the territorial airspace, which bolsters national defense and helps safeguard the integrity of territorial air space.

D. Legal Obligations that Warships and Warplanes Should Undertake While Navigating and Flying over the Exclusive Economic Zone of the Coastal State

One view has it that UNCLOS endows warships and warplanes of non-coastal States with complete immunity from the jurisdiction of coastal States within their EEZs.^① This view runs counter to the precepts of international law. According to article 58 of UNCLOS, in navigation and overflight through

① To support this argument, advocates might quote article 95 of the UNCLOS, which states that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."

a coastal State's EEZ waters or airspace, foreign warships and warplanes must pay due regard to the rights of the coastal State and at minimum shall not infringe on the rights of the coastal State. Though there is no detailed explanation of the "rights of the coastal State" in the Convention, some scholars interpret "rights" here to refer first and foremost to the general rights that coastal States are entitled to under customary international law, for example, the sovereignty, safety and national interest of the coastal State should not be obstructed, etc.; secondly, "rights" refers to the specific rights endowed by UNCLOS on the coastal State. Therefore, activities of other States that take place in the EEZ and affect or threaten the sovereignty, safety or interests of a coastal State — including military intelligence gathering, military surveying, weapons testing, military exercises, plus activities that affect the coastal State's exercise of sovereign rights and jurisdiction over its national resources, such as fishery, exploitation of natural resources, and construction of artificial islands or other structures — are all illegal.

According to article 56 of UNCLOS, when a warship or warplane of a coastal State navigates or overflies an EEZ, the coastal State shall give due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention. This provision illuminates the rights and duties of the coastal State, namely, that the "manner" in which a coastal State conducts military activities in its EEZ shall also comply with the provisions of UNCLOS. In addition, it cannot arbitrarily restrict the military activities of other States but shall pay "due regard" to the military activities of non-coastal States. The coastal State's respect of other States' legal rights in the EEZ has a precondition: the right of the coastal State to protect its sovereignty, safety and interests from infringement supersedes the freedoms of foreign States therein. Only under the condition that the coastal State's rights are respected by other States can the coastal State fulfill its duty of allowing other States to exercise rights of free navigation and overflight compatible with UNCLOS.

II. The Coastal State Has Jurisdiction over "Military Surveying" Belonging to "Marine Scientific Research"

A. "Military Surveying" Is Part of "Marine Scientific Research"

The coastal State has the right to conduct marine scientific research

(MSR) in its exclusive economic zone, while the non-coastal State does not. Yet a problem exists of how to distinguish between “marine scientific research” and “military surveying”. A US Navy ocean survey ship, USNS *Bowditch*, has intruded several times into China’s Yellow Sea waters to gather intelligence. On March 24, 2001, when it was gathering data on the Yellow Sea, *Bowditch* was forced to stop by a Chinese frigate and escorted out of China’s EEZ. On September 19, 2002, *Bowditch* returned to the Yellow Sea to gather data once again. Chinese warplanes and warships issued stern warnings to the US spy vessel gathering intelligence in the EEZ, and finally forced the vessel out of Chinese waters. In response, the Chinese Ministry of Foreign Affairs of China sent a diplomatic note to the US Department of State, protesting the intrusion of the US ocean survey ship *Bowditch* into the Yellow Sea EEZ as well as its monitoring and spying “activities”. However the US Department of Defense took the position that military intelligence gathering activities were distinct from MSR and thus not subject to UNCLOS restrictions. China identified *Bowditch*, a survey vessel equipped with reconnaissance technology, as one of the US’s 27 “special duty” vessels. This description refers to navy vessels providing intelligence support to the US Department of State and other US government agencies, or in other words, navy spy vessels.^① It was not conducting ordinary exploratory activities in China’s Yellow Sea, but conducting “dragging sonar detection” and other underwater monitoring activities that posed a serious threat to China’s national safety.^② UNCLOS endows coastal States with exclusive jurisdiction over MSR within their EEZ. Article 9 of China’s Law on Exclusive Economic Zone and the Continental Shelf provides that “Marine scientific research conducted by any international organization, foreign organization or individual in the exclusive economic zone and continental shelf of the People’s Republic of China must be subject to the approval of the competent department of the People’s Republic of China and observe laws and regulations of the People’s Republic of China”. The military surveying activities conducted

