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MAINTAINING FREEDOM OF NAVIGATION AND OVERFLIGHT IN THE EXCLUSIVE ECONOMIC ZONE AND ON THE HIGH SEAS

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Abstract

Efforts to expand coastal State jurisdiction to include security jurisdiction in the EEZ were soundly rejected by a majority of the nations that participated in the UNCLOS negotiations. The delegates present achieved consensus on provisions that accommodate the resource interests of the coastal State in the EEZ without diminishing user State interests in freedom of navigation and other internationally lawful uses of the sea in the zone. Continued efforts by some States to reinterpret the Convention to unilaterally and unlawfully advance their national interests in the EEZ impinge on traditional uses of the oceans by all States and are inconsistent with international law, long-standing state practice and the intent and negotiating history of UNCLOS. If these efforts succeed, the Convention will unravel over time and the international community will once again be plagued by a new wave of excessive maritime claims. Coastal State competency in the EEZ is strictly limited to resource rights, jurisdiction over resource-related offshore installations and structures, marine scientific research, and protection of the marine environment. Coastal States do not retain security jurisdiction in the EEZ, and may not regulate lawful military activities in the EEZ that are consistent with the UN Charter, UNCLOS, the Chicago Convention, and other relevant international law instruments. The creation of the EEZ was a package deal—coastal States were granted exclusive resource rights and user States retained the high seas freedoms of navigation and overflight, and other lawful uses of the seas associated with those freedoms, which have always applied beyond the territorial sea.

Keywords : *exclusive economic zone, military activities, security jurisdiction, intelligence collection, freedom of navigation and overflight, sovereign resource rights*

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I. INTRODUCTION

On 11 December 1982, Ambassador Tommy T.B. Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea (UNCLOS III), asked the assembled delegates at the final session of the Conference a rhetorical question: whether the Conference had achieved its “fundamental objective of producing a comprehensive constitution for the oceans” that would “stand the test of time.”¹ Ambassador Koh answered his own question in the

¹ “A Constitution for the Oceans”, Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, adapted from statements by the President on 6 and 11 December 1982 at the final session of the Conference

affirmative, for a number of reasons, including: (1) the Convention replaces “a plethora of conflicting claims by coastal States with universally agreed limits...on the exclusive economic zone [EEZ]...” and (2) “the world community’s interest in freedom of navigation will be facilitated by the important compromises on the status of the [EEZ]....”²

While that may have been the understanding of the assembled delegates in 1982, the “Constitution for the Oceans” is on the verge of collapse, as a handful of nations continue efforts to increase their control in the EEZ at the expense of the navigational rights and freedoms enjoyed by all nations in the zone. Efforts to expand coastal State jurisdiction to include residual competencies in the EEZ, like security jurisdiction, were soundly rejected by a majority of the nations that participated in the negotiations.³ At the conclusion of the Conference, the negotiators achieved consensus on Articles 55, 56, 58 and 86, all of which accommodate the resource interests of the coastal State in the EEZ without diminishing user State interests in freedom of navigation and other internationally lawful uses of the sea in the zone.

Continued self-serving efforts by some States to reinterpret the Convention to unilaterally and unlawfully advance their national interests in the EEZ impinge on traditional uses of the oceans by all States and are inconsistent with international law, long-standing state practice and the intent and negotiating history of UNCLOS III. If these efforts succeed and the “package deal” is abrogated, the Convention will unravel over time and the international community will once again be plagued by a new wave of excessive maritime claims that will threaten international peace and security.

II. THE EXCLUSIVE ECONOMIC ZONE

On 10 December 1982, nearly forty percent of the world’s oceans that were once considered high seas open to all nations were encompassed within a new zone created by the United Nations Convention on the Law of the Sea (UNCLOS)—the 200 nautical mile (nm) exclusive economic zone (EEZ). The new zone, however, was not placed under the sovereignty of the coastal State. Rather, coastal States were granted “sovereign rights” in the zone for the purpose of “exploring, exploiting, conserving and managing” living and non-

at Montego Bay, accessed at 21 March 2019, https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf.

