6

Military Activities

Among the rights that have not been explicitly attributed in the exclusive economic zone (EEZ), States disagree in particular on the law governing military activities. On the one hand, although some maritime powers view the United Nations Convention on the Law of the Sea (UNCLOS) as permitting navies to operate in a foreign EEZ essentially the same way as they operate on the high seas, some coastal States argue that different rules apply.[1] On the other hand, it is not clear as to what extent the coastal State can use its EEZ for military purposes, particularly when such use may affect the exercise of freedoms by other States. Moreover, States hold different views on what constitutes military activities. The conflicting interpretations and applications of UNCLOS and customary international law between coastal States and other military-user States have led to a stalemate where both groups believe that their actions are justified and lawful.[2]

This chapter examines the issue of whether or not the establishment of the 200 nautical miles (NM) EEZ affects the conduct of military activities,

[1] United Nations Convention on the Law of the Sea (10 December 1982, in force 16 November 1994) 1833 UNTS 3 (UNCLOS).

[2] George V. Galdorisi and Alan G. Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2001) 32 Cal W Int'l LJ 253; Jon M. Van Dyke, 'Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country' (2004) 28 Marine Policy 29; Brian Wilson, 'An Avoidable Maritime Conflict: Disputes Regarding Military Activities in the Exclusive Economic Zone' (2010) 41 J Mar L & Com 425; Raul (Pete) Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9 Chinese J Int'l L 9; Haiwen Zhang, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) 9 Chinese J Int'l L 31; Peter Dutton, Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons' (China Maritime Studies Institute, US Naval War College, Red Books Study No. 7 2010) https://digital-commons.usnwc.edu/cmsi-red-books/3/; Erik Franckx, 'American and Chinese Views on Navigational Rights of Warships' (2011) 10 Chinese J Int'l L 187; Raul Pedrozo, 'Military Activities in the Exclusive Economic Zone' (2021) 97 Int'l L Stud Ser US Naval War Col 45.

and if so, what international rules apply to such activities. Given the lack of clarity of jurisdiction, this analysis applies the two legal doctrines of the attribution and exercise of rights and duties in the EEZ. On the attribution issue, the conduct of military activities in the EEZ is considered an unattributed right such that jurisdiction is assessed on the particular activity within a given circumstance. In exercising such a residual right, the operating State must maintain a peaceful purpose and must have due regard to other States' rights and duties in using the same maritime zone. This means that, when using the EEZ for military purposes, the coastal State must not impede the freedoms enjoyed by other States, while other States must not impair the sovereign rights and jurisdiction of the coastal State.

This chapter is divided into four sections. Section 6.1 reflects on the history of military uses of the sea, acknowledges the right of all States to conduct military activities on the high seas and identifies the general obligations for conducting peacetime military activities under international law. Section 6.2 discusses military security interests in the EEZ. Although security interests are not explicitly included in Part V of UNCLOS, they nonetheless exist, have been claimed and are protected by both the coastal State and other States from different perspectives. Section 6.3 examines conflicting opinions and practices with regard to the conduct of specific military activities in the EEZ as a means to protect military security interests. The attribution of rights to conduct these activities has provoked conflicts between the operating State and other States, mainly the coastal State. Neither side has any general priority in exercising co-existing rights, but each must act in good faith and give due regard to the other party. Section 6.4 reviews State practice relating to the regulation of military activities at sea and explores a mechanism to build trust and confidence to improve mutual understanding and avoid conflicts.

6.1 Military Uses of the Sea in Peacetime

6.1.1 Freedom of the Seas

The ocean has traditionally been divided into two legal regimes: territorial waters, where the coastal State has sovereignty, and the high seas, which is dominated by the principles of freedom and the exclusivity of flag State jurisdiction.[3] The freedom of the high seas, as a rule of

[3] Daniel P. O'Connell, *The International Law of the Sea*, Vol. I (Oxford University Press 1982) 1; Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th ed., Manchester University Press 2022) 372.

customary law as well as treaty law, is a cornerstone of the international law of the sea.[4] Although its meaning and content have undergone change and refinement over time, the freedom of the high seas has traditionally included the freedom to conduct military activities in times of both peace and war, either defensive or offensive.[5] In theory, subject to the principle of peaceful purposes, the high seas can be used by all ships and aircraft for activities that are not explicitly prohibited under customary or conventional international law.[6]

Broadly speaking, military uses of the sea embrace a wide and complex range of peacekeeping and wartime activities conducted not only on the water surface and in the column, on the seabed and subsoil but also in superjacent air space, by warships, support vessels, military aircraft and tactical and ballistic missile submarines.[7] In addition, military uses of the sea include cyber operations conducted from or through cyber infrastructure located in seas, including infrastructure mounted on ships and submarines, aircraft above the seas, offshore installations and through submarine communication cables.[8] The military uses of the sea serve a variety of purposes for governments.[9] First, in order to protect a State's interests at sea, warships and military aircraft commonly conduct manoeuvres at sea to maintain readiness of engagement, with or without weapons testing.[10] Second, duly authorised government entities perform law enforcement duties with respect to activities occurring within their

[4] O'Connell (1982) 9–10; Churchill, Lowe and Sander (2022) 375–380.

[5] David Joseph Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 86; Daniel P. O'Connell, *The International Law of the Sea*, Vol. II (Oxford University Press 1988) 809, 1094–1096; James C. F. Wang, *Handbook on Ocean Politics & Law* (Greenwood 1992) 367–388; Robin R. Churchill and A. Vaughn Lowe, *The Law of the Sea* (3rd ed., Manchester University Press 1999) 421–431; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2010) 258–284.

[6] Edward D. Brown, 'Freedom of the Sea versus the Common Heritage of Mankind: Fundamental Principles in Conflict' (1982–1983) 20(3) San Diego L Rev 521, 533; Douglas Guilfoyle, 'The High Seas', in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 203, 206–208.

[7] Charles E. Pirtle, 'Military Uses of Ocean Space and the Law of the Sea in the New Millennium' (2000) 31(1) Ocean Dev Int'l L 7, 8; James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff 2013) 236.

[8] Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press 2017) 232 (Tallinn Manual 2.0).

[9] Naval Operations Concept 2010: Implementing the Maritime Strategy (Joint Publication of the US Marine Corps, the US Navy and the US Coast Guard 2010) 9–10 https://irp.fas.org/doddir/navy/noc2010.pdf.

[10] Churchill and Lowe (1999) 426.

jurisdictional sea areas, over ships flying the same flag on the high seas, and over certain international crimes at sea.[11] Third, warships and military aircraft customarily conduct hydrographic surveys and other data-gathering activities through seabed devices or other onboard structures to improve navigational safety and to obtain strategic information about the targeted area.[12] Fourth, States routinely conduct intelligence collection activities or espionage, which may include the use of airborne and ship-based maritime surveillance systems and military devices, installations and structures on the seabed.[13]

Any maritime State, large or small, may use its sea power to secure legitimate uses of ocean space to provide national security, in terms of both self-defence and the capacity to deploy military force overseas for warfare and peaceful purposes.[14] In fact, the use of military force to project power and influence over international relations has long been a traditional weapon in the diplomatic arena – the very term 'gunboat diplomacy' confirms the historic use of naval forces as a coercive element in achieving national goals.[15] Therefore, States possessing strong maritime forces have always favoured more liberal legal regimes for the ocean. The United States, for example, has 'traditionally maintained a strong Navy to preserve the freedom of the seas and to support the global commitments associated with its forward defense strategy' with the aim to ensure political persuasion, reassure allies, deter political adversaries and influence regional events.[16] These political imperatives have pushed maritime powers to seek the greatest freedom for military uses of the sea when developing the legal regimes of maritime zones.

The freedom to use ocean space for military purposes has never been without challenges and contradictions. The presence of a foreign navy in

[11] UNCLOS Articles 110(1) and (5), 111(5).

[12] Sam Bateman, 'Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research' (2005) 29 Marine Policy 163, 163–164.

[13] Desmond Ball, 'Intelligence Collection Operations and EEZs: The Implications of New Technology' (2004) 28 Marine Policy 67, 68–77.

[14] Wang (1992) 367; Arthur W. Westing, 'Military Impact on Ocean Ecology' (1978) 1 Ocean YB 436, 439; Scott C. Truver, 'The Law of the Sea and the Military Use of the Oceans in 2010' (1984) 45 La L Rev 1221, 1226.

[15] Dale G .Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1998–1999) 29 Cal W Int'l LJ 283, 285.

[16] Truver (1984) 1228; Andrew S. Erickson, 'America's Security Role in the South China Sea (Testimony before a Hearing of the US House Foreign Affairs Committee, Subcommittee on Asia and the Pacific, 23 July 2015)' (2016) 69(1) Naval War Col Rev 7, 18.

a nearby sea area is considered to pose a threat to the security and integrity of the coastal State and has provoked conflicts between the coastal State and the operating State.[17] Restrictions on military activities in coastal areas were commonly used in times of crisis and international confrontation. For example, during the Falkland/Malvinas conflict in 1982, the United Kingdom declared a 200 NM maritime exclusion zone around the islands and then replaced it by a total exclusion zone that banned the entry of all Argentine warships, naval auxiliaries and aircraft.[18]

Within adjacent sea areas, the competition has always been between the coastal State's intention to control all military activities for its exclusive use and the desire of other States to freely use the sea for their own or common interests.[19] Over time, the freedom to use the sea for military purposes has been affected by the elongation of the extent of the territorial sea and the creation of various functional jurisdiction zones.

6.1.2 *Codification of the Law of Military Uses of the Sea*

The development of international law in the twentieth century has witnessed the growth of an international consensus in support of increasing restrictions on the use of force in international relations.[20] The broad prohibition on the threat or use of force in the Charter of the United Nations (UN Charter) represents an achievement of profound importance for the strengthening of international law.[21] This development,

[17] Zhang (2010) 47; 邹立刚,《论国家对专属经济区内外国平时军事活动的规制权》,中国法学,2012年第6期,49–57页,第52–53页 (ZOU Ligang, 'On Coastal State's Jurisdiction over Foreign Military Activities in the EEZ in Peacetime' (2012) 6 China Legal Science 49, 52–53).

[18] 'The Falklands Conflict – Chronology of Events' www.falklandswar.org.uk/chron.htm; Lawrence Freedman, *The Official History of the Falklands Campaign* (Routledge 2005) 257–258.

[19] Myres S. McDougal and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Martinus Nijhoff 1985) 17; James Kraska, 'Military Operations', in Rothwell, Oude Elferink, Scott and Stephens (2015) 865, 885.

[20] Paul B. Stephan III and Boris M. Klimenko (eds.), *International Law and International Security: Military and Political Dimensions* (ME Sharpe 1991) 2; David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th ed., Sweet and Maxwell 2015) 725–727; Christine Gray, *International Law and the Use of Force* (4th ed., Oxford University Press 2018) 9–10.

[21] Charter of the United Nations (26 June 1945, in force 24 October 1945), 557 UNTS 143, Article 2(4) (UN Charter).

although it goes beyond the scope of the codification of the law of the sea, influenced the discussion of military uses of ocean space at the three United Nations Conferences on the Law of the Sea.[22]

The historical claims of a coastal State's sovereign rights over the continental shelf was formalised in the 1958 Convention on the Continental Shelf, and refined in UNCLOS.[23] The law of the sea acknowledges the sovereign rights of coastal States over the continental shelf, including the outer continental shelf that extends beyond 200 NM from the baselines, for the exploration and exploitation of the seabed and its natural resources, while preserving the freedom to lay submarine cables and pipelines for all States.[24] The emplacement of military objects on or beneath the seabed floor and subsoil, one of the most important military uses of the sea, is not explicitly permitted or prohibited by these two conventions.[25]

When the 1958 Convention on the Continental Shelf was being negotiated, India proposed that the continental shelf should not be used by any State for the purpose of building military bases or installations, but this was rejected by thirty-one votes to eighteen.[26] Although the final articles did not include an explicit permission, it was believed that, at least in 1958, the traditional high seas freedoms included the right to emplace military installations and devices on or in the seabed of the continental shelf.[27] The additional coastal States' sovereign rights over the continental shelf, as intrusions on the high sea freedoms, are limited to 'the purpose of exploring it and exploiting its natural resources' without affecting the legal status of the superjacent waters or airspace

[22] R. W. G. de Muralt, 'The Military Aspects of the UN Law of the Sea Convention' (1985) 32 Netherlands Int'l L Rev 78, 79.

[23] Convention on the Continental Shelf (29 April 1958, in force 10 June 1964) 499 UNTS 311; UNCLOS Part VI. For the historical background of the development of the coastal State jurisdiction, see Chapter 2 in this volume.

[24] Convention on the Continental Shelf Articles 2, 4; UNCLOS Articles 77, 79.

[25] Tullio Treves, 'Military Installations, Structures, and Devices on the Seabed' (1980) 74 Am J Int'l L 808, 831.

[26] United Nations Conference on the Law of the Sea, Official Records, Vol. VI: Fourth Committee (Continental Shelf) Summary Records of Meetings and Annexes, Geneva, 24 February – 27 April 1958, A/CONF.13/C.4/L.57, Thirtieth Meeting, Consideration of the Draft Articles adopted by the International Law Commission at its Eighth Session (A/3159), India: Proposal, 91, 141.

[27] Rex J. Zedalis, '"Peaceful Purposes" and Other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and Proposed Military Regime for the High Seas' (1979) 7 Syracuse J Int'l L & Com 1, 14; Treves (1980) 834–835.

above those waters.[28] The coastal State's sovereign rights do not automatically apply to the military field, which remains to be governed by the high seas regime.[29] There are, however, limitations on the freedom to use the continental shelf for military purposes. As a traditional high seas freedom, States wishing to emplace weapons, installations and other military devices on the continental shelf are obliged to do so with reasonable regard to the interests of other States in the exercise of their freedom of the high seas.[30] Additionally, it can be argued that the use of the continental shelf for military purposes by a foreign State, similar to the laying or maintenance of submarine cables or pipelines, is subject to the coastal State's right to 'take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources'.[31]

The freedom to use the seabed for military purposes is further restricted by the 1971 Seabed Treaty, which came into force in 1972 and has ninety-four State parties.[32] The 1971 Seabed Treaty recognises the common interest of humankind to promote the peaceful use of the seabed and the ocean floor, and contributes to the process of general and complete disarmament under strict and effective international control.[33] All State parties are obligated

> not to implant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the [12-mile outer limit] any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.[34]

Nevertheless, the 1971 Seabed Treaty only concerns the prohibition on the use of nuclear weapons and other types of weapons of mass destruction, which were considered to have special verification procedures.[35] The freedom to use other, less destructive weapons or military devices on

[28] Convention on the Continental Shelf, Articles 2(1), 3.
[29] O'Connell (1982) 488.
[30] Convention on the High Seas (29 April 1958, in force 30 September 1962) 450 UNTS 11, Article 2.
[31] Ibid Article 26(2); Convention on the Continental Shelf Article 4.
[32] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and Ocean Floor and in the Subsoil Thereof (11 February 1971, in force 18 May 1972) 955 UNTS 115 (1971 Seabed Treaty).
[33] Ibid Preamble.
[34] Ibid Articles 1(1), 2.
[35] David L. Larson, 'Security, Disarmament and the Law of the Sea' (1979) 3 Marine Policy 40, 43.

the seabed and ocean floor was not affected by the 1971 Seabed Treaty so long as their use did not interfere with international navigation or other legitimate uses of the ocean.

