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Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict

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Coastal States have jurisdiction over the establishment of artificial islands, installations and structures under the 1982 United Nations Convention on the Law of the Sea (hereinafter the LOS Convention).² On the other hand, foreign States enjoy freedom of navigation, freedom of overflight, and freedom to lay submarine cables and pipelines in the exclusive economic zone (EEZ) of coastal States.³ The contemporary issue in the LOS Convention is whether foreign States have the right to conduct military activities, including naval task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering, and weapons testing or firing, in coastal States' EEZs.

It is argued that the foreign States' military and missile exercises may result in violating the LOS Convention in two fundamental respects: first, it will interfere with reasonable use of the high seas by others; and, second, it will violate the prohibition against use of the high seas for non-peaceful purposes.⁴ Thus, foreign States' military activities in the EEZs of coastal States would be inconsistent with the principles and norms governing States' military actions at sea under international conventions or customary law.⁵

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

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As a result, the legal question concerning military activities conducted at sea has become much more complicated since the establishment of the legal regime of the EEZ. This is so mainly because Article 58 of the LOS Convention provides that:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, *and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.* (Emphasis added)
2. 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.

During the negotiation of the LOS Convention, agreement on the above italicized wording was perceived as vital by the maritime powers because in their interpretation it implied the legality of naval maneuvers in a coastal State's EEZ as an activity "associated with the operation of ships." The cross-reference to Article 87 is also important to the maritime nations because it lists the major freedoms of the high seas, which include freedom of navigation, freedom of overflight, and freedom to lay submarine cables and pipelines. Accordingly, other States' freedoms in a coastal State's EEZ are the same as those in the high seas. Moreover, the phrase "and other internationally lawful uses of the sea related to these freedoms" implies that other States may enjoy other, unspecified freedoms in a coastal State's EEZ in addition to the ones listed in Article 58.1.

Furthermore, Article 58.2 makes a general cross-reference to Articles 88–115 and other pertinent rules of international law as applying to the EEZ in so far as they are not incompatible with Part V (the EEZ articles) of the LOS Convention. However, some coastal States interpreted Article 58 much more narrowly, arguing that it does not authorize other States to carry out military activities in a coastal State's EEZ, and that the consent of the coastal State is required before conducting such activities.⁶

The question of whether a foreign country has the right to conduct military activities in a coastal State's EEZ was a controversial issue in the negotiations of the text of the LOS Convention and continues to be in State practice.⁷ The maritime powers argued for a broad range of military activities consonant with traditional high seas freedoms. Consequently, they believe the right to naval maneuvers in the EEZ of a coastal State is implied in the freedom of navigation and overflight.⁸ That is, they interpret the phrase "other internationally lawful uses of the sea related to these freedoms" contained in Article 58.1 as including military activities such as

task force maneuvering, flight operations, military exercises, naval surveys, intelligence gathering, and weapons testing and firing.

During the negotiations, some States⁹ expressed strong opposition to military activities¹⁰ in the EEZ because such activities can result in threats to coastal States. However, nowhere in the LOS Convention does it clearly state whether a third State may or may not conduct military activities in the EEZ of a coastal State.¹¹ Absent clarity in the text of the Convention, resolution of this issue is very complicated and controversial. Despite the apparent ambiguity, it seems that the general understanding of the text of the LOS Convention would permit such activities to be conducted.¹²

Nevertheless, due to the ambiguity found in Article 59, and the absence of any compulsory judicial settlement of disputes concerning military activities in the EEZ, it is very difficult to render an authoritative legal interpretation whenever disputes arise. The question of whether naval maneuvers and exercises within a coastal State's EEZ are permissible under international law will remain. No authoritative legal rulings will be made unless actual international disputes arise, and the parties contest the issue before the International Court of Justice or the International Tribunal for the Law of the Sea.

The question concerning the legality of laying military-related submarine cables, pipelines, and/or devices by a State in another State's EEZ is also subject to different interpretations of, and application to, the relevant provisions of the LOS Convention. The coastal State should have the exclusive right in its EEZ to construct, and to authorize and regulate the construction, operation and use of artificial islands, installations and structures for economic purposes, and installations and structures which may interfere with the exercise of the right of the coastal State in the EEZ. Accordingly, other States should obtain consent before laying military-related submarine cables, pipelines, and/or devices in the EEZ of the coastal State. Therefore, the subsequent practices of States will become particularly important for determining the proper interpretation of the LOS Convention's provisions.

Some States argued that "the right of the coastal State to build and to authorize the construction, operation and the use of installations and structures in the EEZ and on the continental shelf is limited only to the categories of such installations and structures as listed in Article 60 of the LOS Convention." Accordingly, they argue that it is not necessary to obtain consent from a coastal State if another State intends to lay military-related submarine cables, pipelines, and/or devices in the EEZ or on the continental shelf of the coastal State. It should be remembered that under Article 58.3 "other" States, when exercising their rights in the EEZ of a coastal State, are required to "have due regard to the rights . . . of the coastal State" in accordance with the provisions of the LOS Convention. If the military activities conducted by a

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foreign country in a coastal State's EEZ interfere with the lawful resource rights and interests of that coastal State, the latter's rights and interests would prevail.