² *Ibid.*

³ Satya N. Nandan and Shabtai Rosenne, eds., *II United Nations Convention on the Law of the Sea 1982: A Commentary*, (Virginia: BRILL, 1993), 491-821. [hereinafter Virginia Commentary II]

living natural resources.⁴ The term “sovereign rights” was deliberately used to clearly distinguish between coastal State resource rights and other limited jurisdiction in the EEZ,⁵ and coastal State authority in the territorial sea where nations exercise the more comprehensive right of “sovereignty.”⁶ Article 89, which applies to the EEZ pursuant to Article 58(2),⁷ confirms this distinction, providing that “no State may validly purport to subject any part of the high seas to its sovereignty.”⁸

Throughout the negotiations, it became clear that creation of the EEZ was a package deal—resource rights would 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” in the zone.⁹ In other words, user States would relinquish their resource rights in the EEZ in favor of the coastal States, but would retain high seas freedoms of navigation and overflight and other lawful uses of the seas in the zone.¹⁰

Notably, Article 86 reflects this package deal by acknowledging 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.¹¹ The first sentence of the article recognizes that the EEZ is *sui generis*, and that certain resource-related high seas freedoms (*e.g.*, resource exploitation and marine scientific research) do not apply in the EEZ. However, the second sentence makes clear that nothing in Article 86 abridges the high seas “freedoms enjoyed by all States in the EEZ in accordance with Article 58.”¹²

Thus, 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,

⁴ United Nations, *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], art. 56.

⁵ Coastal States also have jurisdiction over resource-related off-shore installations and structures, marine scientific research, and protection and preservation of the marine environment. *Ibid.*

⁶ *Ibid.*, art. 2; Virginia Commentary II, NOTE 3 ABOVE, AT 431-444.

⁷ Article 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. UNCLOS, art. 58(2).

⁸ *Ibid.*, art. 89.

⁹ Satya N. Nandan and Shabtai Rosenne, eds., *III United Nations Convention on the Law of the Sea 1982: A Commentary*, (Virginia: BRILL, 1995), 63-64. [hereinafter Virginia Commentary III]

¹⁰ At the opening of the fifth session, Ambassador Koh indicated “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. *Ibid.*, at 65.

¹¹ *Ibid.*, at 69.

¹² *Ibid.*, at 60-71.

and [which are] compatible with the other provisions of the Convention.”¹³ These activities, with the exception of laying pipelines,¹⁴ 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.

All States may also conduct non-resource-related maritime law enforcement activities in foreign EEZs without coastal State notice or 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.¹⁵ 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) and narcotics trafficking (Articles 108), the exercise of the peacetime right of approach and visit (Article 110), the duty to render assistance (Article 98), and the right of hot pursuit (Article 111).¹⁶

III. UN SANCTIONS ENFORCEMENT IN THE EEZ

As a general rule, unless otherwise provided for in the Convention or other binding international instrument, ships are subject to the exclusive jurisdiction of the flag State in the EEZ and on the high seas.¹⁷ However, if a ship sails under the flags of two or more States, using them according to convenience, the ship may not claim any of the nationalities and may be assimilated to a ship without nationality, subject to the jurisdiction of all States.¹⁸ The UN Security Council can also authorize non-consensual boarding of foreign flag

¹³ UNCLOS, art. 58(1).

¹⁴ Article 79(3) provides that “the delineation of the course for the laying of...pipelines on the continental shelf is subject to the consent of the coastal State.” UNCLOS, art. 79(3).

¹⁵ *Ibid.*, art. 58(2).

¹⁶ *See also* UNCLOS, art. 86.

¹⁷ UNCLOS, art. 92(1).

¹⁸ *Ibid.*, art. 92(2).

vessels in the EEZ and on the high seas by carefully worded Security Council resolutions.¹⁹

North Korea (DPRK) has been under UN sanctions since 2006 when it conducted its first nuclear test on 9 October.²⁰ These sanctions, designed to disrupt the DPRK's nuclear weapons and ballistic missile programs, have been incrementally imposed over the past eleven years and include trade embargoes, arms embargo, shipping restrictions, a ban on sale of luxury goods, financial sanctions and diplomatic sanctions.²¹

Despite these robust sanctions, North Korea continues to evade sanctions, principally through illicit ship-to-ship (STS) transfers of refined petroleum and coal. Evasion of sanctions by the DPRK is facilitated by deceptive shipping practices that obfuscate the identity of the vessels, the goods being shipped, and the origin or destination of the cargo. Deceptive tactics include physically altering the vessel's identification (name and IMO number); falsifying cargo and vessel documents; and disabling or manipulating Automatic Identification Systems (AIS) to mask movement or conceal the vessel's next port of call.²²