During the negotiation of the 1971 Seabed Treaty in 1970, the United Nations General Assembly (UNGA) adopted the Declaration of Principles Governing the Seabed and the Ocean Floor (Declaration of Principles).[36] The Declaration of Principles explicitly reserves the seabed and the ocean floor and subsoil thereof beyond the limits of national jurisdiction exclusively for peaceful purposes, 'without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which have be applicable to a broader area'.[37] Although UNCLOS does not contain any provisions on disarmament or arms control in ocean space, the thrust of discussion at the Third United Nations Conference on the Law of the Sea (Third Conference) and the final provisions are premised upon the guidelines established by the Declaration of Principles and the 1971 Seabed Treaty.[38]

Safeguarding free naval movement was one of the primary motivations of the major maritime powers in negotiating UNCLOS in light of the irreversible trend of extended coastal States' claims.[39] Meanwhile, contrasting proposals were made by Malta and other States at an early stage to include coastal States' security rights and jurisdiction in the EEZ.[40] Since it was not possible to reconcile this disagreement, military uses were left out from the formal debate and consequently not expressly addressed in UNCLOS.[41]

[36] United Nations General Assembly (UNGA) Res 2749(XXV), Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Sub-Soil thereof, beyond the Limits of National Jurisdiction, 17 December 1970.

[37] Ibid para. 8.

[38] Larson (1979) 44.

[39] Bernard H. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1983–1984) 24 Va J Int'l L 809, 831–832, 835–841; Satya N. Nandan with Kristine E. Dalaker, *Reflections on the Making of the Modern Law of the Sea* (National University of Singapore Press 2021) 93.

[40] Shigeru Oda, *The Law of the Sea in Our Time II: The United Nations Seabed Committee, 1968–1973* (Sijthoff Leyden 1977) 284–285; UNGA, Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction, Sub-Committee II, A/AC.138/SC.II/L.28, 16 July 1973, Malta.

[41] Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge University Press 1989) 108; Boleslaw A. Boczek, 'Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea' (1989) 20 (4) Ocean Dev & Int'l L 359, 368–370.

With the establishment of the EEZ, there is an important difference between the legal regimes of the areas within and beyond the 200 NM limit. As its name indicates, the primary purpose of establishing the EEZ is to maximise the economic benefits of the coastal State in the adjacent sea area. Consequently, the rights over natural resources, including fishing, jurisdiction to construct artificial islands for all purposes and installations or structures for economic purposes, and to conduct marine scientific research in the EEZ, have been drastically curtailed compared to those on the high seas, and are subject to the jurisdiction of the coastal State.[42] However, the important high seas freedoms for communication have been explicitly preserved. All States enjoy the freedoms 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'.[43] There was no explicit reference to military activities in the current attribution of rights and freedoms in the EEZ, which veraciously fall under the realm of unattributed rights and duties based on the *sui generis* character of the EEZ.

On the one hand, the coastal State has sovereign rights and functional jurisdiction in the EEZ, as well as over the continental shelf. These are 'sovereign rights' exercised 'for the purpose of exploring and exploiting, conserving and managing the natural resources' and 'jurisdiction' in respect of certain other specified activities and purposes in conjunction with consequential duties.[44] Military uses, however, are not automatically included in these sovereign rights and jurisdiction. This is consistent with the drafting history of the provisions concerning the coastal State's sovereign rights over the continental shelf.[45]

On the other hand, States hold different views with regard to whether the freedom to conduct military activities in a foreign EEZ was automatically included in Article 58(1) during the negotiation of UNCLOS and after its adoption.[46] The original version of Article 58, which preserves

[42] UNCLOS Articles 56(1), 60(1), 87(1).
[43] UNCLOS Article 58(1).
[44] UNCLOS Articles 56(1), 77(1); Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (Martinus Nijhoff 1993) 525.
[45] O'Connell (1982) 488; Nordquist, Nandan and Rosenne (1993) 895–896.
[46] R. Galindo Pohl, 'The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea', in Francisco Orrego Vicuña (ed.), *The Exclusive Economic Zone: A Latin American Perspective* (Westview Press 1984) 55; Francesco Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of

the freedoms for all States in the EEZ, appeared in the 1975 text produced by the Evensen Group, and read as 'the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication'.[47] The Castañeda-Vindenes Group replaced 'navigation and communication' with 'these freedoms' and added 'such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of [UNCLOS]'.[48] Subsequent attempts to limit the scope of the proposed high seas freedoms in the EEZ were not accepted.[49] The formula proposed by the Castañeda-Vindenes Group was adopted as part of the final text of Article 58(1). The change to 'related to these freedoms' considerably clarified and possibly expanded the freedoms preserved in the EEZ.[50] It has been argued that international law historically considers military activity a lawful use of the high seas associated with the operation of warships and military aircraft exercising the freedoms of navigation and overflight.[51] Therefore, these changes served the intention of preserving the maritime State's military uses rights in the EEZ and arguably included naval operations under 'other internationally lawful uses of the sea'.[52]

However, a number of States made declarations when signing UNCLOS to express their opinion on these controversial aspects of military uses of the sea. Brazil declared that 'the provisions of the Convention do not authorise other States to carry out in the exclusive economic zone military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, without the consent of the coastal

the Sea' (1985) 18 Cornell Int'l LJ 203, 213–216; A. V. Lowe, 'Some Legal Problems Arising from the Use of the Seas for Military Purposes' (1986) 10 Marine Policy 171, 179–180; YannHuei (Billy) Song, 'China and the Military Use of the Ocean' (1990) 21(2) Ocean Dev & Int'l L 213, 216–217; 王泽林,《论专属经济区内的外国军事活动》,法学杂志,2010年第3期,123–125,第123–124 (WANG Zelin, 'On Foreign Military Operation In Exclusive Economic Zone' (2010) 3 Law Science Magazine 123, 123–124); Moritaka Hayashi, 'Military Activities in the Exclusive Economic Zones of Foreign Coastal States', in David Freestone (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff 2013) 121–129.

[47] Nordquist, Nandan and Rosenne (1993) 558.

[48] Ibid 561–562.

[49] Ibid 563.

[50] Galdorisi and Kaufman (2001) 272.

[51] Brown (1982–1983) 533.

[52] Barbara Kwiatkowska, 'Military Uses in the EEZ – A Reply' (1987) 11 Marine Policy 249, 249.

State'.[53] Similar declarations and positions are maintained by Bangladesh, Cabo Verde, Ecuador, India, Malaysia, Pakistan, Thailand and Uruguay.[54] In contrast, other maritime States have expressly rejected such limitations on the traditional freedom of navigation. For example, Germany specifically stated:

> [a]ccording to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them.[55]

Italy, the Netherlands and the United Kingdom made similar statements.[56]

The question of military uses of the sea touches on political sensitivities and balance of power paradigms that were deliberately avoided during the negotiations at the three UN Conferences on the Law of the Sea. As a result, there is no provision in UNCLOS that clearly states whether the EEZ can be used for military purposes by either the coastal State or other States. The negotiation history and subsequent State practice fail to reveal a unified interpretation of relevant provisions in Part V. Regardless of the attribution of the right to use the EEZ for military purposes, there are certain rules to follow when conducting military activities therein. The general requirement is that the EEZ is reserved for peaceful purposes only, and all States must refrain from any threat or use of force inconsistent with general international law.[57]

[53] UNCLOS, Declarations and Statements, Brazil, Declaration upon Signature (10 December 1982), https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

[54] UNCLOS, Bangladesh, Declaration made upon Ratification (27 July 2001) para 1; Cabo Verde, Declaration made upon Signature (10 December 1982) and confirmed upon Ratification (19 August 1987) para v; Ecuador, Declaration made upon Ratification (24 September 2012) para XVIII; India, Declaration made upon Ratification (29 June 1995) para (b); Malaysia, Declaration made upon Ratification (14 October 1996) para 3; Pakistan, Declaration made upon Ratification (26 February 1997) para (iii); Thailand, Declaration made upon Ratification (15 May 2011) para I(4); Uruguay, Declaration made upon Signature (10 December 1982) para (D).

[55] UNCLOS, Germany, Declaration upon Accession (14 October 1994).

[56] UNCLOS, Italy, Declarations made upon Signature (7 December 1984) and confirmed upon Ratification (13 January 1995); the Netherlands, Declaration upon Ratification (28 June 1996) para B(II)(2) and (4); UK, Declaration upon Accession (25 July 1997) para (a).

[57] UNCLOS Articles 58(2), 88, 301.

In addition, States must have due regard to each other when exercising their legitimate rights and performing their duties.[58]

6.1.3 Obligations in Conducting Peacetime Military Activities

6.1.3.1 The Reservation for Peaceful Purposes/Uses

The concept of peaceful purposes was introduced into the law of the sea by the Declaration of Principles, and repeatedly has been referred to as 'peaceful uses' or 'peaceful purposes' in the Preamble and various provisions of UNCLOS.[59] Among these, three provisions are relevant to the EEZ. Article 88 provides that the high seas and, through cross-reference by Article 58(2), the EEZ 'shall be reserved for peaceful purposes'. Article 240(3) requires that the coastal State give consent for marine scientific research projects in its EEZ that will be conducted by other States 'exclusively for peaceful purposes'. Finally, Article 301 on 'peaceful uses of the sea' is applicable to all aspects of the rights and duties of State parties in the maritime context.

A general debate on the 'peaceful uses of ocean space: zones of peace and security' took place at the fourth session of the Third Conference in 1976, which centred on whether military activities in the ocean were permitted.[60] Many States, including Peru, Ecuador and Madagascar, interpreted 'peaceful purposes' as prohibiting all military activities; other States, the United States among them, interpreted it as prohibiting all military activities for aggressive purposes only, but not for the use of military means of communication; a third group argued that the test of whether an activity is 'peaceful' depends on whether it is consistent with the UN Charter and other rules of international law.[61] The formulation adopted in UNCLOS Article 301 echoes the view of the third group:

[58] UNCLOS Article 58(3).

[59] UNGA Res 2749(XXV) paras 5, 8; UNCLOS Articles 88, 141, 143(1), 147(2), 155(2), 240 (a), 242(1), 246(3), 301.

[60] Third United Nations Conference on the Law of the Sea (Third Conference), Official Records, Vol. V: Fourth Session, Summary Records of Meetings, Plenary Meetings: A/CONF.62/SR.66, Sixtieth Meeting (19 April 1976); A/CONF.62/SR.68, Sixty-eighth Meeting (26 April 1976), 54–68; De Muralt (1985) 79.

[61] Third Conference, Official Records, Vol. V: Fourth Session, Summary Records of Meetings, Plenary Meetings: A/CONF.62/SR.68, Sixty-eighth Meeting (26 April 1976) 65–66 (Iran: para 24); United States, Message from the President of the United States Transmitting United Nations Convention on the Law of the Sea and the Agreement on

> 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.

Thus, military activities that are consistent with the principles of international law embodied in the UN Charter, in particular with Article 2(4) and Article 51, are not *prima facie* prohibited by UNCLOS.[62]

This interpretation of Article 301 is supported by the fact that numerous provisions of UNCLOS either acknowledge legitimate military activities or enumerate non-acceptable ones.[63] Warships and governmental non-commercial ships are not only recognised but are also granted complete immunity from the jurisdiction of any State other than their flag State.[64] This indicates that, in UNCLOS at least, the use of warships or military aircraft does not equate to non-peaceful purposes.[65] Moreover, the prohibition of certain military activities that are incompatible with innocent passage within the territorial sea implies that these activities may be permissible in other parts of the sea if not explicitly prohibited.[66] Furthermore, the optional exclusion of military activities from compulsory judicial settlement is another example indicating the existence, if not the recognition, of military uses of the sea.[67]

Therefore, the requirement of 'peaceful purposes/uses' means that the use of ocean space or the purpose of activities conducted therein or thereabove must not involve a threat or use of force against the territorial integrity or political independence of a State, or in any manner inconsistent with the principles of international law embodied in the UN Charter. 'Peaceful purposes/uses' per se does not exclusively curb military

Implementation of Part XI, Senate Treaty Doc. 103–39, 7 October 1994, 94 www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf (US Commentary (1994)).

[62] Report of the Secretary-General, 'General and Complete Disarmament: Study on the Naval Arms Race', para. 188, A/40/535 (17 September 1985)' (1985) 1 Int'l Org & L Sea Documentary YB 1; Charlotte Beaucillon, 'Limiting Third States' Military Activities in the EEZ: "Due Regard Obligations" and the Law on the Use of Force Applied to Nuclear Weapons' (2019) 34 Int'l J Marine & Coastal L 128, 131–132.

[63] Oxman (1983–1984) 814–815; Boleslaw Adam Boczek, 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries' (1988) 19 Ocean Dev Int'l L 445, 457–458.

[64] UNCLOS Articles 32, 95, 96, 236.

[65] Kwiatkowska (1989) 204.

[66] UNCLOS Article 19(2).

[67] UNCLOS Article 298(1)(b).

activities on the high seas or in the EEZ. Therefore, military activities at sea are not *prima facie* prohibited by UNCLOS. The question thus hinges on what constitutes a 'threat or use of force' as codified in Article 301.

6.1.3.2 The Prohibition on the Threat or Use of Force

The phrase 'threat or use of force' in UNCLOS Article 301 is drawn from Article 2(4) of the UN Charter to provide an answer to the question of what criteria are required to qualify as 'peaceful purpose/uses'. Article 2 (4) provides that '[a]ll 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 Purpose of the United Nations'. Although not identical, UNCLOS Article 301 echoes the obligation laid down in Article 2(4) of the UN Charter. The replacement of 'the' by 'any' in front of the phrase 'threat or use of force' and the expression of 'the principles of international law embodied in the [Charter]' instead of 'the purposes of the United Nations' arguably broadens the scope of the 'threat or use of force' covered by Article 301.[68] It would cover all the principles of international law that are embodied in the UN Charter and not simply be limited to the four purposes of the UN identified in the UN Charter.[69] Subsequent UN resolutions and juridical decisions have contributed to clarifying the legal meaning of the phrase 'threat or use of force', although States remain divided on the interpretation of the vital subject of the phrase, and the application of the law varies depending on the facts of the episode itself.[70]

The term 'use of force' is relatively clear in referring to armed force used directly or indirectly by a State against another State that excludes 'political or economic coercion'.[71] Foremost, it prohibits 'the most serious and dangerous form of the illegal uses of force' – aggression – 'being

[68] Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff 1989) 154.

