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Military Activities in the Exclusive Economic Zone: East Asia Focus

Raul (Pete) Pedrozo

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*Raul (Pete) Pedrozo**

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* Captain Pedrozo is a retired naval officer and former Professor of International Law at the U.S. Naval War College. While on active duty in the U.S. Navy he served in a number of positions including Staff Judge Advocate, U.S. Pacific Command, and Special Assistant to the Under Secretary of Defense for Policy. The views expressed in this article do not necessarily represent the position of the U.S. Government or the U.S. Department of Defense. This content of this paper forms the basis for comments provided by the author at the 8th World Ocean Forum 2014 in Busan, Republic of Korea, on September 17, 2014.

I. INTRODUCTION

On August 19, 2014, a Chinese Su-27 fighter conducted a dangerous intercept of a U.S. Navy P-8 patrol aircraft conducting routine surveillance 135 miles east of Hainan Island. Reminiscent of the 2001 EP-3 incident, the Chinese fighter made several passes under and alongside the P-8 before doing a barrel roll over top of the U.S. plane and flying within 20–30 feet of the Poseidon aircraft. This incident was the fourth “close intercept” by Chinese fighters operating out of Hainan Island since March, and has once again raised the issue of the legality of conducting surveillance operations in and over the exclusive economic zone (EEZ) without coastal State notice or consent.¹

All nations have an absolute right under international law to conduct military activities beyond the territorial sea of another nation. The United Nations Convention on the Law of the Sea (UNCLOS)² created a new zone—the 200 nautical mile (nm) exclusive economic zone (EEZ)—that comprises 38 percent of the world’s oceans, which were previously considered high seas. The zone was created for the sole purpose of granting coastal States greater control over the living and non-living resources adjacent to their coasts.³

Efforts by a handful of nations to expand coastal State authority in the EEZ to include residual competencies and rights in the zone were rejected by a majority of the States participating in the UNCLOS negotiations.⁴ Most nations agreed with the position advocated by the major maritime powers, that “[m]ilitary 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 exclusive eco-

1. Robert Burns and Lolita C. Baldor, *Pentagon Cites “Dangerous” Chinese Jet Intercept*, THE ASSOCIATED PRESS (Aug. 22, 2014), <http://bigstory.ap.org/article/pentagon-cites-dangerous-chinese-jet-intercept>.

2. United Nations Convention on the Law of the Sea, Part V, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. II UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, 491–821 (Satya N. Nandan & Shabtai Rosenne, eds., 1993) [hereinafter VIRGINIA COMMENTARY II].

4. *Id.* at 529–30.

conomic zone.”⁵ In the end, the Conference negotiators finally agreed on Articles 55, 56, 58 and 86, all of which accommodate the various competing interests of coastal States and user States in the EEZ without diminishing freedom of navigation and other internationally lawful uses of the sea.

Dissatisfied with the outcome of the negotiations, however, a few nations have sought to unilaterally expand their control in the EEZ, particularly by imposing restrictions on military operations and other lawful activities. These efforts impinge on traditional uses of the oceans by other States and are inconsistent with international law and State practice.

This paper examines the legal bases for conducting military activities in the EEZ. It then reviews some of the more prominent arguments used by States that purport to regulate such activities in the EEZ. The paper concludes that the right to engage in military activities in the EEZ is consistent with international law, both customary and conventional, as well as State practice.

II. MILITARY ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE

Within the EEZ, the coastal State enjoys sovereign rights for the purpose of “exploring, exploiting, conserving and managing” living and non-living natural resources, as well as jurisdiction over most off-shore installations and structures, marine scientific research, and the protection and preservation of the marine environment.⁶ Coastal States do not, however, exercise sovereignty over the EEZ. The term “sovereign rights” in Article 56 was deliberately chosen to clearly distinguish between coastal State resource rights and other limited jurisdiction in the EEZ, and coastal State authority

5. 17 THIRD UN CONFERENCE ON THE LAW OF THE SEA, PLENARY MEETINGS, OFFICIAL RECORDS, U.N. Doc. A/CONF.62/WS/37 and ADD.1-2, 244 (1973-1982) [hereinafter OFFICIAL RECORDS VOL 17].

6. UNCLOS, *supra* note 2, art. 56. However, with regard to environmental jurisdiction, there is no requirement that military or other government non-commercial vessels and military or other State aircraft comply with coastal State environmental laws and regulations. Article 236 exempts such vessels and aircraft from compliance (“The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.”).

in the territorial sea where coastal States enjoy a much broader and more comprehensive right of “sovereignty.”⁷ This conclusion is confirmed by Article 89, which provides that “no State may validly purport to subject any part of the high seas to its sovereignty.” Article 89 applies to the EEZ pursuant to Article 58(2).⁸

On the other hand, within the EEZ, all States enjoy high seas freedoms of “navigation and overflight . . . laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and [which are] compatible with the other provisions of the Convention.”⁹ These “other internationally lawful uses of the seas” may be undertaken without coastal State notice or consent and include a broad range of military activities such as: intelligence, surveillance and reconnaissance (ISR) operations; military marine data collection and naval oceanographic surveys; war games and military exercises; bunkering and underway replenishment; testing and use of weapons; aircraft carrier flight operations and submarine operations; acoustic and sonar operations; naval control and protection of shipping; establishment and maintenance of military-related artificial installations; ballistic missile defense operations and ballistic missile test support; maritime interdiction operations (e.g., visit, board, search and seizure); conventional and ballistic missile testing; belligerent rights in naval warfare (e.g., right of visit and search); strategic arms control verification; maritime security operations (e.g., counter-terrorism and counter-proliferation); and sea control.

States may also conduct a number of non-resource-related maritime law enforcement activities in foreign EEZs without coastal State consent pursuant to Article 58(2), which provides that “Articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible . . .” with Part V. These constabulary operations include actions taken to counter the slave trade (Article 99) and repress piracy (Articles 100–107), suppression of unauthorized broadcasting (Article 109), suppression of narcotics trafficking (Articles 108), the exercise of the peacetime right of approach and visit (Article 110), the duty to render assis-

7. VIRGINIA COMMENTARY II, *supra* note 3, at 531–44. *See also* JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 233 (2013).

8. UNCLOS, *supra* note 2, art. 58(2) provides that “Articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible . . .” with Part V.

9. UNCLOS, *supra* note 2, art. 58(1).

tance (Article 98), and the right of hot pursuit (Article 111). Article 86 of the Convention confirms this broad interpretation.

During the first three sessions of the negotiations, there was little agreement on how to define the high seas in Article 86. By the fourth session, however, efforts began to focus on “ensuring that the regime of the high seas would apply in the EEZ to the extent it was not incompatible with Part V.”¹⁰ As indicated by the Chairman of the Second Committee:

There could be little debate as to which of the provisions . . . on the high seas apply in the EEZ In simple terms, the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication.¹¹

Similarly, the President of the Conference Ambassador Tommy Koh indicated at the opening of the fifth session that

the special character of . . . [the EEZ] calls for a clear distinction to be drawn between the rights of the coastal State and the rights of the international community in the zone. A satisfactory solution must ensure that the sovereign rights and jurisdiction accorded to the coastal State [in the EEZ] are compatible with well-established and long recognized rights of communication and navigation.¹²

The final text of Article 86 recognizes that the EEZ is a new regime, while at the same time retaining the distinction that had previously existed between the high seas and the territorial sea.¹³ Although the first sentence of the article establishes that the EEZ is *sui generis*, and that certain resource-related high seas freedoms (e.g., living and non-living resource exploitation and marine scientific research) do not apply in the EEZ, the second sentence makes clear that nothing in the article abridges the high seas “freedoms enjoyed by all States in the EEZ in accordance with Article 58.”¹⁴

10. Raul (Pete) Pedrozo, *Responding to Ms. Zhang’s Talking Points on the EEZ*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 207–23, ¶ 16 (2011). *See also* III UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, 63–64 (Satya N. Nandan & Shabtai Rosenne, eds., 1995) [hereinafter VIRGINIA COMMENTARY III].