① The roles of US Navy spy vessels of the United States are very carefully divided; they include not only marine geographic survey vessels, ocean surveillance vessels, drug intelligence vessels and submarine support vessels, but also missile survey vessels, sonar research vessels, submarine cable repair vessels, submarine navigation experiment vessels and ballistic missile experiment vessels.

② Ding Chengyao, On the Incident of US Survey Vessel Intruding into China’s EEZ from the Perspective of International Law, *Journal of East China College of Political Science and Law*, No. 2, 2003, p. 80.

by *Bowditch* in China's EEZ had not been approved by the competent department of Chinese government and thus seriously infringed upon the Chinese government's exclusive jurisdiction over this area. In the same month, the Indian government also formally protested military surveying activities that *Bowditch* carried out in the sea area 30 nautical miles (nm) away from Nicobar Island, alleging that it had infringed upon India's legitimate rights and interests. In January 2001, the Indian government also protested the activities of the UK Royal Navy vessel *HMS Scott*, which had been surveying roughly 190 nm off the coast of Diu.

UNCLOS does not specifically address "military surveying", a term of convenience apparently created by maritime powers such as the UK and the US to serve their own interests.^① This subterfuge has arisen as a result of the contents of UNCLOS article 56, paragraph 1(b)(ii), which provides that coastal States enjoy jurisdiction over MSR activities in its EEZ. If "military surveying" were merely considered a form of MSR, then any data obtained from "military surveying" activities would have to be shared with the coastal State. This would obviously clash with the interests of non-coastal States. For this reason they have fabricated a concept not existing in UNCLOS, and on this basis declare that the coastal State has no explicit right to govern "military surveying" activities. The UK and the US, in order to further their own interests, have resorted to a form of fraudulence, which is not only inconsistent with the spirit of UNCLOS, but also goes against the consensus of the international community.

The developing countries insist that "military surveying" should be grouped together with MSR, a general term that encompasses various marine environmental research activities conducted at sea, including hydrographic surveying.^② The data from hydrographic surveys are mainly used to draft documents and archives that facilitate navigation and enhance navigational safety. These resources are useful to a wide range of professionals, including oceanologists, biologists and environmental scientists. "Military surveying" refers to activities of marine data gathering for military purposes.^③ In essence, "military

① The United States uses the term "military surveying"; the United Kingdom uses the term "military data gathering" (MDG).

② Ding Chengyao, On the Incident of US Survey Vessel Intruding into China's EEZ from the Perspective of International Law, *Journal of East China College of Political Science and Law*, Vol. 2, 2003, p. 81.

③ Ashley Roach and Robert W. Smith, Excessive Maritime Claims, *International Law Studies*, Vol. 66, 1994, p. 248.

surveying” involves the carrying out of marine hydrographic surveying, a traditionally civilian endeavor, for military ends. Civilian and military marine hydrographic surveying are both activities that detect and compile marine data such as seaway conditions, seawater flow rate, sea water quality, sea area climatic characteristics, marine organisms and seabed mineral resources. Both are conducted with the help of various technical instruments aboard survey vessels or aircraft. Their contents involve oceanography, marine geology, physics, chemistry, biology and acoustics, and the equipment used includes sonic fathometers, scanning sonars, benthic seabed grabs, flow meters and model-profiling machines. According to the maritime powers that advocate unrestricted freedoms of military surveying, what sets “military surveying” apart from MSR is the underlying motivation to use data for military purposes like submarine operation and antisubmarine response, laying and removing mines, etc., rather than for the benefit of general marine science. Since the data obtained from military hydrographic surveying is used for military purposes, the so-called “military surveying” endorsed by maritime powers may seem special, but it still falls within the scope of MSR as stipulated by UNCLOS, only with a different underlying purpose.