[69] Ibid; UN Charter Article 1.

[70] Gray (2018) 10–11; James Crawford, *Brownlie's Principles of Public International Law* (9th ed., Oxford University Press 2019) 719–720; Olivier Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 16(5) European J Int'l L 803, 803; Harris and Sivakumaran (2015) 727–730.

[71] Crawford (2019) 720; UNGA A/Res/2625(XXV), 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, Preamble; Harris and Sivakumaran (2015) 727–728.

fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of world conflict and all its catastrophic consequences'.[72] Any invasion, attack or other action by the armed forces of a State against the sovereignty, territorial integrity or political independence of another State constitutes *prima facie* evidence of an act of aggression and falls under the prohibition of the use of force.[73] Moreover, as the International Court of Justice (ICJ) stated in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 'if the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4'.[74] Furthermore, the focus is the verb 'use' to define the occurrence of the action without a requirement of consequences or the period of how long the force was used.

The term 'threat of force' in the context of armed force is disputed, especially when State practice shows a certain tolerance of it.[75] It has been interpreted that any such 'threat' must be closely tied to what the target State perceives as the 'readiness' of another State to use armed force, which is 'a state of extreme aggravation of contradictions, an immediate pre-conflict state' for an attempt to compel the targeted State to take or not to take certain actions.[76] In 1994, when 'Iraqi artillery and tanks were deployed in positions pointing towards and within range of Kuwait, with ammunition at the ready' on the Iraqi side of the border, this situation was argued at the UN Security Council debate to be a 'threat to Kuwait and a breach of the provisions of the Charter'.[77]

The meaning of the phrase 'territorial integrity or political independence' is also unclear.[78] The preparatory work for the UN Charter and the ICJ jurisprudence have demonstrated that this phrase was not intended to have a restrictive effect as 'respect for territorial sovereignty is an essential foundation of international relations', and international law requires political integrity to be respected.[79] Some States have used the

[72] UNGA A/Res/3314(XXIX), 14 December 1974, Definition of Aggression, Preamble.
[73] Ibid paras 1–3.
[74] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para 47.
[75] Crawford (2019) 720.
[76] Alexander S. Skaridov, 'Naval Activity in the Foreign EEZ: The Role of Terminology in Law Regime' (2005) 29 Marine Policy 153, 153–154.
[77] Harris and Sivakumaran (2015) 729.
[78] Beaucillon (2019) 135–136.
[79] Crawford (2019) 720; The Corfu Channel Case, Merits, Judgement of 9 April 1949, ICJ Reports 1949, p. 4, 35; Case Concerning Military and Paramilitary Activities in and

right of 'humanitarian intervention' as a justification to allow the threat or use of force against another State to establish democracy or another preferred political system.[80] However, such practice is limited in number and support, thus it neither presages nor constitutes a change in the customary law that prohibits intervention.[81] Meanwhile, many States insist that any form of use of armed force, whatever the purpose or duration, violates the prohibition on all use of force against another State.[82] If there is ambiguity on the interpretation and application of the phrase, the principle of effectiveness should be applied.[83] Arguably, it is the targeted State that has the right to claim that it is under such threat.

The alternative qualifier is when the threat or use of force is in any other manner inconsistent with the principles of international law embodied in the UN Charter. The language of Article 301 therefore covers all the principles of international law that are embodied in the Charter. This broad coverage was a compromise between two ideologically diverse groups at the Third Conference, where one side aimed for complete demilitarisation of the sea whereas the other side wanted to have limited application of the prohibition of the use of force.[84] Among those principles brought in by UNCLOS Article 301, the inherent right of self-defence, as set out in Article 51 of the Charter, 'is unimpaired and may require adaptation to the new concepts introduced by the Convention'.[85]

In *Guyana/Suriname*, the arbitral tribunal was of the view that the order given by the Surinamese official by radio to the Guyanese rig 'constituted an explicit threat that force might be used if the order was not complied with', based primarily on the testimony of witnesses to the incident that they were convinced of 'unspecified consequences'.[86] The

Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement of 27 July 1986, ICJ Reports 1986, p. 14, para 202.

[80] Gray (2018) 30–33; Oscar Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 Am J Int'l L 645, 648–649.

[81] Crawford (2019) 726–729; Military and Paramilitary Activities (Nicaragua v. United States of America) (1986) para 209.

[82] Gray (2018) 30–33; Schachter (1984) 648–649.

[83] Harris and Sivakumaran (2015) 730.

[84] Killian O'Brien, 'Article 301', in Alexander Proelss (ed.), United Nations Convention on the Law of the Sea: A Commentary (Hart 2017) 1947.

[85] Nordquist, Rosenne and Sohn (1989) 154.

[86] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname (Guyana v. Suriname), Award, 17 September 2007, PCA Case No. 2004-04, 143–144, para 439.

tribunal accepted that 'force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary', but concluded that Suriname's action 'seemed more akin to a threat of military action rather than a mere law enforcement activity'.[87] Since it is 'illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths', the Surinamese threat of the use of force to expel the Guyanese rig from the disputed area breached Article 2(4) of the UN Charter and general international law.[88]

The decision of the arbitral tribunal was criticised for setting a low threshold for determining whether a specific act constitutes the threat of force in violation of Article 2(4).[89] The order was given by a Surinamese navy vessel to a Guyanese private rig and drill ship operated by CGX, Guyana's licensee for commercial activities, within an area that was approximately 50 NM from the baseline.[90] Therefore, such an action cannot be considered as a threat of force directly against the 'political independence' of Guyana, the sovereign State. In addition, this incident took place in the disputed area of the continental shelf, where neither Suriname nor Guyana has territorial rights.[91] Hence, the threat given by the Surinamese navy was not against the 'territorial integrity' of Guyana. An alternative argument could be that the Surinamese navy's threat of unspecified consequences was a threat 'inconsistent with the purposes of the United Nations', which include the settlement of dispute by peaceful means and therefore violated Article 2(4).[92] Contrary to the tribunal's assessment, such a threat should be categorised as a law enforcement activity that violated the safeguards laid down in UNCLOS and general international law whereby 'the use of force must be avoided as far as

[87] Ibid 147, para 445.
[88] Ibid 143–144, paras 439–440.
[89] Gray (2018) 30; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 121, 210; Atsuko Kanehara, 'A Legal and Practical Arrangement of Disputes Concerning Maritime Boundaries Pending Their Final Solution and Law Enforcement: From a Japanese Perspective', in Norman A. Martínez Gutiérrez (ed.), *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (Routledge 2010) 109.
[90] Guyana v. Suriname 30, para 140; Memorial of the Republic of Guyana, Volume 1, 22 February 2005, 5.9.
[91] Guyana v. Suriname 32–33, paras 150–151.
[92] Harris and Sivakumaran (2015) 729.

possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'.[93]

Directly incorporating the obligation under the UN Charter has the effect of emphasising its implementation in the context of the law of the sea. Particularly in view of Article 103 of the UN Charter, obligations under the Charter have the highest priority in the event of a conflict between the obligations of different international agreements.[94] UNCLOS Article 301 has not introduced any additional obligations beyond Article 2(4) whereby the prohibition of the threat or use of force is limited in international relations.[95] The 'threat or use of force' prohibited in Article 2(4) must be applied restrictively and distinctively from activities that constitute 'breach of peace', 'armed attack' or mere 'law enforcement'.[96] Military activities that do not involve the threat or use of force against the territorial integrity or political independence of another State, or violate the principles of international law recognised in the UN Charter, are not prohibited under Article 301.[97]

6.1.3.3 Obligation of Due Regard

Another limitation on using ocean space for military purposes is that the operating State must have due regard for the interests of other States in exercising their rights and obligations.[98] More broadly, in fulfilling their

[93] M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 155. See opposite opinion and discussion in Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13 J Conflict & Security L 77; Jianjun Gao, 'Comments on Guyana v. Suriname' (2009) 8 Chinese J Int'l L 199.

[94] UN Charter Article 103.

[95] Boczek (1989) 370–371.

[96] Gray (2018) 36–40; Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. I (2nd ed., Oxford University Press 2002) 117–125; 金永明,《中美专属经济区内军事活动争议的海洋法剖析》,太平洋学报,第19卷第11期,2011年11月,74–81,第76页 (JIN Yongming, 'A Dissection of Disputes between China and the United States over Military Activities in Exclusive Economic Zone by the Law of the Sea' (2011) 19(11) Pacific Journal 74, 76).

[97] Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III (Martinus Nijhoff 1995) 91; James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press 2011) 253; O'Brien (2017) 1944.

[98] UNCLOS Articles 58(2)–(3), 87(2).

reciprocal due regard obligation, States must act in good faith and exercise their rights, jurisdiction and freedoms 'in a manner which would not constitute an abuse of right'.[99]

The drafting history of the provisions of the EEZ show that early proposals first established the new sovereign rights and jurisdiction of coastal States as intrusions to the high seas freedoms and then made efforts to preserve certain freedoms for all States.[100] As discussed in Chapter 3, the inclusion of a mutual due regard obligation emphasises that both parties' rights and freedoms are not absolute, but must be exercised in a reasonable and fair way so as not to infringe another State's freedoms or rights.[101] The reciprocal duties of due regard contain both substantive and procedural aspects concerning the actions of both sides.[102] In respect to conducting military activities in the EEZ, the operating State must recognise, consider and balance the legitimate rights and obligations of other States, and act in good faith to consult and negotiate in the event of a conflict.[103]

The reciprocal due regard obligation reflects the basic principle of establishing and maintaining an appropriate balance of rights and freedoms between the coastal State and other States in the EEZ. However, there are no agreed specific criteria for States to measure whether their conduct of military activities has fulfilled the due regard obligation. The question of whether an activity is conducted in accordance with the due regard obligation therefore must be decided on a case-by-case basis by the States involved. In some cases, other relevant provisions will assist with the interpretation of the connotation of the due regard obligation. For example, the coastal State may not establish military artificial islands, installations and structures 'where interference may be caused to the use

[99] UNCLOS Article 300.

[100] Nordquist, Nandan and Rosenne (1993) 556.

[101] See discussion in Chapter 3 in this volume. Moritaka Hayashi, 'Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms' (2005) 29 Marine Policy 123, 133.

[102] Tullio Scovazzi, '"Due Regard" Obligations, with Particular Emphasis of Fisheries in the Exclusive Economic Zone' (2019) 34 Int'l J Marine & Coastal L 56, 63.

[103] Ibid; Ioannis Prezas, 'Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States' (2019) 34 Int'l J Marine & Coastal L 97, 105–107; George K. Walker, 'Defining Terms in the 1982 Law of the Sea Convention IV: The Last Round of Definitions Proposed by the International Law Association (American Branch) Law of the Sea Committee' (2005) 36 Cal West Int'l LJ 133, 174–175.

of recognised sea lanes essential to international navigation'.[104] Also, one can confidently say that activities of any kind that could cause significant damage to the natural resources being exploited by the coastal State or deny access to the area of such exploitation would be contrary to the due regard obligation.[105]

Moreover, it has been argued that the reciprocal obligations of due regard flow also 'from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in Articles 192 and 193 of the Convention'.[106] Although a military entity is exempted from the environmental provisions of UNCLOS, the operating State must adopt appropriate measures, on the basis of not impairing operations or operational capabilities of such entities, to ensure that they act in a manner consistent, so far as is reasonable and practicable, with the environmental provisions.[107] In particular, the operating State has the responsibility to ensure that activities within its jurisdiction or control, including military activities, do not cause damage to the environment of other States.[108]

In conclusion, even on the high seas, the freedom to conduct military activities is neither absolute nor static, but is a balanced right that subjects States to the duty of having due regard for the interests of other States and for peaceful purposes.[109] Moreover, States may conclude bilateral or multilateral agreements to regulate conflicting uses of the sea.[110] Additional restrictions on the freedom to use ocean spaces for military purposes are predictable according to the legal regime of the specific sea area where such activities take place. States have been conducting military activities for various purposes within their own EEZ and

[104] UNCLOS Article 60(7).
[105] Oxman (1983–1984) 838; Sam Bateman, 'The Regime of the EEZ: Military Activities and the Need for Compromise?' in Tafsir M. Ndiaye and Rüdiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff 2007) 569, 573.
[106] Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4, para 216; Prezas (2019) 107–108.
[107] UNCLOS Articles 192, 194(4), 236, 300; Pascale Ricard, 'The Limitations on Military Activities by Third States in the EEZ Resulting from Environmental Law' (2019) 34 Int'l J Marine & Coastal L 144, 151–152.
[108] UNCLOS Article 194(2); Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), UN Doc A/Conf.48/14/Rev.1 (1973), Principle 21; Rio Declaration on Environment and Development (Rio de Janeiro, June 1992), UN Doc A/CONF.151/26 (Vol. I) (12 August 1992), Principle 2; Ricard (2019) 155–157.
[109] UNCLOS Articles 87(2), 88; O'Connell (1988) 796–797.
[110] UNCLOS Article 311.

in another State's EEZ, but the extent to which rights and duties are modified or affected remains a controversial matter.

6.2 Military Security in the Exclusive Economic Zone

UNCLOS has established the EEZ as a *sui generis* zone that is neither subject to coastal State sovereignty nor possessing high seas status.[111] UNCLOS grants the economic interests exclusively to the coastal State and reserves communication freedoms to all States. Military security interests, in general, are not explicitly attributed to either the coastal State or other States.[112] Nonetheless, a diverse group of States have asserted security claims beyond the limit of the territorial sea to varying degrees. Essentially, this phenomenon reflects the fact that maritime space is commonly linked with the concept of global security, which inevitably affects territorial interests.[113]

6.2.1 *National Security Interests at Sea*

Freedom of the seas, especially the free movement of military forces, has come to be regarded as essential for maintaining and advancing the national security interests of States.[114] However, national security interests alone are not a solid foundation for seeking to qualify the freedom to use the sea under the jurisdiction of another State for military purposes, as security interests are adjusted according to the changing international environment and are often confronted by the extension of national jurisdiction by the coastal State for security purposes.[115] The scope and meaning accorded to the notion of national security at sea – however different according to the coastal State or other States – influence which interests need to be protected and which activities need to be regulated.