11. VIRGINIA COMMENTARY III, *supra* note 10, at 64.

12. *Id.* at 65.

13. *Id.* at 69.

14. *Id.* at 60–71.

It is also important to recognize that UNCLOS does place some restraints on military activities at sea. However, none of these limitations apply in the EEZ. Article 19 of the Convention restricts certain military activities in foreign territorial seas for ships engaged in innocent passage, such as threat or use of force, use of weapons, intelligence gathering, acts of propaganda, launching and landing of aircraft and other military devices, military surveys and intentionally interfering with communication systems.¹⁵ Article 52 applies the same limitations to archipelagic waters. 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.¹⁶ Articles 39 and 54 prohibit the threat or use of force when ships are engaged in transit passage or Archipelagic Sea Lanes Passage (ASLP), and Articles 40 and 54 prohibit survey activities for ships engaged in transit passage or ASLP. 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.

UNCLOS also makes clear that coastal States lack competence to regulate military activities, such as sensitive reconnaissance operations (SRO), in the airspace above the EEZ, particularly when those activities do not have an impact on the water column or seabed of the EEZ. Articles 2 and 49 of the Convention provide that the airspace above the territorial sea and archipelagic waters is national airspace, subject to coastal/archipelagic State sovereignty (contingent on the right of ASLP). The airspace above the

15. UNCLOS, *supra* note 2, art. 19(2) provides, in part, that:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defense or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
-
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State ...

16. UNCLOS, *supra* note 2, arts. 20 & 52.

EEZ is considered international airspace and, like the high seas, is not subject to coastal State sovereignty.

Activities in international airspace are regulated by the Convention on International Civil Aviation of 1944 (Chicago Convention).¹⁷ Like UNCLOS, Article 1 of the Chicago Convention recognizes that the coastal State “has complete and exclusive sovereignty over the airspace above its territory.” “Territory” is defined in Article 2 as “the land areas and territorial waters adjacent thereto.” A “State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory”¹⁸ Similarly, Article 9(b) allows a “State . . . in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory” But in both of these instances, the restrictions only apply to national, not international, airspace.

Moreover, Article 3 exempts State aircraft (including military aircraft) from the rules of the Chicago Convention, including observance of Flight Information Regions (FIRs), except that State aircraft may not fly over the territory of another State without the consent of that State. The only requirement is that State aircraft operate with “due regard for the safety of navigation of civil aircraft.”¹⁹

Thus, neither UNCLOS nor the Chicago Convention grants coastal States any authority over military aircraft operating in international airspace beyond the 12 nm limit. On the contrary, Article 56 of UNCLOS specifically limits coastal State sovereign rights in the EEZ to the seabed, its subsoil and the waters superjacent to the seabed, with one exception—the coastal State also has exclusive rights over the production of energy from the winds. Similarly, the Chicago Convention only limits military activities

17. Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295, Dec. 7, 1944 [hereinafter Chicago Convention].

18. *Id.*, art. 9(a).

19. *Id.*, art. 3 provides that:

- a. This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.
- b. Aircraft used in military, customs and police services shall be deemed to be state aircraft.
- c. No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization special agreement or otherwise, and in accordance with the terms thereof.
- d. The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

in national airspace and exempts State aircraft from compliance with the Convention's provisions applicable in international airspace. Efforts by Brazil to designate the airspace above the EEZ as national airspace at a meeting of the International Civil Aviation Organization (ICAO) were rejected by the ICAO Legal Committee, calling the idea as "flagrantly contradicting the relevant provisions of UNCLOS which equate the EEZ . . . with the high seas as regards freedom of overflight."²⁰ In short, nothing in UNCLOS or the Chicago Convention provides a legal basis for regulating military activities in international airspace above the EEZ.

III. COASTAL STATE RESTRICTIONS ON MILITARY ACTIVITIES IN THE EEZ

Eighteen States purport to regulate or prohibit foreign military activities in the EEZ. These States include: Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, India, Indonesia,²¹ Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Philippines,²² Portugal, Thailand, and Uruguay.²³ Additionally, even though Article 3 of the Convention limits the breadth of the territorial sea to 12 nm, seven coastal States—Benin (200 nm), the Congo (200 nm), Ecuador (200 nm), Liberia (200 nm), Peru (200 nm), Somalia (200 nm) and Togo (30 nm)—claim a territorial sea in excess of 12 nm that also purports to deny or restrict foreign-flagged military activities.²⁴ In addition, five nations claim security jurisdiction in their 24 nm

20. BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA* 203 (1989).

21. Indonesia has not enacted domestic regulations restricting military activities in their EEZs, but has on occasion objected to foreign military activities in the zone. For example, Indonesia joined Malaysia at a meeting of the ASEAN Regional Forum (ARF) in Manila in 2007 in objecting to proposed ASEAN military exercises in their respective EEZs. Raul (Pete) Pedrozo, *Military Activities In and Over the Exclusive Economic Zone, in FREEDOM OF THE SEAS, PASSAGE RIGHTS, AND THE 1982 LAW OF THE SEA CONVENTION* 235, 237 (Myron H. Nordquist, Tommy T. B. Koh, & John Norton Moore, eds. 2009). *See also* Department of Defense, *Maritime Claims Reference Manual (MCRM)*, Department of Defense Instruction 2005.1–M, June 2008 [hereinafter MCRM], *available at* http://www.jag.navy.mil/organization/code_10_mcrm.htm (last visited Oct. 30, 2014).

22. Similarly, the Philippines has not enacted national regulations that restricts military activities in their EEZs, but has on a few occasions objected to foreign military activities in their EEZ. *See also* MCRM, *supra* note 21.

23. *Id.*

24. *Id.* *See also*, JAMES KRASKA, *MARITIME POWER AND THE LAW OF THE SEA: EXCEPTIONARY OPERATIONS IN WORLD POLITICS* 291–330 (2011).

contiguous zone: Cambodia, China, Sudan, Syria, and Vietnam.²⁵ Of the 30 States that purport to restrict or regulate military activities seaward of the territorial sea, only China,²⁶ North Korea²⁷ and Peru²⁸ have demonstrated a willingness to use force in pursuit of their excessive EEZ claims.

25. MCRM, *supra* note 21.

26. China has been the most active in challenging U.S. military ships and aircraft operating within and over its EEZ. Although Chinese interference occurs on a routine basis, the most notable incidents that received widespread media coverage include:

(1) On March 23, 2001, USNS *Bowditch* (T-AGS-62) was conducting a routine military hydrographic survey in China's claimed EEZ in the Yellow Sea when she was aggressively confronted by a PLA(N) frigate and ordered to leave the area. Raul Pedrozo, *Close Encounters at Sea: The USNS IMPECCABLE Incident*, 62 NAVAL WAR COLLEGE REVIEW (2009).