For example, in 2018, at least 263 tankers delivered refined petroleum products to DPRK ports which were procured from prohibited STS transfers. Assuming these tankers were fully laden (3.78 million barrels), North Korea would have imported more than seven and a half times the amount of refined petroleum allowable under UN Security Council Resolution (UNSCR) 2397.²³

Sanctions enforcement at sea is based on flag State consent beyond the territorial sea. UNSCR 2375 calls on "Member States to inspect vessels with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer or export of which is prohibited by..." appli-

¹⁹ For example, following the invasion of Kuwait by Iraq in 1990, the Security Council passed a resolution calling on "...Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661 (1990)." S/RES/665 (1990), Aug. 25, 1990.

²⁰ United Nations Security Council, *Establishment of a Security Council Sanctions Committee (1718 Committee)*, S/RES/1718 (14 October 2006).

²¹ *Ibid.*; see also S/RES/1874 (2009), June 12, 2009); S/RES/2087 (2013), Jan. 22, 2013); S/RES/2094 (2013), Mar. 7, 2013; S/RES/2270 (2016), Mar. 2, 2016; S/RES/2321 (2016), Nov. 30, 2016; S/RES/2356 (2017), June 2, 2017; S/RES/2371 (2017), Aug. 5, 2017; S/RES/2375 (2017), Sept. 11, 2017; and S/RES/2397 (2017), Dec. 22, 2017.

²² Dept. of State, Dept. of the Treasury, and U.S. Coast Guard North Korea Sanctions Advisory, *Updated Guidance on Addressing North Korea's Illicit Shipping Practices*, Mar. 21, 2019, accessed 21 March 2019 [hereinafter DPRK Sanctions Advisory], https://www.treasury.gov/resource-center/sanctions/Programs/Documents/dprk_vessel_advisory_03212019.pdf.

²³ *Ibid.*

cable Security Council resolutions.²⁴ Some States have argued that enforcement actions in the EEZ, including the right of approach and visit, may only be taken by, or with the consent of, the coastal State, since the UNSCR specifically refers to the “high seas.” Given that most illicit STS activities occur in transfer areas located in the Chinese, Russian and North Korean EEZs, and that these nations are not currently conducting robust sanctions enforcement operations in these waters, such an absurd interpretation of UNSCR 2375 would effectively negate the UN sanctions regime in the East China Sea, the Yellow Sea and the Sea of Japan.

As a result, a coalition of eight nations—Australia, Canada, France, Japan, South Korea, New Zealand, the United Kingdom and the United States—have expanded their surveillance of North Korea’s smuggling activities in these waters, despite frivolous objections, by deploying warships and aircraft to better detect and disrupt STS transfers and other sanctions violations. These coalition efforts ensure that DPRK-related UNSCRs are fully and effectively implemented until North Korea denuclearizes.²⁵

IV. MILITARY ACTIVITIES IN THE EEZ

The United States has consistently maintained that nothing in Part V of the Convention restricts the right of all States to conduct lawful military activities in the EEZ. At the conclusion of UNCLOS III, the United States emphasized that all States would 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 enjoyed by all States in the exclusive economic zone. This is the import of Article 58 of the Convention.”²⁶

²⁴ United Nations Security Council, *DPRK Sanctions*, S/RES/2375 (11 September 2017).

²⁵ DPRK Sanctions Advisory, note 22 above.

²⁶ 17 third UN Conference on the law of the sea, plenary meetings, official records, UN Doc. A/Conf.62/WS/37 and ADD.1-2, 244 (1973-1982). *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, UNDOALOS, accessed 21 March 2019, www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

A handful of States do not agree with this position.