States, coastal or landlocked, large or small, use ocean space for a great variety of purposes under many different circumstances.[116] The ocean is

[111] UNCLOS Article 55.
[112] Tallinn Manual 2.0 (2017) 240.
[113] Kraska (2011) 302; Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 4.
[114] Kraska (2011) 153.
[115] O'Connell (1988) 796–797.
[116] McDougal and Burke (1985) 14–15.

not only the place for natural resource development but also the centre of sea lanes communication and other human activities, including military activities.[117] Ensuring the use of the ocean for military training and planning, manoeuvres, weapons testing or other military operations is essential for maintaining and enhancing the capability of States to protect their security interests at sea.[118] Consequently, the adjacent sea areas are of crucial importance to promoting States' strategic and military interests. For these purposes, States are advancing claims not only to the use of ocean space under their jurisdiction but also to securing effective and efficient access to the ocean space of others, as well as to sharing in the benefits of using the high seas.[119]

On the one hand, coastal States have concerns in relation to national security interests and the protection of natural resources and the marine environment in the adjacent sea areas and tend to extend their control as far as possible to prevent threats coming from the sea.[120] This includes placing limitations on foreign military activities in the EEZ.[121] The development of new military technologies has enabled the proliferation of a number of small and medium-sized navies to control their immediate maritime domains, which contributes to an overall trend in which more States are in favour of limiting the freedom of use of the seas.[122] China, for example, has on various occasions protested and challenged foreign military activities, especially reconnaissance conducted within its EEZ, and asserted that such activities endangered China's national security interests.[123]

[117] Kraska (2011) 139.

[118] Peter A. Dutton, 'Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace' (2009) 103 Am J Int'l L 691, 707–708.

[119] McDougal and Burke (1985) 17–18.

[120] Klein (2011) 26–27.

[121] Kraska (2011) 214; 郑雷,《论中国对专属经济区内他国军事活动的法律立场—以"无暇号"事件为视角》,法学家,2011年第1期,137–146,第140–144页 (ZHENG Lei, 'The Chinese Legal Position on Foreign Military Activities in the EEZ – from the Perspective of the USNS Impeccable Incident' (2011) 1 The Jurist 137, 140–144); 贺赞,《专属经济区内的有限军事活动自由》,政法论坛,第33卷第4期,2015年07月,160–167,第161–162页 (HE Zan, 'The Limited Freedom of Military Activities in the Exclusive Economic Zone' (2015) 33(4) Tribune of Political Science and Law 160, 161–162).

[122] Kerry Lynn Nankivell, 'A Review of "Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics"' (2011) 42(4) Ocean Dev Int'l L 383, 384.

[123] Xiaofeng Ren, 'Commentary on Guidelines for Military and Intelligence Gathering Activities in the EEZ: Freedom of Navigation and Over-Flight does not Equal to Freedom of Military and Intelligence Gather', EEZ Group 21 Honolulu Meeting, East-West Center, Hawaii, USA, 9–10 December 2003; Guangqian Peng, 'China's Maritime

On the other hand, some States, notably powerful maritime States such as the United States, continue to consider maximising mobility in ocean space to be a fundamental national interest.[124] These States argue that ensuring a naval power retains the authority for unimpeded access to the global commons will help to prevent the emergence of security threats on and above the ocean, especially in regions where coastal States have insufficient maritime capacity to maintain order without external assistance.[125] This authority is known as 'expeditionary sea power', a military operation 'to accomplish a specific objective on the periphery or in a foreign country', which relies on the rapid deployment of naval forces.[126] This concern reflects the situation in the Horn of Africa, where international authorities have been brought in to assist the coastal States, primarily Somalia, in gathering military forces for preventing and combatting piracy and international terrorists and for providing security and order at sea.[127]

A somewhat mixed set of policies towards security interests at sea shows that most States pursue policies that enhance their national security while simultaneously fighting to limit the strategic capabilities of their opponents. However, no State can, or should, simply assert control in its own maritime neighbourhood by restraining a foreign presence while seeking unlimited and unimpeded access to areas under the jurisdiction of another State. In addition, the race for control may lead to a situation where States are suspicious of each other's intention in asserting power, and in return seek to accumulate increased power, but not necessarily feel more secure.[128] Unless there is a self-sustaining process built on mutual

Rights and Interests', in Dutton (2010) 15–21; 郑雷 (2011),第143页 (ZHENG (2011) 143); 周忠海和张小奕,《论专属经济区中的军事研究和测量活动》,法学杂志,2012年第10期,101–105,第103–104页 (ZHOU Zhonghai and ZHANG Xiaoyi, 'On Military Research and Military Survey in Exclusive Economic Zone' (2012) 10 Law Science Magazine 101, 103–104).

[124] James Kraska, 'The Law of the Sea Convention: A National Security Success – Global Strategic Mobility Through the Rule of Law' (2007) 39 Geo Wash Int'l L Rev 543, 547–548; The Law of the Sea Convention (Treaty Doc. 103-39), Hearings before the Committee on Foreign Relations United States Senate, 112 Congress, Second Session, June 14 2012, 'Perspectives from the U.S. Military', S. HRG. 112–654.

[125] Dutton (2009) 707–708.

[126] Kraska (2011) 179.

[127] United Nations Security Council S/RES/1816 (2008), 2 June 2008, Preamble.

[128] Shiping Tang, *A Theory of Security Strategy for Our Time: Defensive Realism* (Palgrave Macmillan 2010) 39.

understanding, this situation will become a vicious cycle that may provoke unnecessary conflicts, especially in times of political intensity.

It is inevitable that States want to pursue their national security interests at sea, but their approaches to achieving security vary significantly since they have different perspectives on what constitutes their prioritised interests at a given time. Although contributing to 'the strengthening of peace, security, co-operation and friendly relations among all nations' is a goal of the codification and progressive development of the law of the sea, security interests have never been clearly recognised in the EEZ under UNCLOS.[129] However, the recognition of coastal States' sovereign rights in the EEZ has given them a broader capacity to regulate activities taking place within adjacent sea areas and to prevent threats to their economic interests. It is often in this respect that some coastal States use creative interpretations of their granted rights to incorporate security interests in their EEZ.

6.2.2 *Security Claims over the Exclusive Economic Zone*

Within the territorial sea, foreign vessels must not act in a manner 'prejudicial to the peace, good order or security of the coastal State', but such language was not included in the provisions concerning either the contiguous zone or the EEZ.[130] The desire to protect sovereignty and national interests has driven some States to become more creative and expansive in their definition and interpretation of national security interests, most frequently beyond the limit of their territorial seas.[131] State practice reveals three main approaches: claiming security interests in the contiguous zone; claiming jurisdiction over military surveys or the use of military structures or installations in the EEZ; and requiring consent for the conduct of military activities in the EEZ, especially military manoeuvres involving the use of weapons or explosives (Table 6.1).

It is notable that some States have retreated from their security claims in the EEZ in association with broader territorial sea claims. Chile, for example, was the first Latin American State to proclaim a 200 NM sovereign maritime zone in 1947, but brought its claims in line with

[129] UNCLOS Preamble, para 7.
[130] UNCLOS Articles 19, 33(1), 55–56.
[131] Kraska (2011) 302–304.

Table 6.1 *Security claims over the EEZ*

State	Claims
Bangladesh	Consent required for military exercises or manoeuvres, especially with weapons or explosives, in the EEZ or on the continental shelf[a]
Brazil	Consent required for military exercises and manoeuvres, in particular those involving the use of weapons or explosives; claims exclusive rights to the establishment, operation and use of all types of artificial islands, installations and structures in the EEZ without exception, whatever their nature or purpose[b]
Myanmar	Claims security interest in the contiguous zone; claims jurisdiction to establish a security area for offshore infrastructure in the EEZ[c]
Cabo Verde	Claims exclusive jurisdiction to any other rights not recognised by third States in the EEZ; claims jurisdiction over all installations and structures of any other nature; prohibits military exercises 'with weapons'[d]
Cambodia	Claims security interests in the contiguous zone and control of all foreign activities on the continental shelf irrespective of purpose[e]
China	Enforces security laws in the contiguous zone; requires authorisation for the laying of submarine cables and pipelines on the continental shelf; consent required to conduct any surveying and mapping activities in the EEZ[f]
DPR of Korea	Prohibits any foreign person, vessel or aircraft from installing facilities, taking photographs, investigating or surveying in the EEZ[g]
Ecuador	Claims exclusive right to all types of artificial islands, installations and structures within the 200 NM of its maritime territory; exercises all residual rights and jurisdiction; requires prior notification and authorisation for the entry of any warships, naval auxiliaries or other vessels or aircraft, or ships powered by nuclear energy; requires consent for any military exercises or manoeuvres of any type[h]
Egypt	Claims security jurisdiction to a further 6 NM zone beyond and contiguous to the territorial sea; regulates all matters relating to its EEZ[i]
El Salvador	Claims sovereignty and jurisdiction over the sea and its bed and subsoil to a distance of 200 NM[j] (In the *El Salvador v. Honduras* case, the ICJ judgment refers to the territorial sea, continental shelf and exclusive economic zone of El Salvador[k])

Table 6.1 (*cont.*)

State	Claims
Guyana	Claims exclusive rights and jurisdiction over artificial islands, offshore terminals, installations and other structures and devices for all purposes[l]
India	Claims security jurisdiction out to 24 NM; requires consent for military exercises or manoeuvers, especially those involving the use of weapons or explosives;[m] claims right to verify, inspect, remove or destroy any weapon, device, structure, installation or facility which might be implanted or emplaced on or beneath its continental shelf by any other country[n]
Indonesia	Broadly defines marine scientific research; claims jurisdiction over any artificial islands or installations or other structures within the EEZ[o]
Iran	Claims jurisdiction over other installations and structures, the laying of submarine cables and pipelines, and any kid of research; prohibits foreign military activities and practices, collection of information in the EEZ[p]
Kenya	Claims jurisdiction over military surveillance installations and any structures; claims the right to regulate passage of warships and the conduct of any military manoeuvres in the EEZ[q]
Libya	Claimed the Gulf of Sidra (Surt) as Libyan internal waters with a closing line measuring approximately 300 NM[r]
Malaysia	Requires consent to conduct military exercises or manoeuvres, particularly those involving the use of weapons or explosives, in the EEZ[s]
Maldives	Purports to grant ships of all States innocent passage in the EEZ and requires all foreign vessels to attain prior authorisation before entering the EEZ[t]
Mauritius	Applies domestic laws to artificial islands, installations and structures in the EEZ and on the continental shelf as if they were in the territorial sea; claims jurisdiction over the laying of submarine cables and pipelines[u]
Mexico	Claims the right to verify, inspect, remove, or destroy any military weapon, structure, installation, device or equipment placed on its continental shelf[v]
Nicaragua	Claims over all survey activities[w]
Pakistan	Consent required for military exercises and manoeuvres in the EEZ[x]
Peru	Claims sovereignty and jurisdiction up to a distance of 200 NM 'maritime domain'[y]

Table 6.1 (*cont.*)

State	Claims
Saudi Arabia	Claims security interests in the contiguous zone; applies security laws over artificial islands, installations and structures in the EEZ[z]
Sudan	Claims security interests to a further distance of 6 NM beyond the territorial sea[aa]
Syria	Claims security interests in the contiguous zone; requires a permit for the laying of submarine cables and pipelines[bb]
Thailand	Requires consent for military exercises in the EEZ[cc]
Uruguay	Claims exclusive jurisdiction over all artificial islands, installations and structures in the EEZ; requires authorisation for foreign military exercises and any other military activity in the EEZ[dd]
Viet Nam	Prohibits any acts against the sovereignty, defence and security of Vietnam in the EEZ[ee]
Yemen	Claims security interests in the contiguous zone[ff]

[a] UNCLOS, *Declarations and Statements*, Bangladesh, Declaration made upon Ratification (27 July 2001), para 1

[b] Brazil, Law No. 8617 of 4 January 1993, on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, (1993) 23 LOSB 19, Articles 8–9; UNCLOS, *Declarations and Statements*, Brazil, Declaration made upon Signature (10 December 1982), para IV; Upon Ratification (22 December 1988), para II

[c] Myanmar, Territorial Sea and Maritime Zones Law, 17 July 2017, Articles 18(a), 20(b) www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/Myanmar_MZL_2017.pdf

[d] Cabo Verde, Law No. 60/IV/92 Delimiting the Maritime Areas of the Republic of Cape Verde and Revoking Decree-Law No. 126/77 and all Legal Provisions which contravene this Law, (1994) 26 LOSB 26, Article 13(b)(iv); UNCLOS, *Declarations and Statements*, Cabo Verde, Declaration made upon Signature (10 December 1982) and confirmed upon Ratification (19 August 1987), paras IV–VI

[e] People's Republic of Kampuchea, Decree of the Council of State of 13 July 1982, Articles 4, 6, www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf

[f] China, Exclusive Economic Zone and Continental Shelf Act (26 June 1998), Article 11, www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf; China, Surveying and Mapping Law of the People's Republic of China, 1 December 2002, Article 7 www.asianlii.org/cn/legis/cen/laws/samlotproc506/

[g] Decree by the Central People's Committee Establishing the Economic Zone of the People's Democratic Republic of Korea, 21 June 1977 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRK_1977_Decree.pdf
[h] UNCLOS, *Declarations and Statements*, Ecuador, Declaration made upon Ratification (24 September 2012), paras IV(3), X–XI, XVIII
[i] Decree concerning the Territorial Waters of the Arab Republic of Egypt of 15 January 1951, as amended by Presidential Decree of 17 February 1958, Article 9 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/EGY_1958_Decree.pdf; UNCLOS, *Declarations and Statements*, Egypt, Declarations upon Ratification (26 August 1983).
[j] El Salvador, Constitution of 13 December 1983, Article 84 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SLV_1983_Constitution.pdf
[k] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992, p. 351, General List No. 75.
[l] Guyana, Maritime Boundaries Act, 1977, Act No. 10 of 30 June 1977, Article 16 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GUY_1977_Act.pdf
[m] India, The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Acts, 1976, Act No. 80 of 28 May 1976, Articles 5(4)(a), 7(5) www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IND_1976_Act.pdf; UNCLOS, *Declarations and Statements*, India, Declaration made upon Ratification (29 June 1995), para (b)
[n] 1971 Seabed Treaty, Declaration by India, https://2009-2017.state.gov/documents/organization/74105.pdf (archived content)
[o] Indonesia, Act No. 5 of 1983 on the Indonesia Exclusive Economic Zone (18 October 1983), (1986) 7 LOSB 26, 28, Articles 1(c), 6
[p] Iran, Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, (1993) 24 LOSB 12, 14, Articles 14, 16
[q] Kenya, Chapter 371 – The Maritime Zones Act 1989, Articles 1(2), 9(1)(e) www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_1989_Maritime.pdf
[r] Libya, Information Concerning the Jurisdiction of the Gulf of Surt, www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBY_1973_Information.pdf
[s] UNCLOS, *Declarations and Statements*, Malaysia, Declaration made upon Ratification (14 October 1996), para 3
[t] Maldives, Law No. 32/76 of 5 December 1976 relating to the Navigation and Passage by Foreign Ships and Aircrafts through the Airspace, Territorial Waters and the Economic Zone of the Republic of Maldives, Article 1; Maritime Zones of Maldives Act No. 6/96, Article 14 www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MDV.htm
[u] Maiuritius, Maritime Zones Act 2005 (Act No. 2 of 2005), (2006) 62 LOSB 56–57, Articles 16(2), 17(b), 20(2)
[v] 1971 Seabed Treaty, Declaration by Mexico, https://2009-2017.state.gov/documents/organization/74105.pdf (archived content)