(2) On April 1, 2001, two Chinese F-8s approached a U.S. EP-3 surveillance plane that was conducting a routine reconnaissance flight about 70 miles southeast of Hainan Island. One of the F-8s collided with the U.S. aircraft after it made several close approaches to the EP-3. The EP-3 was severely damaged and was forced to make an emergency landing at the Chinese military airfield in Hainan. The F-8 was chopped in half and the Chinese pilot was never found. The U.S. aircrew was held captive for two weeks and the plane was not returned until July 2001. *Id.*

(3) On March 8, 2009, five Chinese ships (a PLA(N) intelligence ship, a Fisheries Law Enforcement Command (FLEC) patrol vessel, a State Oceanic Administration (SOA) patrol vessel and 2 small PRC cargo ships) surrounded and harassed the USNS *Impeccable* (T-AGOS-23) while she was conducting routine surveillance operations in the South China Sea approximately 75 miles southeast of Hainan Island. The civilian cargo ships, acting as proxies for the PLA(N), approached within 25 meters of the *Impeccable*, forcing her to make an emergency all-stop to avoid a collision. *Id.*

(4) On March 4–5, 2009/May 5, 2009, USNS *Victorious* (T-AGOS-19) was conducting routine surveillance operations in the Yellow Sea when it was illuminated with a high-intensity spotlight by a FLEC patrol vessel 120 nm off the Chinese coast. The next day a Chinese Y-12 maritime surveillance aircraft conducted 12 fly-bys of *Victorious* at an altitude of about 400 feet and a range of 500 yards. Then on May 5, 2009, *Victorious* was harassed by two Chinese fishing vessels that approached within 30 meters of the U.S. surveillance ship. The fishing boats departed when a PLA(N) warship (WAGOR 17) arrived on scene. KRASKA & PEDROZO, *supra* note 7, at 311.

(5) On July–November 2010, China objected to a series of planned U.S.-South Korean military exercises in the Yellow Sea indicating that deploying the USS *George Washington* (CVN 73) to the Yellow Sea would be provocative and a threat to Chinese national security. *Id.*

(6) On June 29, 2011, China warned the United States to stop conducting Sensitive Reconnaissance Operations (SRO) near the Chinese coast because they violate PRC sovereignty and security. The warning came after two Su-27 fighters attempted to intercept a U.S. U-2 reconnaissance aircraft operating over the Taiwan Strait. Kenneth Allen & Jana Allen, *Assessing China's Response to U.S. Reconnaissance Flights*, 11(16) CHINA BRIEF (Sept. 2, 2011).

(7) On July 3, 2013, USNS *Impeccable* was queried by a China Maritime Surveillance (CMS) patrol vessel 100 nm off the Chinese coast in the East China Sea and instructed to discontinue its surveillance operation. Bill Gertz, *Chinese Naval Vessel Tries to Force U.S. Warship to Stop in International Waters*, THE WASHINGTON FREE BEACON (Dec. 13, 2013), <http://freebeacon.com/national-security/chinese-naval-vessel-tries-to-force-u-s-warship-to-stop-in-international-waters/>.

(8) On December 5, 2013, USS *Compens* (CG-63) was monitoring a naval exercise in the South China Sea when it was ordered to leave the exercise area. When the U.S. warship refused to comply, a PLA(N) Amphibious Dock Ship crossed *Compens'* bow at 100 meters and came to a full stop, forcing the U.S. cruiser to take evasive action to avoid a collision. China justified its actions claiming that the *Compens* had entered the 45 kilometer inner defensive layer of the *Liaoning* carrier battle group. *Id.*

(9) On August 19, 2014, a Chinese Su-27 fighter conducted a dangerous intercept of a U.S. Navy P-8 patrol aircraft conducting routine surveillance 135 miles east of Hainan Island, which was fully detailed at the beginning of this article. Burns & Baldor, *supra* note 1.

(10) On August 29, 2014, China once again warned the United States to stop its SRO flights near Chinese territory, claiming that the surveillance activities undermine China's security interests and could lead to "undesirable incidents." Sophie Brown, *Stop Spy Flights, China Warns the U.S.*, CNN (Aug. 29, 2014), <http://www.cnn.com/2014/08/29/world/asia/china-us-spy-flights/>.

27. On January 23, 1968, five North Korean warships—three P4 torpedo boats and two subchasers—attacked the USS *Pueblo* (AGER-2) on the high seas, 15.8 miles off Yo Do Island. The U.S. surveillance ship was overtly collecting intelligence to gauge Soviet and North Korean reactions to the operation. The *Pueblo* was subsequently boarded and escorted back to North Korea, where the crew was held captive for 335 days. The U.S. ship remains in the hands of North Korea. Harry Iredale, *The Pueblo Incident*, USS PUEBLO (AGER-2), available at http://www.usspueblo.org/Pueblo_Incident/January_23.html (last visited Oct. 31, 2014) (based on personal memory and from LLOYD BUCHER, BUCHER: MY STORY (1970)).

28. On April 25, 1992, Peruvian fighters attacked a U.S. C-130 aircraft that was conducting a routine counterdrug surveillance mission in international airspace off the Peruvian coast. The U.S. made an emergency landing at a small airstrip in Talara, Peru, near the border with Ecuador. Peruvian authorities justified their action by alleging that the U.S. aircraft failed to respond to several attempts to establish visual and radio warnings by the two fighter jets. One crewmember was killed; two were injured. Dale Cheney, *Freedom of Navigation*, THE MOBILITY FORUM 30, 33 (July/August 2003); Eric Schmitt, *U.S. Officials Say Mutual Errors May Have Led to Incident in Peru*, NEW YORK TIMES (Apr. 27, 1992), <http://www.nytimes.com/1992/04/27/world/us-officials-say-mutual-errors-may-have-led-to-incident-in-peru.html>; Nathaniel C. Nash, *Peru Jets Attack U.S. Air Transport*, NEW YORK TIMES (Apr. 26, 1992), <http://www.nytimes.com/1992/04/26/world/peru-jets-attack-us-air-transport.html>; Nathaniel C. Nash, *U.S. Says a C-130 was Hit by Gunfire From Peru*, NEW YORK TIMES (Apr. 25, 1992), <http://www.nytimes.com/1992/04/25/world/us-says-a-c-130-was-hit-by-gunfire-from-peru.html>.

Illegal coastal State constraints on foreign military activities in the EEZ vary from State-to-State and include:

- restrictions on “non-peaceful uses” of the EEZ without consent, such as weapons exercises;
- limitations on military marine data collection (military surveys) and hydrographic surveys without prior notice and/or consent;
- requirements for prior notice and/or consent for transits by nuclear-powered vessels or ships carrying hazardous and dangerous goods, such as oil, chemicals, noxious liquids, and radioactive material;
- limiting warship transits to innocent passage;
- prohibitions on ISR operations (intelligence collection) and photography;
- requiring warships to place weapons in an inoperative position prior to entering the contiguous zone;
- restrictions on navigation and overflight through the EEZ;
- prohibitions on conducting flight operations (launching and recovery of aircraft) in the contiguous zone;
- requiring submarines to navigate on the surface and show their flag in the contiguous zone;
- requirements for prior permission for warships to enter the contiguous zone or EEZ;
- asserting security jurisdiction in the contiguous zone or EEZ;
- application of domestic environmental laws and regulations; and
- requirements that military and other State aircraft file flight plans prior to transiting the EEZ.

These excessive claims have no basis in customary international law, State practice, UNCLOS or the Chicago Convention, and have been diplomatically protested against and operationally challenged by the United States under the U.S. Freedom of Navigation Program.

A. Maritime Scientific Research v. Military Marine Data Collection

As discussed above, coastal States may regulate marine scientific research (MSR) in their EEZ. States that purport to limit military marine data collection (surveillance operations and oceanographic surveys) in the EEZ argue

that such operations are akin to MSR and are therefore subject to coastal State control.²⁹ That argument is clearly flawed. To the extent that coastal State laws purport to regulate hydrographic surveys and military marine data collection activities, to include military oceanographic surveys and underwater, surface, and aviation surveillance and reconnaissance missions, they are inconsistent with State practice and customary international law, as well as the plain language of UNCLOS.

