A Heating Arctic

A Summary on the Legal Status of Military Operations in a Foreign EEZ

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1 Introduction

The Arctic Ocean area can be likened to a family's house – a small area and many actors, all vying for space. If the family is at peace, this results in harmony, but once the family begins to fight, that utopia falls apart. For decades since the Cold War, the military activities taking place in the cramped and controlled Arctic region have been of little significance, but over the last years, Russia's military presence in the Arctic Ocean region has become more aggressive in nature, and this, along with Russia's illegal attacks on Ukraine, has caused a rise in tension, calling for concern on both sides, the European and Russian.[1] Most of the Arctic Ocean has been claimed by one state or another as part of its exclusive economic zone (EEZ) or continental shelf, and this has therefore caused significant tension when one state starts a military training exercise in the region.

The Law is unclear on the legality of military exercises in foreign EEZ. Some non-western states, however, most notably China, India, and Brazil, consider such military activities illegal without prior approval from the coastal state.[2] Although, it must be pointed out that western states and scholars,

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[1] For more on the increasingly aggressive approach, see 'The Study on Legal Analysis of Military Activities Hindering Energy Installations in the Exclusive Economic Zone or International Water: Chornomornaftogaz Rigs Case in the Black Sea and the NordBalt Cable Case in the Baltic Sea' 8; For news sources, see, among others, 'Northern Fleet Exercise Area Overlaps into Norway's EEZ amid Europe Tensions' (*The Independent Barents Observer*) <https://thebarentsobserver.com/en/security/2022/01/northern-fleet-will-exercise-maritime-border-norway-amid-europe-tensions> accessed 9 November 2022; Reuters, 'Russia Starts Navy Drills in Barents Sea - Report' *Reuters* (15 February 2022) <https://www.reuters.com/world/europe/russia-starts-navy-drills-barents-sea-report-2022-02-15/> accessed 9 November 2022; '30 Russian naval vessels stage show of force near coast of Norway' (*The Independent Barents Observer)* <https://thebarentsobserver.com/en/security/2019/08/30-russian-naval-vessels-stage-show-force-coast-norway> accessed 9 November 2022.

[2] For more discussion on the non-Western approach see Keyuan Zou, 'Peaceful Use of the Sea and Military Intelligence Gathering in the EEZ' in Seokwoo Lee and Hee Eun Lee (eds), *Asian Yearbook of International Law, Volume 22 (2016)* (Brill Nijhoff 2018); Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012)

generally tend to disagree: Military operations in other states' exclusive economic zone *are* legal, or at least, an ignored issue.[3] Although Russia, the European Union, and Norway actually agree, their current status quo, wherein Russia continues to build up its military prowess in the region and is becoming more active and hostile, has brought about the current untenable situation.

In this paper, I will define the conflicting current legal arguments surrounding the possibility of military operations within a foreign EEZ, and explore the real cost generally, specifically in the Arctic. This essay aims to bring this debate to the forefront of legal issues again.

2 UNCLOS

2.1 Introduction

The regulations on the law of the sea come from the United Nations Convention on the Law of the Sea (UNCLOS) or customary international law. Notably, both demand peace and the peaceful use of the seas.[4]

It must be noted that the UNCLOS, often considered the 'Constitution of the Oceans,'[5] due to its far-reaching administration and widespread acceptance, is unclear on the legality of military operations in a foreign EEZ. The reason for this is twofold and stems from the history of the negotiations of UNCLOS. Firstly, the post-World War II political landscape saw widespread decolonization and new, small states were all vying for part of the pie and wanted more rights in the seas.[6] These new states, along with already-existing politically weaker states, began fighting for recognition and rights in the seas. As a compromise between the new and old, powerful and weak, States, they developed the EEZ.

A note on this debate is called for. It regards the age-old debate between Grotius's *mare liberum* theory, describing an open sea, for all to access equally, and the *mare clausum* theory, wherein the sea is divided into sections for each state. While at first glance, the *mare liberum* theory

28 Utrecht Journal of International and European Law 22; Silvia Menegazzi, 'Military Exercises in the Exclusive Economic Zones: The Chinese Perspective' [2015] Maritime Safety and Security Law Journal 15.

[3] For examples of this see Murray, Jack Whitacre, *Chapter 4: Military Activities in an EEZ – Law of the Sea* (John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen ed); Menegazzi (n 2).

[4] United Nations Convention on the Law of the Sea (entered into force 16 November 1994) 1835 UNTS 3 preamble, art 88, 301.

[5] Tommy T. B. Koh, "A Constitution of the Oceans", in: Myron H. Nordquist (ed.), United Nations Convention on the Law of the Sea 1982: A Commentary, Dordrecht, 1985 xxxvii.