- 1) Of the 168 Parties to UNCLOS, thirty States purport to restrict or regulate military activities beyond the territorial sea;
- 2) Sixteen have enacted domestic regulations restricting military activities in the EEZ (Bangladesh, Brazil, Burma, Cape Verde, China, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Thailand and Uruguay);
- 3) Two have not enacted domestic regulations, but on occasion object to military activities in the EEZ (Indonesia and the Philippines);
- 4) Seven claim a territorial sea in excess of 12 nm, which has the same effect as restricting military activities in the EEZ (Benin, Congo, Ecuador, Liberia, Peru, Somalia, and Togo); and
- 5) Five claim security jurisdictions in their 24 nm contiguous zone.²⁷

These illegal restrictions take many forms and include:

- 1) restrictions on weapons exercises;
- 2) limitations on military marine data collection and hydrographic surveys;
- 3) restrictions on nuclear-powered ships;
- 4) prohibitions on intelligence collection;
- 5) restrictions on navigation and overflight through the EEZ;
- 6) prohibitions on conducting flight operations;
- 7) prior notice or consent requirements;
- 8) application of domestic environmental laws and regulations; and
- 9) requirements that State aircraft file flight plans prior to transiting the EEZ.

None of these excessive claims have a basis in customary international law, UNCLOS, state practice or the Chicago Convention.

When discussing limitations on military activities, it is important to recognize that UNCLOS does impose some restraints on military ships and aircraft at sea. However, none of these restrictions apply in the EEZ. Article 19 prohibits 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 marine data collection, and intentional interference with coastal State communication systems.²⁸ Article 52 applies the same limi-

²⁷ Department of Defense, Maritime Claims Reference Manual (MCRM), Department of Defense Instruction 2005.1–M, June 2008, accessed 21 March 2019, http://www.jag.navy.mil/organization/code_10_mcrm.htm.

²⁸ UNCLOS, art. 19(2).

tations to archipelagic waters.²⁹ 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.³⁰ Articles 39 and 54 prohibit the threat or use of force when ships are engaged in transit passage or archipelagic sea lanes passage (ASLP),³¹ and Articles 40 and 54 prohibit survey activities for ships engaged in transit passage or ASLP.³² Similar restrictions are not found in Part V of the Convention and therefore do not apply to warships, military aircraft and other sovereign immune ships and aircraft operating in or over the EEZ.

A. COASTAL STATE RESTRICTIONS IN INTERNATIONAL AIRSPACE

Efforts by some States to regulate military activities, such as ISR operations, in international airspace beyond the 12-nm territorial sea have no basis in international law. UNCLOS is very clear—coastal States lack competence to regulate military activities in the airspace above the EEZ. Coastal State authority is limited to the national airspace above the territorial sea and archipelagic waters, where the coastal State exercises sovereignty.³³ The airspace above the EEZ is considered international airspace and, like the high seas, is not subject to coastal State sovereignty.

Activities in international airspace are governed by the Convention on International Civil Aviation of 1944 (Chicago Convention).³⁴ Article 1 of the Convention grants coastal States “complete and exclusive sovereignty over the airspace above its territory,” which includes “the land areas and territorial waters adjacent thereto.”³⁵ Thus, a State may restrict or prohibit foreign aircraft, military or civilian, from flying over certain areas of its territory for reasons of military necessity or public safety.³⁶ Moreover, state aircraft—aircraft used in military, customs and police services—are prohibited from flying over the territory of another State or land thereon without the authorization of that State.³⁷

Nonetheless, these authorities only apply to national, not international, airspace. More importantly, with the exception of the prohibition on overflight

²⁹ *Ibid.*, art. 52.

³⁰ *Ibid.*, art. 20 and 52.

³¹ *Ibid.*, art. 39 and 54.

³² *Ibid.*, art. 40 and 54.

³³ *Ibid.*, art. 2 and 49.

³⁴ Convention on International Civil Aviation, (opened for signature 7 December 1944), 15 U.N.T.S. 295 [hereinafter Chicago Convention].

³⁵ *Ibid.*, art. 1 and 2.

³⁶ *Ibid.*, art. 9.

³⁷ *Ibid.*, art. 3.

of national airspace, State aircraft are exempt from the rules of the Chicago Convention, including observance of Flight Information Regions (FIRs).³⁸ The only requirement is that State aircraft operate with “due regard for the safety of navigation of civil aircraft.”³⁹

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, UNCLOS Article 56 specifically limits coastal State sovereign rights in the EEZ to the seabed, its subsoil and the waters superjacent to the seabed, with one exception—coastal State exclusive rights over the production of energy from the winds. Similarly, Article 3 of the Chicago Convention only limits military activities in national airspace and exempts State aircraft from compliance with the Convention’s provisions applicable in international airspace. Of note, Brazil’s efforts to designate the airspace above the EEZ as national airspace was soundly rejected by the International Civil Aviation Organization Legal Committee, stating that Brazil’s proposal flagrantly contradicted “the relevant provisions of UNCLOS which equate the EEZ...with the high seas as regards freedom of overflight.”⁴⁰