B. The Coastal State Has Jurisdiction over “Military Surveying”

According to UNCLOS article 245, the coastal State may enact laws and regulations governing MSR and hydrographic surveying activities within its EEZ, and any “military surveying” activities of non-coastal States “shall be conducted only with the express consent of and under the conditions set forth by the coastal State”; when a foreign ship passes through the EEZ, it shall not conduct any research or surveying activities without prior approval of the coastal State. Any “military surveying” activities conducted by a non-coastal State in the EEZ of a coastal State must be subject to the approval and jurisdiction of the coastal State. A coastal State has the right to approve of the “military surveying” activities in its EEZ or on its continental shelf according to relevant provisions; and “marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.” (UNCLOS, article 246) The coastal State has jurisdiction over “military surveying” activities in its EEZ; furthermore, it may withhold approval of any “military surveying activity” to be conducted by a foreign State in its EEZ. Even if the coastal State has approved of a foreign State’s “military surveying”

activities and the activity is already underway, if the activity violates any obligation attached to the initial approval, then the coastal State maintains the right to halt the activity.

Coastal States enjoy sovereignty over mineral resources, fisheries and microorganisms in their EEZ. "Military surveying" may be a military function, however the data gathered is not necessarily used only in military affairs, so it infringes upon the "resource sovereignty" of the coastal State and should be regulated. Firstly, vessels and aircraft used for "military surveying" may be civil, and the nature of activities they are capable of conducting cannot be ascertained by outward appearance alone; secondly, "military surveying" such as those "involving drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment" will of course arouse the coastal State's concern and should therefore be subject to its approval; thirdly, the information and data obtained will likely involve the detection and even exploitation of the coastal State's natural resources, such as oil or natural gas, and therefore the coastal State should maintain jurisdiction over these activities and be granted full access to said information and data. In addition, the coastal State may disallow or restrict any military activity of other States in its EEZ that obstructs its sovereignty or jurisdiction. No matter if it goes by the name of MSR, "military surveying" or some other term, such activities should all be subject to the approval of the coastal State, and the foreign States conducting them should proceed in a way that respects the sovereignty and jurisdiction of the coastal State and also submit to the jurisdiction of the coastal State in the event a conflict arises.

C. The Information of "Military Surveying" of the Non-coastal State Shall Be Shared with the Coastal State

According to the relevant provisions of UNCLOS articles 248 and 249, States and competent international organizations which intend to undertake "military surveying" activities in a coastal State's EEZ shall, not less than six months in advance of the expected starting date of the MSR project, provide that State with a full description of the nature and objectives of the surveying activities; the methods and means to be used; the precise geographical area(s) in which the project will be conducted; a specific timeline; and the extent to which the coastal State is expected to participate or how it will be represented in the project. If the coastal State desires, it has the right to participate or be

represented in such “military surveying” activities. The coastal State may also require the non-coastal State to provide the final results and conclusions of the “military surveying” as well as information and samples acquired during research and to assist the coastal State in interpreting the intelligence and information acquired.

III. Military Activities Must Reflect “Peaceful Purposes” and Give “Due Regard” to the Legitimate Rights of Various Parties

A. “Peaceful Purpose” Does Not Exclude Military Activities in the Usual Sense, but Legitimate Rights Must Be Respected

UNCLOS, the codification of the fundamental principles of the international law of the sea, refers to the “peaceful use” of the seas and oceans in its preamble, articles 88 and 301, and parts 10 and 13. The preamble sets forth the Convention’s objective of maintaining “peace, justice and progress for all peoples of the world”. It further states that “the problems of ocean space are closely interrelated and need to be considered as a whole”, and expresses the intention to “promote the peaceful use of the seas and oceans.” Article 88 also provides that the high seas shall be reserved for “peaceful purposes”, which is a new requirement absent in the 1958 Convention on the Continental Shelf.^① The purpose of UNCLOS is to foster peace, safety and friendship in line with the tenets and principles of the United Nations as stated in the UN Charter. “Maintenance of international peace and safety” is the first tenet and primary purpose in the UN Charter. Even so, the “peaceful purpose” proviso does not necessarily preclude all military activities by coastal or non-coastal States in the EEZ.