Although UNCLOS does not define MSR or hydrographic surveys, the Convention clearly differentiates between MSR, surveys, and military activities in various articles. The use of the term “marine scientific research” was specifically chosen to distinguish MSR from other types of marine data col-

29. China, for example, has enacted domestic legislation and implementing regulations that prohibit all types of marine data collection—MSR, hydrographic surveys and military marine data collection—without Chinese consent. The 1998 *Law on the Exclusive Economic Zone and Continental Shelf* requires China’s approval for foreign MSR in its EEZ. Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf, Order No. 6, art. 8 (promulgated by the 3rd Meeting of the STANDING COMM. NINTH NAT’L PEOPLE’S CONG., Feb. 26, 1998, effective June 26, 1998) (China) [hereinafter 1998 Chinese Law on the Exclusive Economic Zone and Continental Shelf], translation available at http://www.un.org/depts/los/LEGISLATIONAND_TREATIES/PDFFILES/chn_1998_eez_act.pdf. The law’s implementing regulations—Provisions on the Administration of Foreign-Related Maritime Scientific Research—similarly require Chinese consent for foreign-related MSR activities in the EEZ. Provisions on the Administration of Foreign-Related Maritime Scientific Research, June 18, 1996 (promulgated by Decree No.199 of the State Council of the People’s Republic of China, June 18, 1996) (China). Article 7 of the 2002 Surveying and Mapping Law of the People’s Republic of China, however, requires foreign organizations and individuals that want to engage in surveying and mapping operations in “sea areas under the jurisdiction” of China to obtain the prior approval of competent Chinese authorities. Law of the People’s Republic of China on the Surveying and Mapping (promulgated by the 29th Meeting of the STANDING COMM. NINTH NAT’L PEOPLE’S CONG., Aug. 29, 2002, effective Dec. 1, 2002). Surveying and mapping are broadly defined in Article 2 to include “surveying, collection and presentation of the shape, size, spatial location and properties of the natural geographic factors or the manmade facilities on the surface, as well as the activities for processing and providing of the obtained data, information and achievements.” *Id.* Thus, Beijing’s application of the 1998 and 2002 laws appears inconsistent with UNCLOS because they purport to apply to hydrographic surveys and military marine data collection in the EEZ and thus are not solely limited to regulation of foreign MSR. Raul Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views, in MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS* 23–26 (Peter Dutton, ed. 2010) (No. 7 China Maritime Study). See also J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 413–50 (3d ed. 2012).

lection that are not resource-related, such as hydrographic surveys and military oceanographic surveys.³⁰ Article 19(2)(j), for example, prohibits both “research or survey activities” for ships engaged in innocent passage. Article 40 applies a similar restriction to ships engaged in transit passage—“marine scientific research and hydrographic survey ships may not carry out any research or survey activities” without prior authorization of the States boarding the strait. The same restrictions apply to ships engaged in ASLP (Article 54) and ships transiting archipelagic waters in innocent passage (Article 52).

Article 56(1)(b)(ii) and Part XIII, on the other hand, only grant coastal States jurisdiction over MSR. Article 87(1)(f), also only refers 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 hydrographic surveys in the other maritime zones, including the contiguous zone and the EEZ. Hydrographic surveys and other military marine data collection activities remain issues governed by high seas freedom of navigation and other internationally lawful uses of the sea, and are therefore exempt from coastal State jurisdiction in the contiguous zone and EEZ.³¹ The distinction between MSR and other forms of marine data collection articulated in UNCLOS reflect centuries of State practice.

In order to operate at sea across the full spectrum of operations,³² the U.S. Navy, like any other navy, must fully understand the environment in which it operates. U.S. naval units have plied the world’s oceans for more than 180 years conducting military marine data collection since the Department of Charts and Instruments was first established in 1830.³³ Marine data and intelligence information is continuously collected seaward of the territorial sea by naval ocean surveillance ships and naval oceanographic survey ships to ensure safety of navigation, to build oceanographic and meteorological profiles, to maintain force protection, and to inform naval commanders, theater commanders, and national leaders. Only in the last

30. UNCLOS, *supra* note 2, arts. 19(2)(j), 40, 54, 87(1)(f) & Part XIII.

31. UNCLOS, *supra* note 2, arts. 58, 86 & 87.

32. The Navy’s six core capabilities are forward presence, deterrence, sea control, power projection, maritime security and humanitarian assistance/disaster response. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWERS (Oct. 2007), *available at* <http://www.navy.mil/maritime/MaritimeStrategy.pdf>.

33. The department is the predecessor of today’s Naval Meteorology and Oceanography Command.

thirty years have these operations come under scrutiny by a handful of rogue coastal States. The law, however, is clear—the coastal State’s right to regulate MSR does not apply to other separate and distinct activities, such as oceanographic surveys and other military data collection efforts, including ISR operations.

B. Intelligence, Surveillance and Reconnaissance Operations

Although they were unsuccessful during the UNCLOS negotiations, some nations continue to maintain that coastal States retain residual rights in the EEZ, including the right to assert security jurisdiction in and over the zone. China has been the principal advocate of this position.

Following the 2001 mid-air collision between a Chinese F-8 fighter and an American EP-3 surveillance plane, Washington protested the incident, asserting that China had violated its “due regard” obligation under international law. Beijing responded that intelligence collection posed a threat to China’s national security interests and that U.S. military aircraft therefore only had a right of overflight in the EEZ. China has maintained this position ever since. For example, on June 29, 2011, China warned the United States to stop conducting Sensitive Reconnaissance Operations (SRO) near the Chinese coast because they violate PRC sovereignty and security. The warning came after two Su-27 fighters attempted to intercept a U.S. U-2 reconnaissance aircraft operating over the Taiwan Strait.³⁴ More recently, on August 29, 2014, China once again warned the United States to stop its SRO flights near Chinese territory after Washington protested a dangerous intercept of an American P-8 by a Chinese Su-27 fighter.³⁵ Beijing dismissed the protest, claiming that U.S. surveillance activities undermine China’s security interests and could lead to “undesirable incidents.”³⁶

China’s position is not supported by State practice or a plain reading of UNCLOS, the Chicago Convention and other applicable international instruments. The only place in UNCLOS that address intelligence collection is Article 19(2)(c). That article restricts foreign ships transiting the territorial sea in innocent passage from engaging in “any act aimed at collecting information to the prejudice of the defense or security of the coastal state.” An analogous limitation does not appear in Part V of the Convention regarding the EEZ. Similarly, pursuant to Article 3 of the Chicago Conven-

34. Allen & Allen, *supra* note 26.

35. Burns & Baldor, *supra* note 1.

36. Brown, *supra* note 26.

tion, coastal States may not regulate State aircraft activities seaward of the territorial sea (international airspace). Thus, in accordance with a generally accepted principle of international law—any act that is not prohibited in international law is permitted (the Lotus principle)—States may lawfully engage in intelligence collection, oceanographic surveys and other military activities in and over the EEZ without coastal State notice or consent.³⁷

The text of UNCLOS and the Chicago Convention reflect State practice since 1945. The post-war era saw an increasing number of excessive maritime claims, as nations sought to expand coastal State competencies beyond the territorial sea. Yet, during the Cold War, warships and military aircraft from the Western alliance and the Soviet bloc routinely collected intelligence and conducted military surveys in what is today the EEZ. It was not uncommon for Soviet surveillance ships (AGI) to sit outside the territorial sea and collect intelligence on U.S. and NATO warships and operations at sea. Such surveillance activities were lawful and acceptable to the Alliance so long as the AGIs remained outside of the territorial sea and complied with the obligations of the 1972 International Regulations for Preventing Collisions at Sea (COLREGS)³⁸ and the 1972 US–USSR Agreement on the Prevention of Incidents on the High Seas (INCSEA).³⁹ This practice continues today, as surveillance and survey ships from a number of countries, including Australia, China, Japan, NATO, Russia, South Africa, and the United Kingdom (to name a few), ply the world’s oceans collecting marine data for military use.⁴⁰

The U.S. Navy Special Mission Program (SMP) maintains a fleet of twenty-five ships that conduct a variety of missions seaward of the territorial sea, including (*inter alia*) oceanographic surveys, underwater surveil-

37. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 238 ¶ 20 (July 8).