[w] J Ashley Roach, *Excessive Maritime Claims* (4th ed, Brill 2021) 459
[x] UNCLOS, *Declarations and Statements*, Pakistan, Declaration made upon Ratification (26 February 1997), para (iii)
[y] Peru, Peruvian Maritime Dominion Baselines Law, (2007) 64 LOSB 15, Article 1; *Maritime Dispute (Peru v. Chile)*, Judgment, ICJ Reports 2014, p. 3, para 178; 'Peru's Agent formally declared on behalf of his Government that "[t]he term 'maritime domain' used in [Peru's] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention"'
[z] Saudi Arabia, Translation of Royal Decree No. 6 dated 18/1/1433H, Statute of Maritime Delimitation of the Kingdom of Saudi Arabia (13 December 2011), Articles 11(2), 13(2)(c) www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SAU_2011_Decree.pdf
[aa] Sudan, Territorial Waters and Continental Shelf Act, 1970, Article 9 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SDN_1970_Act.pdf
[bb] Syria, Law No. 28 of 19 November 2003, (2004) 55 LOSB 16–17, Articles 20, 24(2)
[cc] UNCLOS, *Declarations and Statements*, Thailand, Declaration made upon Ratification (15 May 2011), para I(4)
[dd] Uruguay, Act No.17.033 of 20 November 1998 Establishing the Boundaries of the Territorial Sea, the Adjacent Zone, the Exclusive Economic Zone, and the Continental Shelf, Articles 6(A), 8 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/URY_1998_Act.pdf; UNCLOS, *Declarations and Statements*, Uruguay, Declaration made upon Signature (10 December 1982), para (D)
[ee] Viet Nam, The Law on Vietnamese Sea, Law No. 18/2012/QH13, 21 June 2012, Article 37(1) https://lawnet.vn/en/vb/Law-No-18-2012-QH13-on-Vietnamese-sea-23278.html
[ff] Yemen, Act No. 45 of 17 December 1977 Concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and Other Marine Areas, Article 12 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/YEM_1977_Act.pdf

UNCLOS in 1986.[132] Nicaragua, which once claimed sovereignty and jurisdiction over the adjacent sea to 200 NM that was only open to the innocent passage of foreign merchant vessels, has since adjusted its

[132] Chile, Presidential Declaration Concerning Continental Shelf, 23 June 1947, Laws and Regulations on the Regime of the High Seas (United Nations ST/LEG/SER.B/1, 11 January 1951) 6–7; Chile, Law No. 18.565 Amending the Civil Code with Regard to Maritime Space, 13 October 1986 (1), Article 1(1)–(2) www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHL_1986_18565.pdf.

claims in accordance with UNCLOS.[133] The same practice is observed by Liberia and Somalia, which rolled back from a claim of 200 NM territorial sea and established maritime zones according to UNCLOS.[134]

No fewer than thirty coastal States have explicitly sought to apply restrictions to the movement or operations of foreign warships, military aircraft or military devices in the EEZ for the purpose of safeguarding their security interests. These claims have been alleged as being inconsistent with UNCLOS and have been challenged and protested by other States, most notably the United States.[135] In addition, eleven States made objecting declarations for those coastal States that prohibited foreign military activities in the EEZ without permission. These include Belgium, Finland, Germany, Ireland, Italy, Latvia, the Netherlands, Italy, Sweden, the United Kingdom and the United States, with some arguing that the coastal State's rights and jurisdiction in the EEZ 'do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them'.[136]

6.2.3 *Protection of Security Interests as a Residual Right in the Exclusive Economic Zone*

It is clear that security interests exist in maritime areas and a number of States have claimed security interests in the EEZ without specifying the

[133] Nicaragua, Act No. 205 of 19 December 1979 on the Continental Shelf and Adjacent Sea, Articles 2, 4 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NIC_1979_Act.pdf; Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, p. 659; United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS), Table of Claims to Maritime Jurisdiction (as at 15 July 2011, under review as of 2024), www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm.

[134] Liberia, Executive Order No. 48 of 10 January 2013 Extension of Executive Order No. 39 Delimiting the Maritime Zones of the Republic of Liberia www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBR_10Jan2013_Act_EO48.pdf; Proclamation by the President of the Federal Republic of Somalia, 30 June 2014 www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_2014_Proclamation.pdf.

[135] J. Ashley Roach, *Excessive Maritime Claims* (4th ed., Brill 2021) 442–458; US Commentary (1994) 24–25.

[136] UNCLOS, Declarations and Statements; Third Conference, Official Records, Vol. XVII: Resumed Eleventh Session, Written Statements of the Plenary, A/CONF.62/WS/37 and ADD.1–2, 8 March 1983, United States of America, 244.

legal basis for their claims. As discussed earlier, there are different approaches to protecting a State's security interests in the EEZ. While several coastal States have adopted the position that they have been granted jurisdiction over all military activities to prevent security threats in the EEZ, other States insist that the right to conduct military activities is included in the preserved high seas freedoms.[137] As both sides argue for their right to claim or prohibit military activities in the EEZ, it is uncertain which side will prevail.[138] At the debate on 'peaceful uses of ocean space: zones of peace and security' in 1976, Madagascar declared that it

> could not accept a situation where its sovereignty, independence and security were subordinate to the defence interests of others, and where the rich countries used their technological superiority to weaken further the position of the developing countries in the fields of exploration and exploitation of marine resources and, in particular, in the political and military fields.[139]

Many developing States at the meeting echoed this position. However, this debate did not reach any conclusion on whether military activities should be permitted or prohibited in the EEZ. Nearly half-a-century later, the situation that Madagascar could not accept continues.

A possible solution to resolve these conflicting positions is to treat the protection of security interests, including the core element of asserting the right to conduct military activities, as a residual right in the EEZ given the lack of explicit reference in UNCLOS.[140] The conflict is primarily between the need to conduct certain military activity to achieve the protection of the security interest of one State and the interests of another State. As such, whether a State has the right to conduct certain military activity in a given context is determined in such a way to ensure a balance between different States for protecting their respective

[137] Churchill and Lowe (1999) 427.

[138] Yoshifumi Tanaka, *The International Law of the Sea* (3rd ed., Cambridge University Press 2019) 469–472.

[139] Fourth Session, Plenary Meetings, 67th Meeting (23 April 1976), 57 (Madagascar: para 13).

[140] Lowe (1986) 179; Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) 228; Alexander Proelss, 'Article 59', in Proelss (2017) 460; Scovazzi (2019) 60–62; Eduardo Cavalcanti de Mello Filho, 'The Legal Regime of the Exclusive Economic Zone and Foreign Military Exercises or Maneuvers' (2021) Storia Militare Contermporanea 361, 373–375.

interests.[141] Among the declarations and statements made by States upon ratification of and accession to UNCLOS, Belgium, Ecuador, Germany, Italy, the Netherlands, Sweden and Uruguay made explicit references to the residual rights in the EEZ that are linked with the right to conduct military activities.[142]

The guidance provided for resolving conflicts of residual rights in UNCLOS Article 59 is that it is to 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 59 reaffirms the characteristic of the EEZ as a *sui generis* zone, which provides no presumption in favour of either party, but rather a basis for both sides to argue for rights and jurisdiction over military activities, as discussed in Chapter 3.[143]

Security interests at sea present an overlapping situation where different States can advance their claim over the same military activity for different purposes. The prospect of classifying the protection of security interests in the EEZ as a residual right means that such rights are not automatically assigned to either the coastal State or other States, and the conflict arising from their exercise should be resolved 'on the basis of equity and in the light of all the relevant circumstances' within a given context.[144] When reviewing 'all the relevant circumstances', one must take into consideration the formula of attributing rights and freedoms between the coastal State and other States. As such, those favouring the coastal State must be adequately associated with their sovereign rights over natural resources and explicitly recognised jurisdiction whereas those favouring other States are closely associated with the recognised freedoms. Exercising the right to conduct military activities for security purposes, as with the exercise of other rights and freedoms, must be for peaceful purpose only and with due regard to other States' co-existing rights and duties.

[141] Tim Stephens and Donald R. Rothwell, 'The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On' (2012) 27 Int'l J Marine & Coastal L 701, 705; Robin R. Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention', in Alex G. Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005) 134–135.

[142] UNCLOS, Declarations and Statements.

[143] Churchill, Lowe and Sander (2022) 292–293; Proelss 'Article 59' (2017) 462–463.

[144] UNCLOS Article 59.

6.3 Conflicts Regarding Military Activities in the Exclusive Economic Zone

The lack of specific attribution of the right to protect security interests in the EEZ, crucially the conduct of military activities, has led to controversial interpretations and State practice that has resulted in conflicts. The controversies are focussed on two main issues: whether certain activities can be categorised as military activities, and who has the right to conduct these activities. The discussion here follows the formula set out in Article 59, and more broadly Part V of UNCLOS, concerning the attribution of rights to conduct military activities in the EEZ while taking into consideration the debate over their categorisation from both perspectives. However, it appears to be impossible to give a definitive attribution of the right to conduct military activities in the EEZ given the wide range of activities involved.[145] Four main types of activities can be identified that involve the operation of military vessels, aircraft and devices to analyse the attribution and the exercise of rights between the coastal State and other States.

6.3.1 Navigation, Overflight and Military Manoeuvres

Every State, whether coastal or landlocked, has the right to sail ships and fly aircraft entitled to fly its flag in and above the EEZ.[146] As customarily recognised, the freedom of navigation and overflight has never been absolute, in that it must be exercised for peaceful purposes only and with reasonable regard to the interests of other States in exercising their rights and freedoms, as well as fulfilling other conditions laid down in international law.[147] Such freedoms are subject to further restrictions in the EEZ as they need to be compatible with the *sui generis* legal regime.[148]

The right of all States to navigate a military ship or fly a military aircraft in the EEZ must be exercised for peaceful purposes only. The desire to establish a legal order for the seas that will facilitate international communication and promote peaceful use of the seas is clearly recognised in the Preamble and repeated in various provisions of UNCLOS.[149] As discussed earlier, the 'peaceful purposes/uses'

[145] Scovazzi (2019) 61.
[146] UNCLOS Articles 58(1)–(2), 90.
[147] Convention on the High Seas Article 2; UNCLOS Articles 87(2), 88, 300, 301.
[148] UNCLOS Article 58(3). For discussion on the freedoms of navigation and overflight in the EEZ, see Chapter 4 in this volume.
[149] UNCLOS Preamble, Articles 88, 141, 143(1), 147(2), 155(2), 240(a), 242(1), 246(3), 301.

obligation does not exclude the simple movement of any military ships or aircraft in the EEZ.[150]

In exercising the freedoms of navigation and overflight in the EEZ, States must give due regard to the rights and duties of other States using the same area. In terms of freedoms exercised by a foreign State, it must comply with the laws and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law.[151] However, military entities enjoy immunity from coastal State jurisdiction in the EEZ, especially laws and regulations on the protection and preservation of the marine environment.[152] This immunity is based on the grounds of State sovereignty and the principle of equity, because one State is not to be subjected to the jurisdiction of another.[153] When a foreign military entity violates a coastal State's rights and jurisdiction, the coastal State may require the vessel to leave the operational site immediately and the flag State assumes responsibility for any loss or damage resulting from its activities.[154]

There is emerging State practice challenging the freedom of navigation for military vessels powered by nuclear sources because of concerns about radioactive ocean contamination.[155] For instance, a nuclear-powered submarine with a 35 megawatt reactor produces about 22.4 grams of mixed fission products daily during operation, which after 100 days of disintegrating at the rate of 14.7 kilocuries, releases the equivalent amount of short-lived isotopes as a 0.42 kiloton atomic bomb.[156] Despite the relatively good safety record of nuclear-powered vessels, there are concerns over irreversible damage to the ocean environment that might be caused by a large amount of radioactive release

[150] UNCLOS Article 301. See Section 6.1.3.1 in this chapter.
[151] UNCLOS Article 58(3).
[152] UNCLOS Articles 58(2), 95, 236.
[153] UN Charter Article 2(1).
[154] UNCLOS Articles 30–31; The 'ARA Libertad' Case (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, para 64: 'although article 32 is included in Part II of the Convention entitled "Territorial Sea and Contiguous Zone", and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention' (emphasis added). By analogy, Articles 30–31 apply to the EEZ.
[155] Westing (1978) 448; Ian Hore-Lacy, *Nuclear Energy in the 21st Century* (World Nuclear University Press 2007) 93–110; United States Environmental Protection Agency, 'Nuclear Submarines and Aircraft Carriers' www.epa.gov/radtown/nuclear-submarines-and-aircraft-carriers.
[156] Westing (1978) 452–453.

resulting from either intentional or accidental damage or sinking of such vessels.[157] Numerous States restrict or forbid the movement of nuclear warships in their territorial sea and some have extended these restrictions to the EEZ.[158] However, the fact that nuclear-powered warships pose a potential environmental threat is not sufficient grounds to deprive them of the freedom of navigation in the EEZ. It remains the flag State's right and obligation to implement the appropriate preventative measures for these vessels.

Traditionally, military exercises and manoeuvres are considered operational activities as part of the freedom of movement and communication on the high seas.[159] However, it is unclear, since the establishment of the EEZ, whether these activities are considered an internationally lawful use of the sea related to the freedom of navigation that are compatible with the EEZ legal regime, or are prohibited as incompatible with the EEZ regime, or are unattributed rights.[160] State practice also shows great divergence on this issue, particularly those manoeuvres involving weapons testing or live fire exercise.[161] As stated earlier, upon signing or ratifying UNCLOS, Bangladesh, Brazil, Cabo Verde, Ecuador, India, Malaysia, Pakistan, Thailand and Uruguay explicitly declared that military exercises and manoeuvres, particularly those involving the use of weapons, are not permitted in the EEZ without the consent of the coastal State. Meanwhile, opposing declarations were made by Belgium, Finland, Germany, Italy, Sweden, the Netherlands and the United Kingdom.