From a coastal State perspective, according to the provisions of UNCLOS and current practice, the navy, in peacetime, mainly implements police tasks and provides services to the government. These services include exercising sovereignty and rights in the waters governed by the State; carrying out military tasks and weapon experiments on the high seas; exercising the universal jurisdiction principle of the international law; and naval diplomacy. In peace-

^① Shao Jin, Legal Problem of Military Use of Exclusive Economic Zone and Continental Shelf, *Chinese Yearbook of International Law*, 1985, p. 192.

time the navy is also charged with protecting offshore production platforms, artificial islands and other installations, performing “pacific blockade”, and monitoring pollution and dumping of nuclear wastes. With the extension of national resource sovereignty to include marine resources, the need for maritime law enforcement has led coastal States to resort to the use of armed forces to exercise and maintain their sovereign rights and jurisdiction. From the perspective of non-coastal States, their domestic interests may also be intertwined with the freedoms of activity in the EEZ of a coastal State. For example, a State may choose to protect its commercial fleets from pirate or terrorist attack by dispatching the armed forces to provide escort protection. If and when a State’s vessel requires emergency rescue due to causes such as natural disaster, it is the responsibility of the armed forces to provide assistance. Since the close of the Gulf War, the UN Security Council has authorized the use of warships in imposing economic blockades. In addition, a state party in a collective security treaty, when exercising collective self defense, may use military force on the high seas for the purpose of protecting collective military forces, business vessels and aircraft, subject to the constraints of international law.

Though the “peaceful purpose” requirement does not, in principle, preclude non-coastal States from engaging in ordinary military activities in the EEZ of coastal States, the question remains as to what kind of military activities constitute “ordinary” ones. On this topic, one scholar has pointed out that in order to be considered “peaceful use” of the EEZ, the activities of non-coastal States must have been approved by the coastal State and not give rise to tensions, doubt or conflict. Therefore, to verify if a military activity is for “peaceful purpose” or if its method is “peaceful”, one should not only judge whether its behavior is consistent with the requirements of the UN Charter and its international duties and commitments under international law,^① but also take into account whether the military activity constitutes a threat or dangerous situation to the coastal State. The presence of foreign naval forces in the sea areas governed by a state may be either legal or illegal; Their behavior must comply with the basic tenets of contemporary international law and the UN Charter

① During the fourth session of the Third Maritime Law Conference, a debate was conducted on the topic of peaceful use of the seas and oceans. Amara Singe, the conference president, pointed out that the peaceful use of the seas and oceans cannot be separated from negotiations on other occasions concerning disarmament, denuclearization and seabed demilitarization.

and must not threaten or affect the sovereignty safety of the coastal State—otherwise, such activity is illegal.

Both coastal and non-coastal States have their respective rights as well as obligatory duties in the EEZ. The principle of “peaceful purposes” requires that all parties shall pay due regard to other parties’ legitimate rights regarding military activities in the EEZ. According to UNCLOS (article 56), the coastal State enjoys exclusive sovereignty and jurisdiction over its EEZ resources; non-coastal States’ rights include the freedom of navigation and overflight and laying submarine cables and pipelines. As two kinds of rights are exercised in the same space, occasional conflict between them is inevitable. In conducting military activities for “peaceful purposes”, coastal States must comply with the provisions of UNCLOS and give due regard to the legitimate rights of other States. Non-coastal States, in conducting military activities in the EEZ, shall give due regard to the rights of coastal States and observe the relevant laws and regulations not in conflict with statutory and customary rules concerning the EEZ. In light of these principles, if for example a foreign State’s navy engages in intelligence gathering activities while its warships or warplanes navigate or overfly a coastal State’s EEZ, this should not be deemed as “harmless”, but rather as “damaging the peace, good order or safety of the coastal State”.