B. COASTAL STATE RESTRICTIONS ON MARINE DATA COLLECTION IN THE EEZ

In addition to sovereign rights over resources in the EEZ, coastal States are granted exclusive jurisdiction over marine scientific research (MSR) in the zone.⁴¹ Although consent should normally be granted, the coastal State may withhold its consent in certain specified circumstances delineated in Article 246(5)(a)-(d), and it may suspend or terminate a previously approved MSR project as set out in Article 253.⁴²

Some coastal States, however, purport to regulate all marine data collection in the EEZ, arguing that such operations are akin to MSR and are therefore subject to coastal State control.⁴³ To the extent that coastal State laws

³⁸ Article 3a. provides that the Convention “shall be applicable only to civil aircraft and shall not be applicable to state aircraft.” *Ibid.*

³⁹ *Ibid.*, art. 3d.

⁴⁰ Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (New York: Martinus Nijhoff, 1989), 203.

⁴¹ UNCLOS, art. 56(1)(b)(ii) and 246(1)-(2).

⁴² *Ibid.*, art. 246 and 253.

⁴³ China, for example, prohibits all types of marine data collection without Chinese consent. 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 Committee ninth National People’s Congress., FEB. 26, 1998, EFFECTIVE JUNE 26, 1998), [HTTP://WWW.UN.ORG/DEPTS/LOS/LEGISLATIONANDTREATIES/PDFFILES/CHN_1998_EEZ_ACT.PDF](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1998_EEZ_ACT.PDF); 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); LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON THE SURVEY-

purport to regulate hydrographic surveys and military marine data collection (*i.e.*, military oceanographic surveys and underwater, surface and aviation ISR missions), they are inconsistent with UNCLOS, State practice and customary international law.

The terms “research” and “survey” are not defined in UNCLOS. However, various articles of the Convention clearly distinguishes between MSR, hydrographic surveys, and military activities. Ships in innocent passage may not engage in “research or survey activities.”⁴⁴ Similarly, “marine scientific research and hydrographic survey ships may not carry out any research or survey activities” while engaged in transit passage, unless authorized by the States bordering the strait.⁴⁵ The same restrictions apply to ships transiting archipelagic waters in innocent passage and ships engaged in ASLP.⁴⁶ And one of the high seas freedoms enumerated in Article 87 is “freedom of scientific research.”⁴⁷

More importantly, Article 56 and Part XIII only grant coastal States jurisdiction over MSR.⁴⁸ 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 and military marine data collection in the other maritime zones, including the contiguous zone and the EEZ. Hydrographic surveys and 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 EEZ.⁴⁹

The distinction in UNCLOS between MSR and other forms of marine data collection reflects centuries of State practice. Since 1830, when the Department of Charts and Instruments was first established (today’s Naval Meteorology and Oceanography Command), U.S. naval ocean surveillance and oceanographic survey ships have collected marine data and intelligence information seaward of foreign territorial seas to build oceanographic and meteorological profiles, maintain force protection, and inform naval commanders across the full spectrum of naval operations. Only in the last twenty years have these operations come under scrutiny by a handful of rogue coastal States. UNCLOS is clear, however—coastal State authority to regulate MSR does not apply to

ING AND MAPPING (PROMULGATED BY THE 29TH MEETING OF THE STANDING COMMITTEE NINTH NATIONAL PEOPLE’S CONGRESS, AUG. 29, 2002, EFFECTIVE DEC. 1, 2002).

⁴⁴ UNCLOS, art. 19(2)(j).

⁴⁵ *Ibid.*, art. 40.

⁴⁶ *Ibid.*, art. 52 and 54.

⁴⁷ *Ibid.*, art. 87(1)(f).

⁴⁸ *Ibid.*, art. 56(1)(b)(ii) and 246(1)-(2).

⁴⁹ *Ibid.*, art. 58, 86 and 87.

other separate and distinct activities, such as oceanographic surveys and military marine data collection efforts, including ISR operations.