It is a matter of fact that States routinely conduct military exercises and manoeuvres at sea, including in their own EEZ and in foreign EEZs, as well as on the high seas, either individually or jointly with the

[157] T. J. Mueller, J. M. Steele and A. C. Gellender, *Environmental Monitoring and Disposal of Radioactive Wastes from U.S. Naval Nuclear-Powered Ships and Their Support Facilities* (Naval Nuclear Propulsion Program, Department of the Navy, Report NT-19-1, May 2019) 7–9; International Atomic Energy Agency (IAEA), Inventory of Accidents and Losses At Sea Involving Radioactive Material (IAEA, 2001) www-pub.iaea.org/MTCD/Publications/PDF/te_1242_prn.pdf.

[158] Kraska (2011) 115, 303.

[159] Attard (1987) 86.

[160] Churchill and Lowe (1999) 427; Tanaka (2019) 469–472.

[161] Mark J. Valencia, 'Foreign Military Activities in Asia EEZs: Conflict Ahead?' in The National Bureau of Asian Research, Special Report No. 27 (May 2011) 14; United States Department of Defense, 'Military and Security Developments Involving the People's Republic of China', 2023 Annual Report to Congress (2023 China Military Power Report) 19 www.defense.gov/CMPR/.

participation of the coastal State and a third State.[162] These exercises, including missile testing and launching weapons and planes from an aircraft carriers or other warships, are important for military forces to test their strategic deployment and fighting skills in a broad range of scenarios, including evolving crisis and conflict situations.[163] For example, the North Atlantic Treaty Organization (NATO) routinely conducts large-scale military training and exercises.[164] NATO regularly deploys maritime forces in the Baltic Sea in order to exhibit forward presence, maintain a credible and capable defensive capability, and contribute to operational coherence among allied naval forces to support greater regional security and stability.[165]

The coastal State, when conducting military exercises and manoeuvres within its EEZ, must have due regard to the rights and duties of other States and must maintain peaceful purposes. UNCLOS is silent on whether the coastal State may close a certain sea area to navigation for such activities, in contrast to the explicit reference to the right to suspend innocent passage temporarily 'for the protection of its security, including weapons exercise'.[166] It may be argued that the coastal State could close a specified area within its EEZ for military exercises and manoeuvres provided that such closure has been duly published and is not impeding normal passage routes used for international navigation and overflight. NATO allies, for example, have used the Baltic Sea and the region surrounding it as a maritime training ground for over five decades. Known as the Baltic Operations (BALTOPS), the annual military exercise is aimed at delivering high-end training across the entire spectrum of naval warfare.[167]

Military exercises and manoeuvres conducted in the EEZ by a foreign State are likely to be challenged by the coastal State, particularly if such activities involve the use of weapons, and/or take place in disputed areas,

[162] Kraska (2011) 269.

[163] Naval Operations Concept 2010 (2010) 41; United Kingdom Ministry of Defence, 'Huge Military Exercise Underway', 16 April 2013 www.gov.uk/government/news/largest-european-military-exercise-underway.

[164] North Atlantic Treaty Organization (NATO), 'NATO Exercises', 28 March 2022 www.nato.int/cps/en/natohq/topics_49285.htm.

[165] NATO, 'Steadfast Defender 2021' www.nato.int/cps/en/natohq/173840.htm; NATO, 'NATO navies hold annual Northern Coasts collective defence exercise in the Baltic Sea', 9 September 2023 www.nato.int/cps/en/natohq/news_218241.htm?selectedLocale=en.

[166] UNCLOS Article 25(3).

[167] NATO, 'The 50th BALTOPS Kicks off in June', 24 May 2021 https://sfn.nato.int/newsroom/2021/the-50th-baltops-kicks-off-in-june.

and/or during periods of political tension. Numerous examples exist. The military exercises jointly conducted by the United States and South Korea were often denounced by the Democratic People's Republic of Korea as 'an irresponsible and dangerous action' and a 'rehearsal for war', which they responded to with threats of nuclear war.[168] China has firmly protested the annual joint military exercise between the Philippines and the United States, known as 'Balikatan' (shoulder-to-shoulder), and asserts that such activities have raised the risk of armed confrontation over the disputed South China Sea.[169] Such protests concerning foreign military activities are also common in the Baltic Sea, the Black Sea and the Mediterranean Sea, particularly in relation to the tension between NATO and Russia. Both Latvia and Sweden protested Russia's missile tests and military drills in the Baltic Sea in 2018 and 2020, respectively.[170] With an acceleration of tension between Türkiye and Greece over their long-standing dispute concerning maritime rights and natural resources in 2020, both sides brought in allies to conduct military exercises and drills with the intention to demonstrate strength, and issued protests over the other side's activities.[171] Despite these ongoing challenges by the

[168] KJ Kwon, 'South Korea: Joint Military Drills with US over, but Vigilance on North Remains', CNN, 30 April 2013 (online); Reuters, 'U.S., South Korea conduct joint Navy drills to counter North Korea threat', 16 October 2017, (online).

[169] Peter Symonds, 'US-Philippine Military Exercises Directed against China', World Socialist Web Site, 26 April 2012, www.wsws.org/en/articles/2012/04/usph-a26.html; Guifen Zhang, 'US-Philippines Joint Military Exercise Means Nothing for Philippines', People's Daily Online, 15 April 2013, http://english.peopledaily.com.cn/90786/8207055.html (Accessed in December 2022); Renato Cruz de Castro, 'Balikatan 2019 and the Crisis in Philippine-China Rapprochement', Asia Maritime Transparency Initiative, 23 April 2019 https://amti.csis.org/balikatan-2019-and-the-crisis-in-philippine-china-rapprochement/; Brad Lendon, 'US and Philippine Forces Fire on Mock Enemy Warship in South China Sea Military Exercise', CNN, 26 April 2023 (online); Bree Megivern, 'Why China Is Wary of US 'Ironclad' Alliance With the Philippines', The Diplomat, 2 May 2024 (online).

[170] Gederts Gelzis, 'Russian Rocket Tests Force Partial Closing of Baltic Sea, Airspace', Reuters, 4 April 2018 (online); Thomas Erdbrink and Andrew E Kramer, 'Sweden Raises Alarm over Russian Military Exercises', The New York Times, 26 August 2020 (online).

[171] 'France Joins Military Exercises in East Mediterranean', Reuters, 26 August 2020 (online); 'Tensions Rise in Eastern Mediterranean after Turkey Launches New Military Drills', Euronews, 29 August 2020 (online); Monique O'Neill, 'Greece, Cyprus and the U.S. join forces for naval SOF exercise in the Mediterranean Sea', 10 February 2021 www.eucom.mil/article/41100/greece-cyprus-and-the-us-join-forces-for-naval-sof-exercise-in-the-mediterranean-sea.

coastal States, the ICJ concluded in *Nicaragua (Merits)* that the conduct of military manoeuvres closer to a coastal State's border is not in breach of 'the principle of forbidding recourse to the threat or use of force'.[172]

The operating State, either the coastal State or a foreign State, is obligated to adopt appropriate measures to ensure that its military entities act in a manner consistent with the environmental protection and preservation provisions in UNCLOS.[173] Such measures must not impair operations or operational capabilities of such entities and must be reasonable and practicable.[174] Such measures may include the assessment of environmental impacts and subsequent communication with potentially affected States.[175] However, the vague language and general obligation leaves a coastal State little to no means to challenge foreign military activity based on environmental obligations. Likewise, it would be difficult for any foreign State to challenge a coastal State's military activity conducted in its own EEZ on the basis of environmental obligation.

In summary, warships and military aircraft of all States enjoy the freedom of navigation and overflight in the EEZ, including the freedom to conduct military manoeuvres despite the lack of consensus in relation to their legalities among States.[176] As long as these activities are conducted consistent with the due regard obligation and peaceful purposes, they are not prohibited in principle.[177] Up until a certain point, foreign military presence and exercises are to be tolerated in the EEZ of a coastal State. In the problematic situation where weapons are used, there are a range of factors that would be applicable in determining whether their use fulfils these requirements, particularly the due regard obligation. These would include whether such use causes undue restriction on the freedoms of navigation and overflight, or causes harm to natural resources. The operating State must ensure that it fulfils these obligations and assumes responsibility if such exercises damage the rights and

[172] Military and Paramilitary Activities (Nicaragua v. United States of America) (1986) paras 92, 227.
[173] UNCLOS Articles 192, 194, 236.
[174] UNCLOS Article 236.
[175] UNCLOS Articles 204–206, 300; Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, p. 14, para 204; Ricard (2019) 160–162.
[176] Rothwell and Stephens (2010) 280.
[177] Churchill, Lowe and Sander (2022) 280–281.

jurisdiction of the coastal State, or the freedoms of other States. In order to reduce tension, it would be a good practice for the operating State to give notice to the coastal State or other interested States and provide information of what, when and where such military exercises will take place. Moreover, given the circumstances and by the nature of the rights that could be affected by the military exercise, the operating State should initiate a certain level of consultation with the rights-holding State to fulfil their due regard obligation.[178]

6.3.2 *Espionage, Intelligence Gathering and Surveillance*

States have advanced the need to acquire knowledge of maritime areas, mainly through intelligence gathering activities, to make decisions about their national defence strategies.[179] There is no general rule in international law that prohibits or limits activities of intelligence gathering beyond the limit of the territorial sea.[180] Despite different interpretations on the legality of military intelligence gathering in the EEZ, in practice, States have tolerated such activities for a long time.[181] Peacetime military intelligence gathering, also known as reconnaissance or espionage, is principally conducted by space-based, airborne, ship-based and seabed-attached maritime surveillance systems, including cyber infrastructure.[182] Although peacetime military intelligence gathering does not per se violate international law, the method by which it is carried out might do so.

[178] In the Matter of the Chagos Marine Protected Area Arbitration Before an Arbitral Tribunal Constituted under Annex VII to the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award, 18 March 2015, PCA Case No. 2011-03, para 519 (Chagos MPA Arbitration).

[179] Klein (2011) 214–215; Asaf Lubin, 'The Liberty to Spy' (2020) 61(1) Harv Int'l LJ 185, 233–235.

[180] UNCLOS Article 19(2)(c); Inaki Navarretet and Russell Buchan, 'Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions' (2019) 51 Cornell Int'l LJ 897, 909–910.

[181] Dieter Fleck, 'Individual and State Responsibility for Intelligence Gathering' (2006-2007) 28 Mich J Int'l L 687, 688–689.

[182] Ball (2004) 67–68; Efthymios Papastavridis, 'Intelligence Gathering in the Exclusive Economic Zone' (2017) 93 Int'l Law Stud 446, 450; Tallinn Manual 2.0 (2017) 168. The use of seabed-attached devices are discussed in Section 6.3.4 in this chapter.

Satellite-based reconnaissance was initiated by the United States in 1958 to spy on the Union of Soviet Socialist Republics (USSR) and its allies.[183] The Galactic Radiation and Background satellite system, the first satellite system for signal surveillance, detected radar as it passed within the line of sight of a transmitting radar system; it then beamed down the radar signals it intercepted to a network of ground stations and transferred them to magnetic tape, which was then taken by courier to the United States for analysis.[184] The technology of the Galactic Radiation and Background satellite system is now obsolete, but conducting electronic surveillance from orbit continues to be a primary technique.[185] Except in cases that use artificial islands, installations and structures for on-land stationing, conducting satellite-based reconnaissance in another State's EEZ is less likely to interfere with the coastal State's sovereign rights or jurisdiction.

Airborne surveillance systems are operated by military aircraft that collect both signal and electronic intelligence, which has the advantage of providing regular, real-time surveillance of the electromagnetic emissions in important parts of the spectrum that are undetectable from ground sites.[186] Traditional manned aircraft can intercept and record the emissions of radar and other radio/electronic systems, as well as signals of computer-to-computer data traffic, and even phone traffic, to map air defence networks, airfields and missile batteries for target planning purposes.[187] The advanced airborne facility involves unmanned aerial vehicles, which can be launched outside the EEZ on a pre-programmed mission without the launching ship or aircraft actually entering the zone itself.[188] Since the coastal State's jurisdiction in the airspace above the EEZ is limited to activities for the economic exploitation and exploration of the zone, such as the production of energy from wind, it would be difficult to challenge foreign airborne surveillance unless it interferes with these economic activities.[189]

Likewise, military surveillance ships are widely used to collect intelligence at sea. For example, the United States maintains six ocean surveillance ships as part of the twenty-one ships under the Military Sealift

[183] Mark F. Moynihan, 'The Scientific Community and Intelligence Collection' (2000) 53 Physics Today 51, 53.
[184] Ibid 54–56.
[185] Ibid 55; Marco Giulio Barone, 'Maritime Surveillance Radars: Eyes on the Seas' (2020) 4 Military Technology 49, 49. 2023 China Military Power Report 97-103.
[186] Ball (2004) 69; Naval Operations Concept 2010 (2010) 83–84.
[187] Ball (2004) 69.
[188] Ibid 71; Naval Operations Concept 2010 (2010) 83–84.
[189] UNCLOS Article 56(1)(a).

Command's Special Mission programme,[190] which routinely collects intelligence on the high seas and in foreign EEZs, despite diplomatic protests from China, India, Brazil and other States.[191] The surveillance ships conduct a variety of missions, including collecting signal and electronic intelligence; monitoring naval exercises, communications, or combatant surveillance; monitoring the movement of ballistic missile–carrying submarines; and using passive and active low-frequency sonar arrays to detect and track undersea threats.[192] Some of the detection techniques used by the surveillance ships – high-powered sonar arrays, for example – may disorient or injure whales and other marine mammals,[193] which arguably could interfere with the coastal State's sovereign rights to explore, conserve and manage such resources.

There have been increasing concerns regarding the legitimacy of certain highly advanced technologies used in intelligence gathering and surveillance. Particularly relevant in this context are active signals intelligence activities, some of which are deliberately provocative and are intended to generate responses from the targeted coastal State, while others may involve intercepting naval radar and emitters to locate, identify and track surface ships in the targeted areas.[194] These activities do not have a direct impact on natural resources and appear to cause far greater interference with communication and defence systems of the targeted State. These highly provocative activities may cause or exacerbate conflicts, since many coastal States consider them hostile and incompatible with the peaceful purposes obligation.[195]

[190] United States Navy's Military Sealift Command, 'Special Mission (PM2)', Oceanographic Surveillance Ships: USNS Able, USNS Effective, USNS Impeccable, USNS Loyal, HOS Red Rock and USNS Victorious www.msc.usff.navy.mil/Ships/Special-Mission-PM2/.

[191] Pedrozo (2010) 12–15.

[192] Ball (2004) 73–76.

[193] Supreme Court of the United States, 'Winter, Secretary of the Navy, et al. v. Natural Resources Defense Council, Inc., Et Al.', Certiorari to the United States Court of Appeals for the Ninth Circuit, No.07-1239, decided on 12 November 2008, 5–6; Douglas P Nowacek and Brandon L Southall, Effective Planning Strategies for Managing Environmental Risk Associated with Geophysical and other Imaging Surveys (IUCN 2016); Erica Fleishman et al., 'Current Status of Development of Methods to Assess Effects of Cumulative or Aggregated Underwater Sounds on Marine Mammals', in Arthur N Popper and Anthony Hawkins (eds), The Effects of Noise on Aquatic Life II (Springer, 2016) https://doi.org/10.1007/978-1-4939-2981-8_36.