In the future, no matter how international disputes concerning the issue of naval maneuvers and other military activities conducted in the EEZ of a coastal State might be generated, or how the disputes are settled, the possibility of this kind of dispute arising could be avoided entirely or at least reduced. This is possible if the State conducting military activities in the coastal State's EEZ shows "reasonable regard" for the interests of that coastal State and other States.¹³ In other words, if the coastal State's rights and interests in relation to exploration, exploitation, conservation and management of natural resources; the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment in its EEZ; and other States' rights and interests in the coastal State's EEZ, such as freedoms of navigation and overflight and freedom to lay submarine cables and pipelines,¹⁴ are not affected by the military activities of another State, these kinds of military activities are permissible under the LOS Convention.

Article 58 of the LOS Convention should be applied in order to answer the question of whether foreign States have the right, under international law, to conduct military-related activities in the coastal State's EEZ. The answer will depend on the nature and purposes of the activities. Because the operation of foreign States' intelligence gathering ships in the coastal States' EEZ involve no use of weapons and explosives, and is thus considered to be "associated with the operation of the ships" in exercising freedom of navigation in the coastal State's EEZ, it can hardly be maintained that the foreign States' activities violate international law. As a matter of law, if "due regard" indeed has been given to the coastal States' rights and interests, the foreign States do have the right to conduct military activities, including weapons testing or firing, in the coastal State's EEZ. Of course, if any live-fire military exercises are to be conducted, the establishment of a warning or exclusion zone to protect others using the affected ocean area is required because engaging in any live-fire military exercises creates dangers.¹⁵

In addition, military intelligence-gathering is different, because it is not related to the construction, operation and the use of installations in the EEZ and also would not normally be published or disseminated. Intelligence-gathering activities can also take many forms, and activities that involve "drilling into the continental shelf, the use of explosives, or the introduction of harmful substances into the marine environment"¹⁶ would certainly implicate concerns of the coastal State and should require its consent.

In light of the foregoing analysis, foreign States are allowed, under international law, to conduct military activities in the EEZ, provided that the coastal State's

resource rights and interests are not affected by the activities, and provided that the purpose for conducting the activities is not to intimidate the coastal States by threat or use of force. However, it would be considered a violation of international law if foreign States were to fire missiles into a water area in the coastal State's EEZ without giving due regard to the resource rights and interests of the coastal States and/or if it affected other States' freedoms of navigation and overflight in the coastal State's EEZ, or had an adverse impact on other States' national interests concerning maintenance of peace and stability in the coastal States' region. In these circumstances, the legality of the foreign State's military activities should be examined in accordance with the relevant provisions of the LOS Convention, in particular Articles 58 and 301, and other international legal instruments, such as the Charter of the United Nations.

In conclusion, even if all States have navigational and overflight rights in the EEZ of a coastal State under the LOS Convention, these rights should be balanced against the resource interests of the coastal State. If there is interference in the coastal State's economic utilization of its EEZ, limitations on the above mentioned freedom of navigation and overflight should be accepted. Conflicts between coastal and maritime States regarding military activities in the EEZ "should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."¹⁷

Notes

1. Captain Hyun-Soo Kim of the Republic of Korea Navy is Professor of International Law and Director of the Law of the Sea Research Division of the Republic of Korea Naval War College.
2. United Nations Convention on the Law of the Sea, Dec.10, 1982, art. 56.1(b), 1833 U.N.T.S. 3, 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter LOS Convention].
3. *Id.*, arts. 58, 87.
4. *Id.*, arts. 301.
5. *Id.*, arts. 56(1).
6. Brazil (1982 declaration), Cape Verde (1997 declaration), India (1995 declaration), Malaysia (1996 declaration), Pakistan (1997 declaration) and Uruguay (1992 declaration). Peru and Iran also prohibit foreign military activities and practices within their EEZ. See Maritime Claims Reference Manual, US Department of Defense 2005.1-M, <http://www.dtic.mil/whs/directives/corres/html/20051m.htm> (Apr. 2, 2001).
7. FRANCISCO ORREGO VICUNA, THE EXCLUSIVE ECONOMIC ZONE: REGIME AND LEGAL NATURE UNDER INTERNATIONAL LAW 309 (1989).
8. Germany (1994), Italy (1995), the Netherlands (1996) and the United Kingdom (1997) declared in general that the Convention does not authorize the coastal states to prohibit military exercises in the EEZ and the rights and jurisdiction of the coastal states in the EEZ do not include the right to require either prior notification or permission for the conducting of military exercises or maneuvers. The text of these declarations is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

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9. Peru, Albania, the Philippines, the Khmer Republic, North Korea, Costa Rica, Ecuador, Pakistan, Portugal, Senegal, Somalia, and Uruguay. UNCLOS III Official Records, Vol. II, 28 (1975).
10. For example, the use of weapons, the launching of aircraft, espionage, interference with coastal communications, and propaganda aimed at the coastal communities.
11. See VICUNA, *supra* note 7, at 108; TULLIO SCOVAZZI, THE EVOLUTION OF INTERNATIONAL LAW OF THE SEA: NEW ISSUES, NEW CHALLENGES 162 (2001).
12. See CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA 303–304 (Jon M. Van Dyke ed., 1985).
13. See LOS Convention, *supra* note 2, art. 56.1.
14. *Id.*, art. 87.
15. Jon M. Van Dyke, *Military Exclusion and Warning Zones on the High Sea*, 15 MARINE POLICY 164 (1991).
16. J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSE TO EXCESSIVE MARITIME CLAIMS 426 (1996).
17. LOS Convention, *supra* note 2, art. 59.