In case of any conflict or dispute between a coastal and non-coastal State regarding military activity in the EEZ, according to international law, the rights of the coastal State shall prevail.

B. Military Activities Must Give “Due Regard” to the Legitimate Rights of the Coastal State

In the event a conflict arises between the exercise of jurisdiction by a coastal State and the exercise by any other State of its navigational freedoms in the EEZ, the coastal State shall be given priority rights to settle the conflict. One such instance was the 2001 Hainan Incident, in which a US spy plane violated the UNCLOS provision that overflight by non-coastal States through the EEZ airspace of a coastal State give due regard to the rights of the coastal State. This action threatened China’s national security. In response China dispatched fighter jets to supervise the US spy plane. The US plane violated flight rules and caused a collision, and from the Chinese perspective should be held fully accountable for this incident. China acknowledges that all States have the freedom of overflight in the EEZ, but exercise of these rights must not

jeopardize the national security of the coastal State.

Coastal State enjoys sovereignty over the natural resources in their EEZ, as UNCLOS plainly states. Classified as a national right, this constitutes one of states' most basic rights.^① Such sovereignty is exclusive, comprehensive and incontrovertible; moreover, infringement of any sort on this right is unacceptable.^② To protect its legitimate rights and interests in the EEZ and prevent undue external interference and influence, a coastal State's rights concerning military activity in the EEZ prevail over those of foreign States. In case of any conflict between a coastal and non-coastal State over military activity in the EEZ, the coastal State's sovereignty takes precedence over non-coastal States' right to conduct military activities in the EEZ. Furthermore, in the settlement of any dispute, the coastal State shall be given a preferential status. Adding another layer of complexity to the mix, the legal restrictions espoused by two separate "due regard" clauses are also distinct. The preamble of UNCLOS clearly provides that to peacefully, equitably and effectively use marine resources, the interests of all parties must be considered, but especially the "special interests and needs of developing countries". Elsewhere, as noted above, UNCLOS stipulates that non-coastal States shall pay "due regard to the rights and duties of the coastal State" and "comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part." (UNCLOS article 58)

C. The Military Activities of Belligerent States in the EEZ of the Neutral States Shall Pay Due Regard to the Rights of the Coastal States

The EEZ is vital to the economic interests of coastal States. For belligerent States to conduct military activities therein would surely exert a negative influence on the zone's marine resources and environment, not to mention infringe on the rights and sovereignty of coastal States, specifically those wishing

① *Collection of International Treaties (1924—1933)*, Beijing: World Knowledge Publishing House, 1961, p. 545.

② Zhou Gengsheng, *International Law*, Volume I, Commercial Press, 1976, p. 77; *Collection of International Treaties (1924—1933)*, Beijing: World Knowledge Publishing House, 1961, p. 545.

to remain neutral. Therefore, some experts recommend that maritime clashes, hostile operations or other military actions be strictly forbidden in the EEZs of neutral States. In contrast, some scholars argue that waging war within the EEZs of neutral States does not violate the relevant provisions of international conventions.^① UNCLOS was designed to function as a framework of maritime governance during times of peace. Even so, UNCLOS effectively divided up the sea into different areas, each with their accompanying rights and duties, and this compartmentalization has a major impact on the exercise of the right of belligerency or neutrality during a period of armed conflict. Though the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*^② has not provided whether belligerent States may go so far as to set up a blocked area in the EEZ of neutral States, it does concede that belligerent States may engage in hostile operations in these areas. Of course, military activities must give due regard to the right of coastal States to choose neutrality. Also, belligerents must not hinder coastal State activities such as economic resource exploration and development in the EEZ and on the continental shelf; at the same time, the protection and preservation of the marine environment should not be compromised. Therefore, a belligerent State may not attack any artificial island, installation or equipment within the EEZ of neutral States to satisfy its principle of “military necessity”, destroy or change the marine environment on a large scale to realize military interests, or undermine the coastal State’s sovereignty over its resources. If any belligerent State desires to lay underwater mines in the EEZ of a neutral State, it must not only observe the above principle, but must also notify the coastal State and other third-party States to ensure that the freedom of navigation in the EEZ is not affected.