C. INTELLIGENCE, SURVEILLANCE AND RECONNAISSANCE OPERATIONS IN THE EEZ

Having failed at UNCLOS III to include security jurisdiction as a coastal State competency in the EEZ, a few States cite Articles 59, 88 and 301 to support their regulation of foreign military activities in their EEZ.⁵⁰ In effect, these States argue that security jurisdiction was retained as a residual right under Article 59 and that military activities violate the peaceful purposes provisions of the Convention (Articles 88 and 301).⁵¹ These arguments are not supported by a plain reading of UNCLOS, State practice, the Chicago Convention, or any other applicable international instrument.

UNCLOS addresses intelligence collection in only one article—Article 19(2)(c). That provision 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.”⁵² An analogous limitation does not appear in Part V of the Convention regarding the EEZ. Similarly, Article 3 of the Chicago Convention limits coastal State authority over military aircraft to national airspace. Coastal States may not regulate State aircraft activities seaward of the territorial sea in international airspace.⁵³

⁵⁰ 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. Kenneth Allen & Jana Allen, “Assessing China’s Response to U.S. Reconnaissance Flights,” *China Brief* 11 no. 16 (2011). Similarly, 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.” Sophie Brown, *Stop Spy Flights, China Warns the U.S.*, CNN, (Aug. 29, 2014), accessed 21 March 2019, <http://www.cnn.com/2014/08/29/world/asia/china-us-spy-flights/>.

⁵¹ Article 59 provides: “In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the 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.” Article 88, which applies to the EEZ via Article 58, provides: “The high seas shall be reserved for peaceful purposes.” Article 301 provides: “In 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.” UNCLOS, art. 59, 88 and 301.

⁵² *Ibid.*, art. 19(2)(c).

⁵³ Chicago Convention, art. 3.

The text of UNCLOS and the Chicago Convention reflect State practice since 1945. During the Cold War, warships and military aircraft from the NATO alliance and the Soviet bloc routinely collected intelligence and conducted military marine data collection operations in what is today the EEZ. Such surveillance activities were lawful and acceptable to NATO so long as Soviet ships and aircraft remained outside of the territorial sea and complied with the obligations of the 1972 International Regulations for Preventing Collisions at Sea (COLREGS)⁵⁴ and the 1972 US–USSR Agreement on the Prevention of Incidents on the High Seas (INCSEA).⁵⁵ Even on those rare occasions when coastal States objected to foreign ISR flights off their coast, normally they claimed that the aircraft intruded into “national” airspace, rather than questioning the legality of intelligence collection generally.⁵⁶ This long-standing State practice continues today, as military surveillance aircraft and survey ships from a number of countries, including Australia, China, Japan, NATO, Russia, South Africa, and the United Kingdom (to name a few), operate on, under and over the world’s oceans collecting marine data for military use.

Of note, 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.⁵⁷ 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.⁵⁸

⁵⁴ Convention on International Regulations for Preventing Collisions at Sea, (opened for signature 20 October 1972), 28 UST 3459, TIAS 8587, 1050 U.N.T.S. 17.

⁵⁵ 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 Proto-col thereto, May 22, 1973, 24 UST 1063, TIAS No. 7624, and by the 1998 exchange of diplomatic notes.

⁵⁶ For example, in June 2012 Syrian forces shot down an unarmed Turkish RF-4E Phantom reconnaissance aircraft. Damascus justified its actions claiming that the Turkish spy plane was operating within Syrian national airspace when it was engaged. The Syrians did not allege that ISR operations, in general, were per se illegal. Eric Schmitt & Sebnem Arsu, “Backed By NATO, Turkey Steps Up Warning to Syria”, NEW YORK TIMES (June 27, 2012), accessed 21 March 2019, http://www.nytimes.com/2012/06/27/world/middleeast/turkey-seeks-nato-backing-in-syria-dispute.html?pagewanted=all&_r=0. See also Oliver J. Lissitzyn, “Electronic Reconnaissance from the High Seas and International Law” in *The Role of International Law and an Evolving Oceans Law*, Richard B. Lillich & John Norton Moore, eds. (Rhode Island: Naval War College, 1980), 566–567, 574–575, 578–579.