38. Convention on International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 UST 3459, TIAS 8587, 1050 U.N.T.S. 17 [hereinafter COLREGS].

39. Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, Dec. 29, 1972, 852 U.N.T.S. 151, as amended by the Protocol thereto, May 22, 1973, 24 UST 1063, TIAS No. 7624, and by the 1998 exchange of diplomatic notes [hereinafter INCSEA].

40. Pedrozo, *supra* note 10, ¶ 5.

lance, hydrographic surveys, and missile tracking and acoustic surveys.⁴¹ Of these twenty-five vessels, six are multipurpose oceanographic survey ships that perform acoustic, biological, physical and geophysical surveys to enhance the Navy's information on the marine environment.⁴² A seventh oceanographic survey ship collects data in coastal regions around the world that is used to improve technology in undersea warfare, enemy ship detection and charting the world's coastlines. The SMP also operates five ocean surveillance ships that directly support the Navy by using both passive and active low-frequency sonar arrays to detect and track undersea threats. These ships additionally provide locating data that promote navigational safety of various undersea platforms. Operations by these ships seaward of the territorial sea are consistent with international law and long-standing State practice.

Likewise, since the advent of aviation more than one hundred years ago, military aircraft have flown countless missions beyond national airspace, to include ISR operations. These activities were commonplace during the Cold War and in most cases occurred without incident or adverse political repercussions. Even on those rare occasions when coastal States have objected to foreign ISR flights off their coast, normally they have done so on the grounds that the aircraft intruded into "national" airspace, rather than questioning the legality of intelligence collection generally.⁴³ The issue of aerial reconnaissance was brought before the UN Security Council following a series of incidents involving the United States and the Soviet Union. During the deliberations, the Soviet delegation specifically rejected the position that a coastal State had the right to interfere with intelligence collection activities beyond national airspace.⁴⁴ The United Kingdom delegations similarly indicated without objection that aerial surveillance directed at a coastal State from international airspace was consistent with international law and the UN Charter.⁴⁵

41. U.S. Navy Fact File: Oceanographic Survey Ships—T-AGS, available at http://www.navy.mil/navydata/fact_display.asp?cid=4500&tid=700&ct=4 (last visited Oct. 31, 2014).

42. These ships use multibeam, wide-angle, precision sonar systems that allow the ships to chart wide areas of the ocean floor.

43. Oliver J. Lissitzyn, *The Role of International Law and an Evolving Oceans Law*, in *ELECTRONIC RECONNAISSANCE FROM THE HIGH SEAS AND INTERNATIONAL LAW* 566–67, 574–75, 578–79 (Richard B. Lillich & John Norton Moore eds., 1980) (Vol. 61 U.S. Naval War College International Law Studies).

44. *Id.*

45. *Id.*

State practice since the end of the Cold War has continued to respect the distinction between national and international airspace with regard to ISR operations. For example, from 2004 to 2014, over fifty Russian aircraft have been intercepted in the U.S., Canadian, Japanese, South Korean and British ADIZs.⁴⁶ In each case, the Russian aircraft were intercepted and monitored, but were permitted to go on their way when it was determined that they would not penetrate the national airspace of the coastal State.⁴⁷ In the one case where force was used—Syrian forces shot down an unarmed Turkish RF-4E Phantom reconnaissance aircraft in June 2012—Damascus justified its actions claiming that the Turkish spy plane was well within Syr-

46. Bill Gertz, *Russian Bombers Fly Within 50 Miles of California Coast, U.S. F-22, F-15 Jets Intercept Four Bear H bombers near Alaska, Northern California*, THE WASHINGTON FREE BEACON (June 11, 2014), <http://freebeacon.com/national-security/russian-bombers-fly-within-50-miles-of-california-coast/>.

47. (1) Between May 2007 and May 2008, Russian TU-95 Bear bombers conducted a number of operational flights off the coasts of Alaska and Canada. U.S. and Canadian fighters intercepted and monitored the bombers, but each time the Russian aircraft were allowed to continue on their way. Rowan Scarborough, *Russian Flights Smack of Cold War*, THE WASHINGTON TIMES (26 June 2008), <http://www.washingtontimes.com/news/2008/jun/26/russian-flights-smack-of-cold-war/?page=all>.

(2) In November 2007, British Typhoon fighter jets intercepted a Russian reconnaissance aircraft that was detected approaching British airspace. The aircraft was allowed to proceed after it was determined that it would not enter British airspace. Matthew Hickley & David Williams, *RAF Fighter Jets Scrambled to Intercept Russian Bombers*, MAIL ONLINE (Aug. 22, 2007), <http://www.dailymail.co.uk/news/article-476751/RAF-fighter-jets-scrambled-intercept-Russian-bombers.html>.

(3) In March and May of 2008, U.S. F-15 jets intercepted Russian Tu-95 Bear heavy bombers off of Alaska. After it was determined that the Bears would not penetrate U.S. airspace, they were permitted to complete their mission. Erik Holmes, *More Russian Bombers Flying off Alaska*, AIR FORCE TIMES (Apr. 8 2008), <http://www.airforcetimes.com/article/20080406/NEWS/804060301/More-Russian-bombers-flying-off-Alaska-coast>.

(4) In February 2009, Canadian CF-18 fighters intercepted a Russian Tu-95 Bear bomber that was approaching Canadian airspace. When it is determined that the intercepted aircraft was on a training mission, it was allowed to continue on its flight without harassment or interference. *Russia Denies Plane Approached Canadian Airspace*, CANADIAN BROADCASTING CORP. NEWS (Feb. 27, 2009), <http://www.cbc.ca/news/canada/russia-denies-plane-approached-canadian-airspace-1.796007>.

(5) In February 2013, two bombers were intercepted as they circled the U.S. Pacific island of Guam, in a rare long-range incursion. Two Bear Hs also were intercepted near Alaska on April 28, 2013. A Russian Bear H incursion in Asia took place in in July 2013 when two Tu-95s were intercepted by Japanese and South Korean jets near the Korean peninsula and Japan's northern Hokkaido Island. Gertz, *supra* note 46.

ian national airspace when it was engaged.⁴⁸ The Syrians did not allege that ISR operations, in general, were per se illegal. The most recent incident occurred in June 2014 when two Russian strategic bombers were intercepted by two U.S. F-15s after the Russian Tu-95 Bear H aircraft came within fifty miles of the California coast.⁴⁹ The Russian aircraft were permitted to continue on their way after it was determined that they were conducting a training mission and would not penetrate U.S. national airspace.⁵⁰

Further evidence of State practice can also be found in numerous bilateral incidents at sea agreements that specifically recognize the legitimacy of military activities at sea, to include ISR operations. Article III(3) of the US–USSR INCSEA Agreement provides that “ships engaged in surveillance of other ships shall stay at a distance which avoids the risk of collision and also shall avoid executing maneuvers embarrassing or endangering the ships under surveillance” Similar language is contained in agreements between Russia and the United Kingdom, Canada, Germany, France, Italy, the Netherlands, Norway, Spain, Greece, Japan and the Republic of Korea.⁵¹

Despite this abundant evidence of State practice that permits intelligence collection beyond the territorial sea in and over the EEZ, China stands alone in its continued harassment and interference of U.S. SMS operations in the EEZ and U.S. SRO flights in international airspace. Without question, intelligence collection seaward of the territorial sea is not subject to coastal State jurisdiction or control in and over the EEZ. These activities are consistent with long-standing State practice and international law, including UNCLOS (Articles 56, 58 and 87) and the Chicago Convention (Article 3), and are a legitimate exercise of high seas freedoms seaward of the territorial sea. If China wishes to intercept and query a foreign warship, SMS ship or military aircraft operating off its coast in order to determine its intentions, it may do so. However, such intercepts must be carried out in a

48. Eric Schmitt & Sebnem Arsu, *Backed By NATO, Turkey Steps Up Warning To Syria*, NEW YORK TIMES (June 27, 2012), http://www.nytimes.com/2012/06/27/world/middle-east/turkey-seeks-nato-backing-in-syria-dispute.html?pagewanted=all&_r=0.