① Xiang Min, Reflection on the War Law on the Exclusive Economic Zone of the Neutral States as Naval Battle Area, *Journal of the Xi'an College of Political Science*, No. 5, 2003, p. 74.

② In 1987, pursuant to a proposal by the Research Institute of International Humanitarian Law, with the assistance of Italy’s Pisa University and Syracuse University of the United States, a preliminary Round Table on International Humanitarian Law Applicable to Armed Conflicts at Sea was convened in San Remo, Italy. From 1988 to 1994, the Research Institute of International Humanitarian Law held a series of round tables to draft and formulate the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.

*D. The Coastal State is in a Dominant and Preferential Position
in the Distribution of "Residual Rights" of the Exclusive
Economic Zone*

According to article 56 of UNCLOS, besides developing, using, conserving and managing natural resources, the rights of the coastal State in the EEZ also include "other rights". This term refers to "residual rights", as they are often called. The "residual rights" under the law of the sea, that is, the rights not expressly granted or forbidden in UNCLOS, such as allowable fish catch residue in the EEZ and the residual right of marine pollution. UNCLOS article 58 (1) also allows "other internationally lawful uses of the sea related to these freedoms ... and uses compatible with the other provisions of this Convention". Though the original text of this paragraph makes explicit that these rights must "be compatible with other international laws", some scholars assert that this sentence carries certain implications, including allowing warships to act in the EEZ of other States without restriction.^① Still others contend that warships must maintain due regard for the interests of the coastal State in its EEZ. "Restrictions on the military use of the exclusive economic zone are far stricter than restrictions on similar activities on the high seas".^② If any warship fails to observe the regulations of the coastal State, the coastal State shall have the right to require the warship to leave the exclusive economic zone.

Without permission, non-coastal States shall not have the right to conduct military activities such as training and drilling. When a warship passes through the EEZ of another State, the daily training of the navy may continue. If any rocket or guided missile for military use flies over or falls into the EEZ of another State, does this count as an exercise of legitimate overflight freedom? Some scholars insist that if the military training is not threatening in nature and complies with "those other uses provided in the Convention", occasional aircraft launching and helicopter liftoff from a warship are permissible. If the clause "and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircrafts"

① Oxman Bernard, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, *Virginia Journal of International Law*, Vol. 24, 1984, p. 809.

② Orrego Vicuna Francisco, *The Exclusive Economic Zone*, Cambridge: Cambridge University Press, 1989, p. 111.

(UNCLOS, article 58) is taken literally, it means that a warship may operate in any place whatsoever. It may conduct activities such as missile launching and weapons testing in other States' EEZs. This view misinterprets the legal concept of the EEZ as a unique area and a product of the balance between maritime State power and coastal State interests. Therefore, as one scholar observes: It would be unrealistic to equate weapon testing such as launching torpedo and cannon and illegal weapon hiding in the exclusive economic zone to the uses of vessels, aircrafts and submarine cables.^① As any weapons testing could threaten coastal States' fishery-related and other interests, such operations must obtain prior authorization and approval from the coastal State in question and submit to its jurisdiction and lawful restrictions.