[194] Ball (2004) 69; Papastavridis (2017) 471.

[195] Hayashi (2005) 126, 130; Klein (2011) 220; 周忠海和张小奕 (2012), 第103–104页 (ZHOU and ZHANG (2012), 103–104).

The lack of legal clarity in relation to espionage, intelligence gathering and surveillance in the EEZ has been problematic, especially in situations where such activities are conducted in a foreign EEZ.[196] Alongside the firm position held by the United States, the United Kingdom also considers the airspace above the EEZ as international airspace, in which military aircraft of another State may lawfully fly 'for the purpose of surveillance and observation of activities within that other state's national airspace or territory'.[197] China, on the other hand, constantly challenges unauthorised foreign intelligence-gathering and surveillance activities in its EEZ.[198] China recognises that all States enjoy 'the freedom of navigation and overflight and of laying submarine cables and pipelines, and shall enjoy other legal and practical marine benefits associated with these freedoms' within the Chinese EEZ.[199] However, the phrase 'other legal and practical marine benefits associated with these freedoms' is different from the expression of 'other internationally lawful uses of the sea related to these freedoms' used in UNCLOS Article 58(1). The phrase in the Chinese law only equals the expression of 'such as those associated with the operation of ships, aircraft and submarine cables and pipelines' that was used to exemplify 'other internationally lawful uses'.[200] This language would narrow the scope of the associated freedoms enjoyed by other States, which is arguably intended to restrict foreign military activities in China's EEZ.

The debate over foreign intelligence-gathering activities was highlighted in April 2001 when a US Navy EP-3 surveillance plane collided with a Chinese F-8 fighter jet approximately 70 NM southeast of Hainan Island, killing the Chinese pilot and making a forced landing at Lingshui Military Airport.[201] The Chinese view was that the intelligence collected

[196] Mark J. Valencia, 'Introduction: Military and Intelligence Gathering Activities in the Exclusive Economic Zones: Consensus and Disagreement II' (2005) 29 Marine Policy 98. Amaani Lyle, 'DoD Registers Concern to China for Dangerous Intercept', 22 August 2014, www.defense.gov/News/News-Stories/Article/Article/603111/dod-registers-concern-to-china-for-dangerous-intercept/.

[197] United Kingdom, Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict (JSP 383, 2004) Chapter 12: Air Operations, para 12.14, www.gov.uk/government/organisations/ministry-of-defence/series/jsp-383.

[198] Christopher J. Castelli, 'Clashing Views Exchanged in Sino-U.S. Maritime Safety Talks' (2010) 26(46) Inside the Pentagon 11, 11–12.

[199] China, Exclusive Economic Zone and Continental Shelf Act Article 11.

[200] UNCLOS Article 58(1).

[201] Shirley A Kan et al., 'China-US Aircraft Collision Incident of April 2001: Assessments and Policy Implications', CRS Report for Congress (10 October 2001) 1 www.fas.org/

could be used for hostile purposes and such activity went far beyond the scope of overflight and abused such a freedom, breaching the due regard obligation and peaceful purposes, which constituted an infringement upon China's sovereignty.[202] The United States claimed it was engaging in a traditional military activity over international waters, which was legally permissible and conducted with due regard of China's rights as a coastal State.[203] It is generally recognised that the airspace above the EEZ is governed by the 'specific legal regime' as established in UNCLOS, which is different from the international space asserted by the United States.[204] Thus, the United States military plane flying above the Chinese EEZ must fulfil the obligation of operating for peaceful purposes and have due regard to the rights and duties of China.[205] However, the mere assertion that performing reconnaissance in the EEZ constitutes an abuse of the right of overflight seems too weak to support China's position of prohibiting the entrance of US aircraft altogether. The Chinese position is further weakened by its own increased surveillance activities in the East and South China Sea, particularly around disputed islands with Japan, as well as observing a US missile defence test off Alaska in 2017 and 2021.[206]

There have been many incidents involving coastal States and foreign surveillance ships in Asian waters. In December 2001, the Japanese Coast Guard chased an alleged North Korean spy ship out of its EEZ using at least twenty-five vessels and fourteen aircraft, attacking and eventually

sgp/crs/row/RL30946.pdf; Eric Donnelly, 'The United States-China EP-3 Incident: Legality and Realpolitik' (2004) 9(1) J Conflict & Sec L 25, 25–26; Robert T. Kline, 'The Pen and the Sword: The People's Republic of China's Effort to Redefine the Exclusive Economic Zones through Maritime Lawfare and Military Enforcement' (2013) 216 Mil L Rev 122, 125.

[202] 发言人谈美国军用侦察机撞毁中国军用飞机事件真相和中方有关立场 (Spoke's Person on the Facts and China's Position on the Incident of United States Military Surveillance Plan Crushed Chinese Military Plan) 3 April 2010, www.mfa.gov.cn/web/ziliao_674904/zt_674979/ywzt_675099/2355_676073/2379_676137/200104/t20010403_9289942.shtml.

[203] Kan (2001) 20; Roach (2021) 413–420.

[204] UNCLOS Articles 55, 86.

[205] UNCLOS Articles 58(2)–(3), 88, 300–301.

[206] Sui-Lee Wee and Linda Sieg, 'China Surveillance Ships near Islands Disputed with Japan', Reuters, 14 September 2012 (online); Martin Fackler, '日本抗议中国战机再次威胁日方侦察机 (Japan Protested over Chinese Military Plan threating Japanese Surveillance Aircraft)', The New York Times, 12 June 2014 (online); Roach (2021), 454; 2023 China Military Power Report v, 19, 52–53.

sinking the suspected ship in China's EEZ, killing the fifteen crewmembers on board.[207] The United States and China continue to have confrontations in the Yellow Sea, the East China Sea and the South China Sea, with China challenging the activities of US surveillance ships. Most notably, on 8 March 2009, five Chinese vessels surrounded the USNS *Impeccable* approximately seventy-five miles south of Hainan Island in the South China Sea and forced it to stop operating and leave the area.[208] The United States made a formal complaint, labelling the Chinese actions as reckless, unprofessional and unlawful; China responded that *Impeccable* had illegally engaged in intelligence data gathering and was in violation of Chinese domestic law and international law.[209] Given the ongoing tension around disputed islands in the East and South China Seas and the battle for maritime dominance between China and the United States in the Asia-Pacific region, the suspicion over foreign military surveillance activities will continue to provoke conflicts among the coastal State and operating States.[210]

The need to obtain intelligence in the EEZ seems even more important for the coastal State based on its security concerns. Coastal States are also not prohibited from conducting espionage, intelligence-gathering and surveillance activities in their EEZs provided that they are not impeding the freedoms of navigation and overflight and such activities are for peaceful purposes. In addition to the often secret espionage activities, coastal States are increasingly using air defence identification zones (ADIZ) and maritime identification zones to obtain information that could further complicate the debate on military intelligence gathering

[207] James Conachy, 'Japan Militarisation Accelerates after Sinking of Alleged North Korean Spy Ship', World Socialist Web Site, 9 January 2002 www.wsws.org/en/articles/2002/01/jap-j09.html.

[208] Thom Shanker and Mark Mazzetti, 'China and US Clash on Naval Fracas', The New York Times, 10 March 2009 (online).

[209] 'Raw Data: Pentagon Statement on Chinese Incident with US Navy', Fox News, 9 March 2009 (online); 'China Hits out at US on Navy Row', BBC News, 10 March 2009 (online).

[210] Felix K. Chang, 'China's Maritime Intelligence, Surveillance, and Reconnaissance Capability in the South China Sea', Foreign Policy Research Institute, 5 May 2021 www.fpri.org/article/2021/05/chinas-maritime-intelligence-surveillance-and-reconnaissance-capability-in-the-south-china-sea/; Mark J. Valencia, 'US-China Race for Surveillance Supremacy in South China Sea Risks a Needless Clash', South China Morning Post, 14 May 2021 (online); 2023 China Military Power Report 138-139.

and surveillance activities in the EEZ.[211] These coastal surveillance regulations should have limited impacts on foreign military aircraft and ships, since they should be exempted given their immunity status. However, there has been some questionable State practice on the applicable regulations that were adopted with an aim to limit foreign espionage activities. China, for example, requires all aircraft entering the East China Sea ADIZ to submit flight plans and maintain communications through radio and radar, and will assert necessary armed response to non-compliant aircraft.[212]

Unlike in the territorial sea, where 'any act aimed at collecting information to the prejudice of defence or security of the coastal States' is forbidden, such activities are not specifically outlawed in the EEZ.[213] Despite the ongoing debates, both the coastal State and other States have been conducting espionage, intelligence-gathering and surveillance activities in the EEZ. In general, these activities have the essential feature that the data generated are used for military purposes only and are not released to the public. It is often accepted that the operating State has the right to determine if a certain activity is of military nature and for military purposes, with other States having less means to question this categorisation.[214] The coastal State, for instance, would have to accept that the data allegedly collected for military purposes does not have direct economic value and would not impede the normal exercise of its sovereign rights and jurisdiction. Nevertheless, the increasing sophistication of surveillance capabilities has put the appropriate balance between the

[211] See further discussion in Chapter 8 in this volume.

[212] 中华人民共和国东海防空识别区航空器识别规则公告, 2013年11月23日 (Announcement of the Aircraft Identification Rules of the East China Sea Air Defense Identification Zone of the People's Republic of China, 23 November 2013), www.gov.cn/jrzg/2013-11/23/content_2533101.htm; 中华人民共和国政府关于划设东海防空识别区的声明(Statement by the Government of the People's Republic of China on the Establishment of the East China Sea Air Defense Identification Zone),23 November 2013 www.gov.cn/jrzg/2013-11/23/content_2533099.htm; 王崇敏和邹立刚,《我国在专属经济区建立防空识别区的探讨》,法学杂志,2013年第1期,95–99,第99页 (WANG Chongmin and ZOU Ligang, 'Discussion on Building Air Defence Identification Zone in Our Exclusive Economic Zone' (2013) 1 Law Science Magazine 95, 99).

[213] UNCLOS Article 19(2)(c).

[214] In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016, PCA Case No 2013-19, paras 1027–1028.

coastal State and the operating State to a test, as the security interests recognised and protected in the territorial sea or even the territory of the coastal State may be infringed upon without the offender physically entering these areas.[215] However, until the right to protect security interests is recognised in the EEZ, the coastal State does not have a strong legal position to challenge the legality of intelligence gathering and surveillance by a foreign State, other than the vague mutual due regard obligation and the prohibition on the threat or use of force.

6.3.3 *Military Survey and Research*

The military survey is another type of military activity that has been routinely conducted in the EEZ irrespective of the controversy over its legitimacy.[216] It is closely related to the hydrographic survey, oceanographic survey and marine scientific research activities. UNCLOS has relatively clear rules on jurisdiction over marine scientific research in the EEZ, but since it does not provide definitions for any of these activities, States employ differing interpretations that may confuse the attribution of jurisdiction over a specific activity. Thus, there is often disagreement over whether surveys are a marine scientific research activity, and whether military surveys and research should be exempted from coastal State jurisdiction.

Marine scientific research, in general, refers to 'any study or related experimental work designed to increase man's knowledge of the marine environment' that falls under coastal State jurisdiction in the EEZ.[217]

[215] Klein (2011) 220–221.

[216] UN DOALOS, Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea (United Nations 2010) 5–6; Kraska (2011) 270–271; 金永明 (2011) 第76–77页 (JIN (2011) 76–77); 王传剑和李军,《中美南海航行自由争议的焦点法律问题及其应对》,东南亚研究,2018年第5期,132–158,第147页 (WANG Chuanjian and LI Jun, 'The Focal Legal Issues of Sino-US Dispute over the Freedom of Navigation in South China Sea and Their Countermeasures' (2018) 5 Southeast Asian Studies 132, 147).

[217] Alfred H. A. Soons, *Marine Scientific Research and the Law of the Sea* (TMC Hague 1982) 6; UNCLOS Articles 246, 253; United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *Marine Scientific Research: A revised guide to the implementation of the relevant provisions of the United Nations Convention on the Law of the Sea* (United Nations, 2010) 4–6; United States, Department of the Navy, 'Diplomatic Clearance for U.S. Navy Marine Data Collection Activities in Foreign Jurisdictions', OPNAV INSTRUCTION 3128.9G, 22 April 2021, para 4(d) (OPNAV INSTRUCTION 3128.9G) www.secnav.navy.mil/doni/Directives/03000%20Naval%20Operations%20and%20Readiness/03-100%20Naval%20Operations%20Support/3128.9G.pdf.

Hydrographic survey is defined by the International Hydrographic Organization as

> [a] SURVEY having for its principal purpose the determination of DATA relating to bodies of water. A hydrographic survey may consist of the determination of one or several of the following classes of DATA: DEPTH of water; configuration and NATURE OF THE BOTTOM; directions and force of CURRENTS; HEIGHTS and TIMES of TIDES and water stages; and location of topographic features and fixed objects for survey and navigation purposes (emphasis in the original).[218]

Oceanographic survey is defined as '[a] study or examination of any physical, chemical, biological, geological or geophysical condition in the OCEAN, or any part of it. An expedition to gather DATA, samples or information to conduct such studies or examination' (emphasis in the original).[219]

The 1958 Convention on the Continental Shelf distinguished between 'purely scientific research into the physical or biological characteristics of the continental shelf' and other resource-oriented research.[220] The former refers to activities that are solely intended to increase human knowledge about the ocean with the results made internationally available, regardless of their subsequent application, while the latter refers to those undertaken primarily for specific practical purposes, commonly known as applied scientific research.[221] The coastal State may not normally withhold its consent for pure scientific research, but may reserve authorisation over applied scientific research.[222]

UNCLOS does not distinguish survey from scientific research, but various articles refer to research and survey activities separately, and Part XIII deals solely with marine scientific research.[223] A close reading of the provisions shows that the separation only occurs in the context of special passage regimes, including innocent passage, transit passage and archipelagic sea lanes passage, to ensure such passage is 'continuous and expeditious'.[224] It is unclear why survey activities

[218] International Hydrographic Organization (IHO), S-32 IHO - Hydrographic Dictionary, (Hydrographic Dictionary Working Group (HDWG) 2019), Eng ID 5244, https://iho.int/en/standards-and-specifications.
[219] Ibid Eng ID 5250.
[220] Convention on the Continental Shelf Article 5(8).
[221] Soons (1982) 6.
[222] Convention on the Continental Shelf Article 5(8).
[223] UNCLOS Articles 19(2)(j), 21(1)(g), 40, and Part XIII.
[224] UNCLOS Articles 18(2), 19(2)(j), 21(1)(g), 39(1)(c), 40, 54.

have been singled out in these provisions, but State practice remains divided on whether UNCLOS established a separate legal regime for surveying.[225]

UNCLOS nevertheless implies its acceptance of the different treatment between pure and applied scientific research as adopted in the 1958 Convention on the Continental Shelf. It requires that coastal States should normally 'grant their consent for marine scientific research projects' in their EEZs or on their continental shelves to be carried out 'in order to increase scientific knowledge of the marine environment for the benefit of all mankind', emphasising the right to reserve consent for projects for any specific practical purposes.[226] Surveys, both hydrographic and oceanographic, serve the purpose of obtaining knowledge of the condition of the waters and the seabed. Some survey activities also employ the same methods and equipment as scientific research, in particular oceanographic sampling, mid-water and ocean floor parameters, launch and recovery of hydrographic survey launches or other scientific packages, including the handling, monitoring and servicing of remotely operated vehicles.[227] Hence, surveys in general should be considered part of the broader scope of marine scientific research as a type of applied scientific research. However, certain specific survey activities may be exempted from coastal State jurisdiction if they can be assimilated to other preserved freedoms, such as cable surveys, which are regarded as activities associated with the operation of submarine cables.[228] Jurisdiction over hydrographic and oceanographic surveys is more controversial because they provide vital information to determine the geographical features of the seabed that facilitates the exploration and exploitation

[225] Klein (2011) 222–223; Bateman (2005) 165; Sam Bateman, 'A Response to Pedrozo: The Wider Utility of Hydrographic Surveys' (2011) 10 Chinese J Int'l L 117, 179; Roach (2021) 486–493.