49. The Tu-95 can be equipped with intelligence-gathering sensors and is capable of carrying nuclear cruise missiles. Gertz, *supra* note 46.

50. A similar incident occurred on July 4, 2012. *Id.*

51. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶¶ 2.8, 2–36 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, U.S. Naval War College International Law Studies); David F. Winkler, *Soviet Motivations to Negotiate INCSEA* (Naval Historical Center, Colloquium on Contemporary History Project, Seminar 10, Sept. 23, 2003), www.history.navy.mil/colloquia/cch10d.html.

safe and responsible manner, consistent with the COLREGS and with due regard for the rights of foreign ships and aircraft to operate in and over the EEZ.

C. “Peaceful Purposes” Provisions

A corollary argument made by some States, including China, is that military activities are inconsistent with the peaceful purposes provision of UNCLOS.⁵² Again, this position is not supported by State practice, a plain reading of UNCLOS or other applicable international instruments.

Article 301 of the Convention calls on States to “refrain from any threat or use of force against the territorial integrity or political independence of any State” The language is identical to text in Article 2(4) of the UN Charter on the prohibition of armed aggression in the relations among States.⁵³ UNCLOS, however, makes a clear distinction 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 subparagraphs of Article 19(2) restrict other military activities in the territorial sea:

- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defense or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
-
- (j) the carrying out of research or survey activities;

52. UNCLOS, *supra* note 2, art. 301 (providing that “[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”).

53. UN Charter Article 2(4) provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State . . .

The distinction in Article 19 between “threat or use of force” from other types of military activities clearly demonstrates that UNCLOS does not automatically equate use of force with these other military acts.

The “peaceful purposes” language originally was derived from the text of UN General Assembly Resolution 2749 (1970), which declared that the sea-bed beyond the limits of national jurisdiction was reserved exclusively for peaceful purposes.⁵⁴ A group of developing nations proposed that the original version of Article 301 be included in Article 88, which provides that “[t]he high seas shall be reserved for peaceful purposes.” That proposal was not adopted, however, and the text was reintroduced separately as a new article.⁵⁵ An effort to include the new Article 301 in the EEZ section of the Convention (Part V) was also defeated “by maritime States on the ground that security matters should not be considered within the EEZ regime.”⁵⁶

As the negotiations of the Convention continued, some developing States took the position that the text of Articles 88 and 301 would prohibit all military activities in the oceans. Ecuador, for example, argued that “the use of the ocean space for exclusively peaceful purposes must mean complete demilitarization and the exclusion from it of all military activities.”⁵⁷ Maritime States opposed such a strict interpretation of the “peaceful purposes” language, asserting that the test of whether an activity was considered “peaceful” was determined by the UN Charter and other obligations of international law.⁵⁸

54. UNGA Res. 2749 (XXV), U.N. Doc. A/Res/2749 (Dec. 17, 1970).

55. VIRGINIA COMMENTARY III, *supra* note 10, at 90. See also KRASKA & PEDROZO, *supra* note 7, at 305.

56. DAVID J. ATTARD, THE EXCLUSIVE ECONOMIC ZONE 69 (1991).

57. VIRGINIA COMMENTARY III, *supra* note 10, at 88–89.

58. *Id.* at 89–91. In response to Ecuador’s proposal at the Fourth Session, the U.S. delegate stated,

The term “peaceful purposes” did not, of course, preclude military activities generally. The United States has consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference was not charged with such a purpose and was not prepared for such a negotiation. Any attempt to turn the Conference’s attention to such a complex task would quickly bring to an end current efforts to negotiate a law of the sea convention.

Most commentators that have addressed this issue agree that

based on various provisions of the Convention . . . it is logical . . . to interpret the peaceful . . . purposes clauses as prohibiting only those activities which are not consistent with the UN Charter. It may be concluded accordingly that the peaceful purposes . . . clauses in Articles 88 and 301 do not prohibit all military activities on the high seas and in EEZs, but only those that threaten or use force in a manner inconsistent with the UN Charter.⁵⁹

Thus, the determination of whether an activity is “peaceful” is made under Article 2(4) of the UN Charter.⁶⁰ Successive U.S. administrations have maintained the position that the “peaceful purposes” provisions can only be read in conjunction with the general body of international law, including Article 2(4) and the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter.⁶¹

To accept that all military activities are, by their nature, inconsistent with the “peaceful purposes,” would mean that nations could not operate military vessels or aircraft, not just in the EEZ, but also the high seas. Such a conclusion, however, is at odds with decisions of the UN Security Coun-

Id. at 89. The same text can be found in V THIRD UN CONFERENCE ON THE LAW OF THE SEA, 67TH PLENARY MEETING, OFFICIAL RECORDS, U.N. Doc. A/CONF.62/WS/67, at 62 (1973–1982). *See also*, Bernard H. Oxman, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 829–32 (1984); KRASKA & PEDROZO, *supra* note 7, at 306–07.

59. Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123–37 (2005). *See also* Pedrozo, *supra* note 10, ¶ 27.

60. KRASKA & PEDROZO, *supra* note 7, at 304–09.

61. *Id.* at 308. In the commentary accompanying the U.S. President’s letter of transmittal of the Convention to the Senate in 1994, President Clinton stated that none of the peaceful purposes provisions of the Convention (Articles 88, 141, 143, 147, 155, 240, 242, 246 and 301) “create new rights or obligations, imposes restraints upon military operations, or impairs the inherent right of self-defense. . . . More generally, military activities, which are consistent with the principles of international law, are not prohibited by these, or any other, provisions of the Convention.” Letter of Transmittal from President Bill Clinton, United Nations Convention on the Law of the Sea, S. Treaty Doc. 103–39, 103rd Cong., at III and 94 (1994). A similar position was taken by President Bush in his 2004 letter of transmittal of the Convention to the Senate: “The United States understands that nothing in the Convention, including any provisions referring to ‘peaceful uses’ or ‘peaceful purposes,’ impairs the inherent right of individual or collective self-defense or rights during armed conflict.” United Nations Convention on the Law of the Sea, S. Exec. Rpt. 108-10, 108th Cong., § 3, at 16–17.

cil, which indicate that “military activities consistent with the principles of international law embodied in [Article 2(4) and Article 51 of] the Charter of the United Nations . . . are not prohibited by the Convention on the Law of the Sea.”⁶² The International Court of Justice has similarly ruled that naval maneuvers conducted by the United States from 1982 to 1985 off the coast of Nicaragua during the U.S.-backed counter-revolution against the Sandinista government did not constitute a threat or use of force against Nicaragua.⁶³

The Security Council has likewise determined that peacetime intelligence collection is not considered a “threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state . . . in violation of the Charter of the United Nations.” Following the shoot down of an American U-2 spy plane near Sverdlovsk in 1960, an effort by the Soviet Union to have a Security Council resolution adopted that would have labelled the U-2 flights as “acts of aggression” under the Charter failed by a vote of 7 to 2 (with 2 abstentions), thereby confirming that peacetime intelligence collection is consistent with the UN Charter.⁶⁴

The *San Remo Manual on the Law of Armed Conflicts at Sea* similarly rejects the interpretation that all military activities are inconsistent with the “peaceful purposes” provisions of the Convention. According to the *Manual*, armed conflict at sea can take place on the high seas, as well as in the EEZ of a neutral State.⁶⁵ The only limitation is that belligerents must “have due regard for the [resource] rights and duties of the coastal State” in the EEZ.⁶⁶

Other multilateral instruments likewise 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. The International Maritime Organization (IMO)/International Hydrographic Organization (IHO) World-wide Navigational Warning Service recognizes that military activities at sea, such as naval exercises and missile firings, are lawful uses of the sea, for which “naval area” warnings

62. VIRGINIA COMMENTARY III, *supra* note 10, at 88–89. See also KRASKA & PEDROZO, *supra* note 7, at 307.

63. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), 1986 I.C.J. 14, ¶ 227 (June 27).