Non-coastal States do not have the right to set up temporary military zones in the EEZ. In the Malvinas Island Armed Conflict of early 1982, Argentina resorted to the use of military force to resolve a sovereignty dispute with the United Kingdom. After imposing a military occupation over the Malvinas Island, the United Kingdom rapidly responded by announcing its intention to install a naval blockade around the sea area extending 200 nautical miles from the island—boundaries that incidentally overlap with those of the EEZ—and forbid all foreign ships from entering this area. All aircraft and ships entering the forbidden area would be attacked, and the United Kingdom threatened to bombard and sink any Argentine ships it encountered in this area. The above practices of the United Kingdom would substantively transform the EEZ surrounding the Malvinas Island into an exclusive military zone, expanding the jurisdiction and sovereign rights ascribed to the area under the UNCLOS regime. Therefore, some States labeled the UK's announcement as a "serious error in sea area jurisdiction", as it made "it a fact to establish a military zone 200 nautical miles away from the coast baseline, with legal effect."^② As response, Argentina also established an exclusive military zone of 200 nautical miles around

① Scovazzi Tullio, *The Evolution of International Law of the Sea: New Issues, New Challenges*, The Hague: Martinus Nijhoff Publishers, 2001, p. 162. (reprinted from Volume 286 of *Recueil des Cours*)

② Dalton has observed that in the wake of the Falkland Islands conflict, a temporary non-military zone essentially became a completely sealed-off, exclusive zone. One view has it that for UNCLOS States Parties to interrupt foreign States' freedoms of navigation and overflight through the high seas constituted a violation of international law. Such a view is based in a one-sided understanding of international law. Belligerent States still have the right to undertake self-defense and other such operations on the high seas.

the same island. In 1979, once Grenada's pro-Soviet regime took power following a coup d'état, the United States planned a so-called international action^① to establish and support a pro-US puppet regime. The *Independent* carrier group and the *USS Guam* amphibious assault ships reached the sea area adjacent to Grenada in October 1983 and promptly established an aeronaval blockade with a radius of 50 nm. To implement a comprehensive blockade of Grenada, all the island's navigational links with the external world were severed. UNCLOS contains no express permission for non-coastal States to install military blockades coterminous with a coastal State's EEZ. According to UNCLOS articles 19, 25 and 40, it is legal for a coastal State to impose a blocked area in its territorial or internal waters, but there is no reference to whether a blocked area may be set up in the EEZ or on the high seas. In line with the principle of freedom on the high seas, setting up a blocked area on the high seas is permissible, however any strait used for international navigation must not be blocked. Concerning naval blockades, detailed special rules have been promulgated in the *Manual of the Laws of Naval Wars* (Oxford 1913). To bypass these rules, in past wars and other armed conflicts, many States avoided using terms like blockade or blocked area, opting instead for less regulated ones such as military zone and military forbidden area.^② One scholar has argued that since weapons testing and military training of the navy may affect the surrounding sea areas, particularly by inflicting a negative impact on the fishery or resource-related interests of coastal States, a non-coastal State may set a temporary military zone in the coastal State's EEZ for the purpose of conducting such activities; this is fully in conformity with customary international law. "To conduct activities for military purpose in a temporary zone of the high seas has always been regarded by the practice of customary international law as the right for national self defense. Therefore, it can be ascertained that the establishment of a temporary military zone and reasonable activities conducted therein are legitimate."^③ This view has been strongly opposed by some coastal States, who argue that inappropriate military activities may interfere with and affect fishery

① Following this call to action, police forces of seven Caribbean countries—Jamaica, Dominica, Barbados, Antigua, St. Vincent, Saint Lucia, and Saint Christopher and Nevis—were assembled off the coast of Barbados to carry out "drilling" activities.

② Li Li and Lin Ao, Legal Issues in Naval Blockade Wars, *Journal of Political Work*, No. 12, 2003, p. 47.