[6] For information on this debate, including a group of (new) states, the Group of 77, see Boleslaw Adam Boczek, 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries' (1988) 19 Ocean Development and International Law 445, 448; See also generally Satya Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary*, vol III (Martinus Nijhoff) Volume II.

provides for equity, in reality, it provides for equality. Due to unequal resources, states have different levels of access to the seas, and its resources.[7] For example, while the United States is able to traverse the sea at relatively high speeds, another state does not have the same resources and may only be able to access a few nautical miles of sea. Conversely, it is often those states, therefore, that most need the sea for sustenance and economic prosperity that do not have the resources to access the sea. As a result, less powerful states often found their resources exploited by more powerful global players.[8] The exclusive economic zone was created, among other reasons, to remedy this.

Secondly, the two opposing Superpowers of the time – the Soviet Union and the United States – were not known for their goodwill toward each other, so an agreement would be groundbreaking. Therefore, to facilitate the negotiations, highly contentious issues, such as military operations, were left off the docket.[9] The issue has, since then, once again come front and center.

Therefore, the extent of this rule is unclear but can be viewed through the lenses of the different legal arguments contained in UNCLOS. First, this section will scrutinize military operations with regard to the freedom of navigation, then compare military operations with exploration of the EEZ, and finally analyze the principle of due regard for the rights of other states.

2.2 Freedom of navigation

The first argument regards the extent of freedom of navigation under UNCLOS. The Corfu Channel case established that, under customary international law, the freedom of navigation did not limit the navigational rights of military vessels in straights, but it also did not specify a scope.[10] In other words, it did not determine whether it was just the movement or also the operation of its military hardware that was covered. The case was, however, influential in the creation of the freedom of navigation.

UNCLOS later adopted and expanded this definition but left unanswered many questions. Article 58 confers the rights referred to the high seas, listed in article 87, to the Exclusive Economic Zone.[11] While

[7] Geng (n 2) 24 and; Charles E Pirtle, 'Military Uses of Ocean Space and the Law of the Sea in the New Millennium' (2000) 31 Ocean Development & International Law 7, 36.
[8] See, for example, *Fisheries Jurisdiction (United Kingdom v Iceland)* [1974] ICJ Rep 1974.
[9] Note: articles 29-32 of UNCLOS do provide rules on warships, their responsibilities and their immunities; however, UNCLOS does not go into the extent of the freedom of navigation for the warships, or the operation military vessels. For more on this, see Boczek (n 5) 448; Pirtle (n 6) 9; also, generally, for the Cold War and Western-centric law of the sea regime, see Menegazzi (n 2).
[10] Geng (n 2) 26; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* [1949] ICJ Rep 1949.
[11] United Nations Convention on the Law of the Sea (n 4) 58, 87.

article 87 of UNCLOS does allow for the freedom of navigation, the extent is unclear. For example, the question arises whether the use of weapons in naval exercises is included within the freedom of navigation, usually reserved for innocent passage. Additionally, article 58 itself goes further and commands that states "enjoy … the freedoms … associated with the operation of ships" within the EEZ. Both articles bring about two questions: firstly, is this article referring to civilian ships only, or does it include military ships? And secondly, what is the scope of the 'operation of ships'?

To answer the first question, the aforementioned Corfu Channel case equates civilian and military vessels.[12] This follows the line of thinking of the United States and its western allies.[13] They are supported by the President of the negotiations of UNCLOS, who condemned states that restricted the freedom of navigation.[14] Other states, including China, point out the ambiguity here, though: they claim there is no concrete answer in the law and, therefore, cannot be bound by it.[15]

Secondly, the scope of 'operation of ships' is inconclusive, and the definition of military operation is currently non-existent in the current law.[16] However, some have split the definition of military operations into two general groups.[17] Firstly, movement rights, or the freedom of navigation, relates to the right of military vessels to navigate the seas freely, without disturbance. Secondly, operational rights refer to the *use* of military equipment beyond simple navigation. This includes "maneuvering, anchoring, intelligence collection, surveillance, military exercises, ordnance testing and firing, and surveys."[18] The latter definition suggests that the operations of military equipment would not be accepted under the umbrella of the freedom of navigation. This is not currently regulated by the law, however, and therefore requires codification.

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[12] *United Kingdom of Great Britain and Northern Ireland v. Albania* (n 9).

[13] Murray, Jack Whitacre, *Chapter 4: Military Activities in an EEZ – Law of the Sea*, p 4 (John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen ed).

[14] Some states, most notably Brazil, were vocal about their interpretation of the treaty. The President of the Conference (UNCLOS III) said to this: 'Nowhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted.' Geng (n 2).

[15] Menegazzi (n 2) 59, 60, 65.

[16] For the debate, see ibid 58; 'Military Activities in the EEZ: Preventing Uncertainty and Defusing Conflict' 260; Young-Kil Park, 'Different Voices on Military Activities in the EEZ' (2011) 3 KMI International Journal of Maritime Affairs and Fisheries 183, 184.

[17] For example, Zou (n 2) 163; Pirtle (n 6) 8; Boczek (n 5).

[18] Zou (n 2) 163.