64. Lissitzyn, *supra* note 43, at 566.

65. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 10, at 8 (Louise Doswald Beck ed., 1995).

66. *Id.*, ¶¶ 34 & 35, at 14.

are to be issued.⁶⁷ Annex 15 to the Chicago Convention regarding Aeronautical Information Services similarly acknowledges the legitimacy of military activities in international airspace by providing that military exercises that pose hazards to civil aviation are appropriate subjects for notices to airmen.⁶⁸

D. Coastal State Environmental Regulations

Despite the plain language of Article 236 of UNCLOS, some States purport to apply their domestic environmental laws and regulations to limit foreign military activities in their EEZ. Article 56 does grant the coastal State “jurisdiction . . . with regard to . . . the protection and preservation of the marine environment.” It is equally clear in the first sentence of Article 236, however, that the environmental provisions of the Convention do not apply to “any warship, naval auxiliary and other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.”⁶⁹ Thus, sovereign immune vessels and aircraft do not have a legal obligation to comply with domestic environmental regulations. The only requirement is that “each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or air-

67. IMO/IHO World-wide Navigational Warning Service Document, annex 1, ¶ 4.2.1.3.13, June 24, 2013, http://www.iho.int/mtg_docs/com_wg/CPRNW/WWNWS_Publications_&_Documents/English/MSC_Circ1288.pdf (“The following subjects are considered suitable for transmission as NAVAREA warnings . . . information that might affect the safety of shipping, sometimes over wide areas, e.g., naval exercises, missile firings . . .”).

68. Chicago Convention, *supra* note 17, annex 15, ¶ 5.1.1.1(l) (“a NOTAM shall be . . . issued concerning the following information: . . . l) presence of hazards which affect air navigation (including . . . military exercises . . .).”). See Aeronautical Information Services website, at Federal Aviation Administration, www.faa.gov/ (last visited Oct. 31, 2014).

69. UNCLOS, *supra* note 2, art. 236 (providing that “[t]he provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.”).

craft act in a manner consistent, so far as is reasonable and practicable, with this Convention.”⁷⁰

The second sentence of Article 236 was carefully worded to preserve the principle of sovereign immunity reflected in Article 95⁷¹ and Article 96,⁷² both of which apply in the EEZ pursuant to Article 58.⁷³ Thus, it is the flag State’s responsibility, not the coastal State’s right, to adopt appropriate measures that will allow its government vessels to act consistent with the environmental provisions of the Convention. Moreover, any measures adopted by the flag State shall not impair operations or operational capabilities of the ship or aircraft. Finally, if the flag State can adopt measures that do not interfere with the platform’s operational capabilities, then the ship or aircraft may act in a manner consistent with the Convention, but only if it is reasonable and practicable, based on the circumstances, for the platform to do so.

Accordingly, it is abundantly clear that sovereign immune ships and aircraft do not have a legal obligation to comply or respect coastal State environmental laws and regulations. The Convention merely requires that sovereign immune ships and aircraft make best efforts to act consistently 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 platform.⁷⁴

China’s application of its domestic laws and regulations provides one example of how coastal States overreach with regard to their environmental jurisdiction in the EEZ. China claimed a 200 nm EEZ in its 1998 Exclusive Economic Zone and Continental Shelf Law.⁷⁵ Article 3 of the law provides, *inter alia*, that China exercises “jurisdiction in relation to . . . protection and conservation of [the] maritime environment.” Article 10 further states that China “has the power to take necessary measures for preventing,

70. *Id.*

71. UNCLOS, *supra* note 2, art. 95 (stating that “[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”).

72. UNCLOS, *supra* note 2, art. 96 (providing that “[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.”).

73. UNCLOS, *supra* note 2, art. 58(2) (stating that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”).

74. Pedrozo, *supra* note 10, ¶ 29–30

75. 1998 Chinese Law on the Exclusive Economic Zone and Continental Shelf *supra* note 29, art. 2.

eliminating and controlling pollution to [the] marine environment and protecting and conserving the marine environment . . .” of the EEZ. The 1998 law does not, however, distinguish between commercial and sovereign immune vessels. Similarly, China’s Marine Environmental Protection Law and its implementing regulations purport to apply to all vessels of Chinese or foreign registry operating in “sea areas under the jurisdiction” of China.⁷⁶ As discussed above, under prevailing international law, China may not impose or enforce domestic environmental laws on sovereign vessels and aircraft operating in the EEZ.

Beginning in 2007, China amplified its environmental argument at meetings of the U.S.-China Military Maritime Consultative Agreement and Defense Policy Talks. In these meetings China indicated that sonar use by U.S. SMSs was harming marine mammals and disrupting fish stocks in China’s EEZ, and that they could therefore regulate such activities.⁷⁷ Coincidentally, during this same time period, the U.S. Navy was litigating a number of lawsuits filed by environmental groups in U.S. courts, “including a 2007 ruling against the U.S. Navy in a lawsuit before the U.S. District Court in Southern California that challenged the Navy’s use of mid-frequency active sonar during military exercises.”⁷⁸ China continued to advance this position even after the U.S. Supreme Court overturned the district court opinion and ruled in favor of the Navy in 2008, stating that there was no evidence marine mammals were being harmed by the Navy’s use of sonar in Southern California.⁷⁹

76. Marine Environment Protection Law of the People’s Republic of China, Order No. 26, art. 2 (promulgated by the 24th Meeting of the STANDING COMM. FIFTH NAT’L PEOPLE’S CONG., Aug. 23, 1982; revised at the 13th Meeting of the STANDING COMM. NINTH NAT’L PEOPLE’S CONG., Dec. 25, 1999 (China), *translation available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384046.htm; Regulations of the People’s Republic of China on the Control over Prevention of Pollution by Vessels in Sea Waters (promulgated by the State Council, Dec. 29, 1983) (China), *translation available at* <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050468.html>.

77. *China’s Active Defense Strategy and its Regional Impact: Testimony Before the U.S.-China Economic & Security Review Commission*, U.S. H.R., 112th Cong., 1st Sess. (2011) (prepared statement by Captain Stacy A. Pedrozo, JAGC, USN), *available at* <http://www.cfr.org/china/chinas-active-defense-strategy-its-regional-impact/p23963>.

78. KRASKA & PEDROZO, *supra* note 7, at 310.

79. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

IV. NORTH KOREA'S MILITARY ZONE

North Korea has one of the most expansive and illegal claims in the EEZ. On August 1, 1977, North Korea announced that it was establishing a "military zone"—"50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea."⁸⁰ The zone was purportedly established to safeguard the North Korean EEZ and defend the "nation's interests and sovereignty."⁸¹ Foreign military ships and aircraft are prohibited from entering the zone, and "civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval."⁸² Civilian ships and aircraft that have been granted access to the zone may not, however, engage in "acts for military purposes or acts infringing upon the economic interests."⁸³ Taking photographs and collecting marine data is also strictly prohibited.