③ Van Dyke Jon M, Military Exclusion and Warning Zones on the High Seas, *Marine Policy*, Vol. 15, 1991, p. 147.

activities in this sea area as well as coastal States' sovereign rights over the resources in their EEZ. Therefore coastal States can be expected to unhesitatingly adopt measures to protect and preserve their resources and impose reasonable restrictions on foreign States' military activities within their EEZs. Such steps will challenge the legitimacy of foreign States' temporary military zones.^①

The coastal State occupies a priority position when it comes to nonproliferation activities in its EEZ. According to US intelligence, on December 9, 2002, a Spanish warship intercepted and captured a North Korean cargo ship bound for Yemen on the high seas and subsequently uncovered 15 "Scud" tactical ballistic missiles and rocket propellant stowed under the cement cargo, whereas the ship's shipping list recorded only cement. Through a series of high-level negotiations, the United States agreed to let the ship pass, and on December 11, this ship resumed its journey to Yemen.^② In December 2002, the United States released the national strategy for opposing weapons of mass destruction, declared that opposing weapons of mass destruction was the top national security issue for the United States, and called for the strengthening of offshore "resistance and banning" capabilities, including diplomacy, military and law enforcement. Consequently, then-president George W. Bush issued the "Proliferation Security Initiative" (PSI) during a convocation in Krakow, Poland,^③ proposing to intercept any ship or aircraft "suspected of" carrying weapons of mass destruction and prevent delivery to their intended recipient countries.

Traditionally, international law provides that the right of visit may only be exercised on the high seas, while the PSI defines the "international sea areas" for exercising the right of visit as all sea areas apart from the internal, territorial and archipelagic waters of a State. That is to say, under the PSI, a coastal State's EEZ is numbered among the sea areas in which the right of visit may be reasonably exercised. The implementation of such actions inevitably infringes

① Orrego Vicuna Francisco, *The Exclusive Economic Zone*, Cambridge: Cambridge University Press, 1989, p. 111.

② At <http://www.china.com.cn/chinese/junshi/583050.htm>, 20 June 2011.

③ The initial participating States of this proposal included Australia, France, Germany, Italy, Japan, Holland, Poland, Portugal, Spain, the United Kingdom and the United States; Canada, Denmark, Norway, Singapore and Turkey joined it in December 2003. On May 31, 2004, the Ministry of Foreign Affairs of Russia announced that it too would participate in the US-led PSI and became the 17th participating State.

upon the sovereignty and rights of coastal States. It flouts the basic principles of contemporary international relations and those of international law. Further, it erodes the integrity of the EEZ and flag state exclusive jurisdiction regimes, which introduces disorder into the current international framework for law of the sea.

The United Nations Security Council declared in Resolution 1540 (2004) that it “welcomes efforts in this context [i. e. ,proliferation of nuclear,chemical and biological weapons,as well as their means of delivery, constitutes a threat to international peace and security] by multilateral arrangements which contribute to non-proliferation”; requires that “all States,in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear,chemical or biological weapons and their means of delivery,in particular for terrorist purposes”; aims to “develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat,including through international cooperation when necessary,the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law”;and finally calls upon all States,“in accordance with their national legal authorities and legislation and consistent with international law ,to take cooperative action to prevent illicit trafficking in nuclear,chemical or biological weapons,their means of delivery, and related materials”. Marine law enforcement measures such as the right of visit, order to divert, escort back to port and armed attack may not be abused.

IV. Conclusion

Lacking equally broad freedoms as the high seas and differing also from the territorial waters,the exclusive economic zone is a new and sui generis regime under maritime law. The ambiguous wordings of the Convention leave room for various interpretations among States. Judging from the general principles of international law and the legislative intent behind UNCLOS, the “freedoms of navigation and overflight” in the EEZ are subject to certain restrictions; the coastal States enjoy jurisdiction over “military surveying”, a form of “marine scientific research”; military activities must reflect “peaceful purposes” and pay due regard to the legitimate rights of various parties; and coastal States occupy a dominant and preferential position regarding the alloca-

tion and exercise of “residual rights”. Any reasonable interpretation or application of the Convention should not go beyond these principles.

(Translator: CHEN Xiaoshuang;
Editor: YU Rui;
English Editor: Joshua Owens)