⁵⁷ Lissitzyn, *ibid.*

⁵⁸ *Ibid.*

With regard to peaceful purposes, 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....”⁵⁹ 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.⁶⁰

UNCLOS Article 19 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.”⁶¹ The remaining subparagraphs of Article 19(2) restrict other military activities in the territorial sea.⁶² The distinction in Article 19 between “threat or use of force” and 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 has its origin in 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.⁶³ A proposal by a group of developing nations to include a version of Article 301 in Article 88 was not adopted.⁶⁴ Similarly, an effort to include the new Article 301 in Part V of the Convention was also defeated “by maritime States on the ground that security matters should not be considered within the EEZ regime.”⁶⁵

⁵⁹ UNCLOS, art. 301.

⁶⁰ 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.” Charter of the United Nations, 1 U.N.T.S. XVI, Oct. 24, 1945.

⁶¹ UNCLOS, art. 19(2)(a).

⁶² Other military activities prohibited by Article 19 include: (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; and (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State. UNCLOS, art. 19.

⁶³ United Nations General Assembly, Res. 2749 (XXV), U.N. Doc. A/Res/2749 (Dec. 17, 1970).

⁶⁴ Virginia Commentary III, NOTE 9 ABOVE, AT 90.

⁶⁵ David J. Attard, *The Exclusive Economic Zone in International Law* (Oxford: Oxford University Press, 1987), 69.

Nonetheless, some developing States took the position that 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.”⁶⁶ This strict interpretation of the “peaceful purposes” language was opposed by the maritime States, arguing instead that the test of whether an activity was considered “peaceful” was determined by the UN Charter and other obligations of international law.⁶⁷

The United States, for example, stated that:

*“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.”*⁶⁸

Most commentators that have addressed this issue agree with the United States:

*“...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...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.”*⁶⁹

Thus, the determination of whether an activity is “peaceful” is made under Article 2(4) of the UN Charter, and the “peaceful purposes” provisions must be read in conjunction with the general body of international law, including the inherent right of individual and collective self-defense reflected in Article 51 of the UN Charter.⁷⁰

⁶⁶ Virginia Commentary III, NOTE 9 ABOVE, AT 88-89.

⁶⁷ *Ibid.*, at 89-91.

⁶⁸ *Ibid.*, at 89. See also 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).

⁶⁹ Moritaka Hayashi, “Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms,” 29 *Marine Policy* 29 (2005): 123-137.

⁷⁰ In the commentary accompanying the U.S. President’s letter of transmittal of the Convention to the Sen-

To accept that all military activities are, by their nature, inconsistent with the “peaceful purposes” provisions would be contrary to the decisions of the UN Security Council, 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.”⁷¹ The International Court of Justice has similarly ruled that naval maneuvers conducted by the U.S. Navy 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.⁷²

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.⁷³ Two months later, the Soviets shot down an American RB-47H spy plane while it was conducting an ISR mission over the Barents Sea near the Kola Peninsula. Again, the Soviets introduced a draft resolution that would have labelled the surveillance mission an “act of aggression” under the Charter. The draft resolution was rejected by a vote of 9 to 2.⁷⁴

V. CONCLUSION

Without question, coastal State competency in the EEZ is strictly limited to resource rights, jurisdiction over resource-related offshore installations and

ate in 1994, President Clinton stated that none of the peaceful purposes provisions of the Convention “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.

⁷¹ Virginia Commentary III, NOTE 9 ABOVE, AT 88-89.

⁷² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), 1986 I.C.J. 14, ¶ 227 (June 27).

⁷³ S.C., 15th yr., 860th mtg., para. 87.

⁷⁴ S.C., 15th yr., 883rd mtg., para. 187

structures and MSR, and protection of the marine environment. Coastal States do not retain residual security jurisdiction in the EEZ, and may not regulate lawful military activities in the EEZ that are consistent with the UN Charter, UNCLOS, the Chicago Convention, and other relevant international law instruments.

Reflecting on this issue in 2008, Ambassador Tommy Koh recalled that “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 in the 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.” He went on to state that “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.”⁷⁵

All nations, particularly those that make excessive claims in their EEZ, should heed Ambassador Koh’s instructive analysis and abide by their treaty obligations. The creation of the EEZ was a package deal—coastal States were granted exclusive resource rights and user States retained the high seas freedoms of navigation and overflight, and other lawful uses of the seas associated with those freedoms, which have always applied beyond the territorial sea.

⁷⁵ 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*, Myron H. Nordquist, Tommy T.B. Koh & John Norton Moore, eds. (Virginia: BRILL, 2009), 53.

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