80. MCRM, *supra* note 21, North Korea. The proclamation provides:

Demanded by the situation prevailing in our country, the Supreme Command of the Korean People's Army establishes the military boundary to reliably safeguard the economic sea zone of the Democratic People's Republic of Korea and firmly defend militarily the nation's interests and sovereignty of the country.

The military boundary is up to 50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea.

In the military boundary (on the sea, in the sea and in the sky) acts of foreigners, foreign military vessels, and foreign military planes are prohibited and civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval.

In the military boundary (on the sea, in the sea, and in the sky) civilian vessels and civilian planes shall not conduct acts for military purposes or acts infringing upon the economic interests.⁹⁸³

The military zone stretches 50 nm beyond the 12 nm territorial sea in the Sea of Japan on the east coast and to the limits of its EEZ in the Yellow Sea (abutting the Chinese EEZ) on the west coast.⁹⁸⁴

Foreign warships and aircraft are forbidden from entry into the zone, and merchant ships and commercial airliners are required to seek permission from North Korea. Additionally, foreign ships and aircraft may not take photographs or collect marine data in the North Korean EEZ.

Korean Central News Agency, *in* 4 FOREIGN BROADCAST INFORMATION SERVICE, Asia and Pacific, Aug. 1, 1977, at D6; THE PEOPLE'S KOREA, Aug. 10, 1977, at 2, col. 1, reprinted in Choon-Ho Park, *The 50-mile Military Boundary Zone of North Korea*, 72 AMERICAN JOURNAL OF INTERNATIONAL LAW 866, 866–67 n.1 (1978).

81. *Id.*

82. *Id.*

83. *Id.*

In effect, North Korea treats the waters and airspace contained within the military zone as internal waters and national airspace, respectively. Such a claim is clearly inconsistent with UNCLOS, Parts II (territorial sea and contiguous zone), III (EEZ), and VII (high seas), as well as the Chicago Convention, Articles 1–3 and 9, discussed above.

V. CONCLUSION

For the foreseeable future, coastal States will continue to make a variety of legal arguments to justify interference with foreign-flagged warships and military aircraft operating their EEZ. By raising the political and military costs of such operations, these States seek to pressure nations to remain outside the EEZ. These efforts, however, impinge on traditional uses of the EEZ by other States, are inconsistent with international law, and should be opposed by all sea-going nations.

If the position of a handful of nations becomes the international standard, nearly 38 percent of the world's oceans that were once considered high seas and open to unfettered military use will come under coastal State regulation and control. In the Asia-Pacific, the littoral States could deny military access to all of the South China and East China Seas, the Sea of Japan and the Yellow Sea, which are home to some of the world's most strategic sea lines of communication. Such a result was not part of the package deal negotiated at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and would never have been agreed to by the major maritime powers.

Rather, the majority of the delegations present at the negotiations agreed with the view of the major maritime powers, as expressed by the United States at the conclusion of the diplomatic conference:

All States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. 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 en-

joyed by all States in the exclusive economic zone. This is the import of Article 58 of the Convention.⁸⁴

This conclusion is supported by statements made by Ambassador Tommy Koh at a conference in Singapore in 2008. Ambassador Koh recalled,

some coastal states would like the status of the EEZ to approximate the legal status of the territorial seas. Many other states held the view that the rights of the coastal States and EEZ are limited to the exploitation of living and non-living resources and that the water column should be treated much like the high seas.⁸⁵

Ambassador Koh went on to state, “I find a tendency on the part of some coastal States . . . to assert their sovereignty in the EEZ . . . [and doing so] is not consistent with the intention of those of us who negotiated this text, and is not consistent with the correct interpretation of this part [Part V] of the Convention.”⁸⁶

There are some indications that China may be re-evaluating its position as it develops a more robust blue-water capability. There is growing evidence that China has engaged in military activities, to include ISR and military marine data collection, in the American, Vietnamese, Philippine and Japanese EEZs without notice or consent.⁸⁷ In its 2013 Annual Report to Congress, the Department of Defense indicated that

84. OFFICIAL RECORDS, VOL 17, *supra* note 5, at 244. *Accord* the signing and ratification statements of Germany, Italy, the Netherlands, the Russian Federation and the United Kingdom. *Declarations and Statements*, United Nations, Oceans & Law of the Sea, available at www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Oct. 31, 2014). *See also*, Elmar Rauch, *Military Uses of the Oceans*, 28 GERMAN YEARBOOK OF INTERNATIONAL LAW 241–42 (1985); Boleslaw Adam Bocek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 329, 363, 368 (1989).

85. Tommy T.B. Koh, *Remarks on the Legal Status of the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 53 (Myron H. Nordquist, Tommy T.B. Koh & John Norton Moore, eds., 2009).

86. *Id.* at 54–55.

87. Raul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW ¶ 16–18 (2010).

the PLA Navy has begun to conduct military activities within the Exclusive Economic Zones (EEZs) of other nations, without the permission of those coastal states. Of note, the United States has observed over the past year several instances of Chinese naval activities in the EEZ around Guam and Hawaii. One of those instances was during the execution of the annual Rim of the Pacific (RIMPAC) exercise in July/August 2012. While the United States considers the PLA Navy activities in its EEZ to be lawful, the activity undercuts China's decades-old position that similar foreign military activities in China's EEZ are unlawful.⁸⁸

These deployments were confirmed by a PLA officer at the annual Shangri-La Dialogue in Singapore on June 1, 2013.⁸⁹

More recently, in July 2014, a *Dongdao*-class Auxiliary General Intelligence (AGI) ship was observed in the U.S. EEZ collecting intelligence on the USS *Ronald Reagan* Strike Group during the 2014 Rim of the Pacific Exercise (RIMPAC) off the coast of Hawaii.⁹⁰ Yet, despite evidence that the PLAN is conducting ISR operations in foreign EEZs, on August 29, 2014, China warned the United States to stop its SRO flights near Chinese territory, claiming that the surveillance activities undermine China's security interests and could lead to "undesirable incidents."⁹¹ It therefore appears that China is applying a double standard. On the one hand, it believes that the PLAN can conduct naval operations, including surveillance, in foreign EEZs. On the other hand, it objects to the presence of foreign surveillance ships and aircraft in China's EEZ.

Until 1982, the EEZ did not exist. All waters seaward of the territorial sea were considered high seas. For centuries, navies have operated freely in these waters "as a matter of right, thereby firmly establishing, as customary

88. OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 39 (2013).

89. Rory Medcalf, *Maritime Game-Changer Revealed at Shangri-La Dialogue*, THE DIPLOMAT (June 2, 2013), <http://dev3.the-diplomat.com/2013/06/maritime-game-changer-revealed-at-shangri-la-dialogue/comment-page-1/> ("it was striking to hear a Chinese military officer reveal in an open discussion at this conference on Saturday that China had 'thought of reciprocating' by 'sending ships and planes to the US EEZ.' He then went further and announced that China had in fact done so 'few times,' although not on a daily basis . . .").

90. Zachary Keck, *China is Spying on RIMPAC*, THE DIPLOMAT (July 20, 2014), <http://thediplomat.com/2014/07/china-is-spying-on-rimpac/>.

91. Brown, *supra* note 26.

international law, the right to conduct military activities beyond the territorial sea.”⁹² Nothing in UNCLOS changes that paradigm.

92. Pedrozo, *supra* note 10, at ¶ 4.