2.3 Exploration

The second legal issue regards exploration. Article 56 of UNCLOS provides that the coastal state has

> "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to *other activities for the* economic exploitation and *exploration of the zone*, such as the production of energy from the water, currents, and winds [emphasis added];"[19]

Primarily this article is meant to refer to economic and scientific exploitation. Beyond that, however, the article also guarantees sovereign rights for the exploration of a coastal state's exclusive economic zone. The extent of this exploration, however, is unclear; the article decidedly allows for economic exploration, such as the production of energy or exploration of hydrocarbons. However, similarly, military exercises are meant to provide for the exploration of an area and of the mechanisms to be used in times of war. Would such military exploration include scientific exploration by military ships, as often done by China in the Arctic? What about weapons testing? How far does "exploration" go?

More to the point, under UNCLOS, a coastal state is given priority for Marine Scientific Research (MSR). While, in these instances, the MSR is not exclusively for the coastal state, it requires notification. Could it be that scientific research is protected but not the fundamental security interests of the state?[20] Logically, neighboring states operating military technology near or within their respective borders may be more worrying for the other state.[21] It would, therefore, not be far-fetched to consider military exploration of the EEZ as requiring notification.

2.4 Due regard

The final legal argument to be made regards the due regard obligations at the end of article 87 of UNCLOS, restricting the freedoms of states, including the freedom of navigation.

> "These freedoms shall be exercised by all States with due regard for the interests

[19] United Nations Convention on the Law of the Sea (n 4) art 56.
[20] Zou (n 2) 164. In his article, Zou weighs the freedom of navigation with limitations such as the one clearly established in UNCLOS for MSR.
[21] Take, for example, the issue at hand on the second question in the *United Kingdom of Great Britain and Northern Ireland v. Albania* (n 9), wherein Albania was apparently unable to ascertain the intent of the British Naval warships. For further examples and analysis, see also Menegazzi (n 2) 57.

of other States in their exercise of the freedom of the high seas."[22]

According to the ICJ's Chagos case, due regard requires states to ensure that the allocation of rights and obligations is equal and that each state shall not infringe on the other's rights. The Court makes clear that the coastal state nor any other state has priority in claiming any right. A balance based on the necessary information would be required to strike a conclusion.[23] Of importance here is the emphasis often put on sovereignty in international law and the necessity to protect that sovereignty.[24] As stated before, part of that sovereignty is the integrity and security of the state and the right of a state to ensure another state is not actively working against it or at least for the coastal state to be aware of the actions in its area of influence.

3 Discussion

Of issue with many states are the security impacts of a purely open ocean. In a time where technology is rapidly improving and more states have highly capable military weaponry, the necessity for states to ensure their safety in the Exclusive Economic Zone is not without merit. In such cases, where there are non-attributed rights, Article 69 of UNCLOS requires states to come to an equitable agreement, "taking into account the respective importance of the interest involved."[25] There is no presumption of benefit to the coastal state, but instead, the importance of each party's interest must be weighed against each other. It is easily argued that the integrity of the coastal state is the most crucial interest, as without which it cannot protect, defend, and ensure its survival as a sovereign state.

Looking back at the beginnings of maritime delimitation, the "cannon shot" rule established a territorial sea of three nautical miles, or the distance the cannons could shoot. Today, weaponry can go further, and surveillance is a serious threat to national security, and therefore the protections, in the form of more autonomy over the EEZ, should be bolstered.

The argument herein should not be construed to believe that a foreign state cannot not act in the EEZ of another state, rather that there should be clearly established rules in this regard. In the author's opinion, a simple rule of notification would be sufficient. Therefore, the safety of actors, both military and otherwise, at sea are kept safe, as well as

[22] United Nations Convention on the Law of the Sea (n 4) art 87.
[23] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* [2019] ICJ Rep 2019.
[24] For more on states in international law, reciprocity, and sovereignty, see Gleider I Hernández, *International Law* (Oxford University Press 2019) chapter 1.
[25] United Nations Convention on the Law of the Sea (n 4) art 69.

the interests of the coastal state. To appease the states insisting on keeping the oceans open to all, notification of the coastal state may not necessarily allow the coastal state to refuse the operation of military equipment by the non-coastal state, or the coastal state may only refuse in certain situations.

The situation in the Arctic is slightly different, however. Here, there is no disagreement by the states - the parties legally agree, but Russia is using it its benefit, increasing its military maneuvers in the Arctic. It should be noted, however, that the Soviet Union, before it gained its later military might, was against the militarization of the oceans and attempted to ban military activities in the high seas.[26] A reversion back to this policy for Russia is possible, however, unlikely, as the policies of both sides have become entrenched in the region, and changing it would be tantamount to changing the balance of power in the area.

This, however, does not mean that there is no cause for concern. As stated in the introduction, the war with Russia has exacerbated the available legal structures, and the posturing on both sides has not turned down the thermostat.

[26] Boczek (n 5) 457.