[226] UNCLOS Article 246(3) and (5); Myron H. Nordquist, Shabtai Rosenne and Alexander Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV (Martinus Nijhoff 1991) 517–518.

[227] Australian Government, Geoscience Australia, 'Marine and Coastal Survey Techniques' www.ga.gov.au/scientific-topics/marine/survey-techniques; Sam Bateman, 'Hydrographic Surveying in Exclusive Economic Zones: Is it Marine Scientific Research?', in Myron H Nordquist, Tommy Koh, and John Norton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Brill 2009) 105, 111–114.

[228] UNCLOS Article 58(1). See also discussion in Chapter 5 in this volume.

of natural resources, which are of great concern for coastal States' economic interests.[229]

The US Navy has adopted the definition of military survey as

> activities undertaken in territorial seas, archipelagic waters, straits for navigation, the EEZ, high seas and on the continental shelf involving marine data collection (whether or not classified) for military purposes (not normally available to the general public or scientific community). Military surveys can include oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic and related data.[230]

Most of these activities can be classified under the category of hydrographic survey, subordinate to a broader definition of marine scientific research.[231] The key element that the US Navy uses to differentiate military surveys from marine scientific research is the 'military purposes' whereby data is not made available to the public.[232] The information generated during a military survey is essential for 'effective submarine operations, anti-submarine warfare, mine warfare and mine countermeasures', particularly in waters where 'oceanographic and underwater acoustic conditions vary widely with uneven bottom topography, fast tidal streams and a relatively high level of marine life'.[233] Similar to the data collected by intelligence gathering and surveillance activities, a military survey provides the operating State important knowledge to make decisions about their defence strategies.

The United States routinely conducts military surveys and research seaward of foreign territorial seas and has continued to do so since the establishment of the EEZ.[234] It has also clearly stated that hydrographic

[229] UNCLOS Article 246(5)(a); Soons (1982) 118–125; Alfred H. A. Soons, 'The Legal Regime of Marine Scientific Research: Current Issues', in Myron Nordquist, Ronán Long, Tomas Heidar and John Norton Moore (eds.), *Law, Science & Ocean Management* (Brill 2007) 139, 160; Bateman (2011) 180–181; Haiwen Zhang, 'The Conflict between Jurisdiction of Coastal States on MSR in EEZ and Military Survey', in Myron Nordquist, John Norton Moore and Kuen-Chen Fu (eds.), *Recent Developments in the Law of the Sea and China* (Brill 2006) 317, 328.

[230] OPNAV INSTRUCTION 3128.9G para 4(b).

[231] Mohammad Hanif Hamden and Ami Hassan Md Din, 'A Review of Advancement of Hydrographic Surveying towards Ellipsoidal Referenced Surveying Technique', (2018) IOP Conf Ser: Earth Environ Sci 169 012019.

[232] Roach (2021) 541; OPNAV INSTRUCTION 3128.9G para 4(d).

[233] Bateman (2005) 166.

[234] Pedrozo (2010) 12–13; Roach (2021) 538–539.

surveys and military surveys are not marine scientific research.[235] The US Navy has eight ships dedicated to surveying and research. Two are general-purpose oceanographic research vessels that are manned by contracted commercial crews.[236] It also maintains six oceanographic survey ships as part of the twenty-one ships under the Military Sealift Command's Special Mission programme.[237] These survey ships perform acoustic, biological, physical and geophysical surveys using multi-beam, wide-angle, precision sonar systems that are the same as used for hydrographic surveys to collect data on the ocean environment.[238] However, the United States insists that these naval operations are required not to be combined with marine scientific research activities.[239]

In contrast, both China and India take the position that military hydrographic surveys fall under the scope of marine scientific research that is subject to the coastal State's jurisdiction in the EEZ.[240] China requires foreign organisations or individuals that wish to conduct such activities in its EEZ to obtain approval from the competent authorities and observe the provisions of relevant Chinese laws, administrative rules and regulations.[241] This requirement would forbid any foreign entity from conducting military surveys without explicit consent from the Chinese government. China has frequently confronted US military survey and research ships in its EEZ. For example, in September 2009, USNS *Bowditch* was confronted and followed by Chinese patrol planes and vessels in the Yellow Sea while doing oceanographic surveys, which led to a collision between a Chinese fishing vessel and *Bowditch* that

[235] United States, Department of State, Office of Ocean and Polar Affairs, 'Marine Scientific Research Consent Overview' www.state.gov/marine-scientific-research-consent-overview/.

[236] Roach (2021) 538.

[237] United States Navy's Military Sealift Command, 'Special Mission (PM2)', Oceanographic Survey Ships: USNS Bowditch, USNS Bruce C. Heezen, USNS Henson, USNS Pathfinder, USNS Mary Sears, USNS Marie Tharp.

[238] United States Navy's Military Sealift Command, 'Special Mission (PM2)'; Melvin J Umbach, *Hydrographic Manual* (4th ed., United States, Department of Commerce, National Oceanic and Atmospheric Administration, 4 July 1976) Part One, https://nauticalcharts.noaa.gov/publications/docs/standards-and-requirements/hydrographic-manual/hydro-man-4th-edition.pdf; IHO, *Manual on Hydrography* (IHO 2005) chapter 1 http://acls-aatc.ca/wp-content/uploads/2017/06/iho-manual.pdf.

[239] OPNAV INSTRUCTION 3128.9G paras 6.a.(8)–(10); Roach (2021) 539.

[240] China, Exclusive Economic Zone and Continental Shelf Act Article 9; India, Act No. 80 (1976) Article 7(5).

[241] China, Surveying and Mapping Law, Article 7.

damaged its sonar system.[242] India also has restricted foreign military activities in its EEZ.[243] It challenged the USNS *Bowditch* for conducting military surveys in its EEZ in 2004, with India claiming that 'the warship gathered data that could reveal much military information on the ocean environment, including identifying possible underground nuclear facilities and submarines. Such data helps reorient technology in undersea warfare and enemy ship detection'.[244]

There is no general consensus in relation to military surveys and research in the EEZ.[245] It could be argued that surveys are a type of marine scientific research that should be regulated by the coastal State in the EEZ except those that can be exempted. The crucial issue is whether military surveys and research should be exempted from coastal State jurisdiction due to their military purpose. The data collected could be used to support the safety of navigation, increase the knowledge of the marine environment for economic purposes, or assist with warfare planning. In practice, the coastal State cannot be certain of the type and purpose of the survey or research that military entities are conducting in its EEZ, which tends to raise suspicions and provoke conflicts.[246] The coastal State may only challenge such activities if they violate its sovereign rights over natural resources or jurisdiction over marine scientific research, but they lack a legal basis to challenge such vessels for constituting a threat to its security interests.

Due to the highly political nature and sensitivity of the data collected, it seems unlikely that disputes on this matter will be easily resolved between States or settled by international courts and tribunals in the

[242] 魏庆, '美间谍船潜伏中国近海 助侦察攻击中国核潜艇', 2015年03月04日 (WEI Qing, 'US Spy Ship Lurks in China's Coastal Waters to help Detect and Attack Chinese Nuclear Submarines' 4 March 2015), www.xinhuanet.com/mil/2015-03/04/c_127541834.htm; '2001–2009 South China Sea Developments' www.globalsecurity.org/military/world/war/south-china-sea-2009.htm; 李广义,万彬华和朱宏杰,《论专属经济区军事活动的权利与义务》,中国海洋法评论,2011年第1期,134–147,第138–140页 (LI Guangyi, WAN Binhua and ZHU Hongjie, 'On the Rights and Obligations of Military Activities in the Exclusive Economic Zone', (2011) 1 China Oceans Law Review 134, 138–140).

[243] UNCLOS, Declarations and Statements, India, Declaration made upon Ratification (29 June 1995), para (b).

[244] Ranjit Bhushan, 'Port Hole: An American Warship Is Caught Spying in the Indian Waters under the Pretext of Research', Outlook, 7 June 2004 https://outlookindia.com/magazine/story/port-hole/224131 (last visited in December 2023).

[245] Franckx (2011) 198; Pedrozo (2021) 48.

[246] Zhang (2010) 37–38; Moritaka Hayashi, 'Military Activities in the Exclusive Economic Zones of Foreign Coastal States' (2012) 27(4) Int'l J Marine & Coastal L 795, 797–799.

near future.[247] It would help to ease tensions if the operating State obeyed the due regard obligation and refrained from collecting data vital to the coastal State's economic interests and gave assurances through notification of the survey time and location. The operating State may also release the data collected, wholly or partially, after a period of time when the secrecy is no longer needed. In particular, if the military research can 'increase scientific knowledge of the marine environment for the benefit of all mankind', the research data should be made available to the public.[248]

6.3.4 *Military Installations, Structures and Other Devices*

Many maritime powers have deployed various military devices, installations and structures in and onto the ocean floor, including the seabed of foreign EEZs, that play a significant role in military uses of the sea.[249] These objects can be placed on the seabed directly, or through storage and other facilities, including submarines, submarine cables, platforms or installations fixed onto the seabed.[250] Examples of these objects include undersea data centres, espionage equipment, sonar monitoring and surveillance systems, navigation aids for submarines and warships, armed mines and other weapon systems.[251] Given the lack of explicit attribution of the right to deploy military objects in the EEZ, the attribution and exercise of such a right should follow the rules established in Article 59 of UNCLOS and the obligations of exercising co-existing rights. Each type of military object will be discussed below to determine whether they are more closely associated with the communication freedoms under Article 58, or with the sovereign rights and jurisdiction of the coastal State, particularly its jurisdiction over 'installations and structures' under Article 60.

Submarines and other warships deploy listening equipment and other detection and communication devices to monitor the positions, movement and numbers of submarines or other military forces in the targeted

[247] Franckx (2011) 199; Tanaka (2019) 442–444.
[248] Tallinn Manual 2.0 (2017) 240; UNCLOS Article 244.
[249] Treves (1980) 808–809.
[250] Ibid; Tallinn Manual 2.0 (2017) 253.
[251] Hayashi (2005) 129–130; Tallinn Manual 2.0 (2017) 234–235.

area.[252] They are essential components of anti-submarine warfare, which dates back to the First World War when 'the British effectively used listening devices (hydrophones) and aircraft to detect German U-boats, and depth charges and mines to sink them'.[253] The continental slope is an ideal area to place anti-submarine warfare sonar devices, as they can pick up sounds at a greater distance over the deep seabed, and the advancement of technology over the past five decades provides a high degree of accuracy.[254] These data provide important information to assist with targeting and navigation, as well as scouting another State's military capability and movements, which could be essential in avoiding surprise attacks.[255] It seems that these monitoring and surveillance devices are more closely associated with the operation of ships than the exploration and exploitation of natural resources. States often argue that the use of such devices is essential to protect their security interests, but many of them still challenge the deployment of these devices by a foreign State within their EEZ or on their continental shelf.

States are also deploying various expendable marine instruments to collect data about the water column for a variety of purposes, including modelling global warming and other hydrologic changes, locating natural resources and monitoring the movement of submarines and other naval operations.[256] Both warships and scientific research ships routinely deploy expendable instruments into the ocean, with an estimated deployment of millions of such instruments worldwide between the 1960s and 1990s.[257] Underwater explosions or disposal of unwanted explosives at sea can have harmful effects on marine living creatures and the environment due to the shock waves and release of toxic chemicals.[258] When such expendable instruments are used as part of a marine scientific

[252] Treves (1980) 810–811.
[253] Frank Barnaby, 'Strategic Submarines and Antisubmarine Warfare' (1978) 1 Ocean YB 376, 378.
[254] Larson (1979) 53; Brian Taddiken, '66 Years of Undersea Surveillance' (2021) 35(1) Naval History Magazine www.usni.org/magazines/naval-history-magazine/2021/february/66-years-undersea-surveillance; James Kraska and Raul Pedrozo, 'Seabed Warfare', in James Kraska and Raul Pedrozo, *Disruptive Technology and the Law of Naval Warfare* (Oxford University Press 2022) 174–179.
[255] Treves (1980) 810.
[256] James Kraska, 'Oceanographic and Naval Deployments of Expendable Marine Instruments under US and International Law' (1995) 20 Ocean Dev Int'l L 314, 337; Hayashi (2005) 130.
[257] Kraska (1995) 314.
[258] Wang (1992) 373.

research project in the EEZ, they must be authorised by the coastal State.[259] Given that their use is mainly for navigation and survey purposes, military forces of all States may deploy such instruments in the EEZ. Their use must observe the obligations set out in UNCLOS for military activities at sea. In particular, the use of expendable instruments in the EEZ must not interfere with the exercise of another States' rights and duties, including the coastal State's sovereign rights and jurisdiction.[260] The operating State should also adopt appropriate measures to ensure that their normal uses are consistent, as far as is reasonable and practicable, with environmental protection and preservation requirements.[261]

States have traditionally deployed armed mines and other weapon systems on the seabed. The 1971 Seabed Treaty prohibits the emplacement of nuclear weapons and other weapons of mass destruction and of installations specially designed to store, test or use them on the seabed beyond 12 miles from shore.[262] But the treaty is silent on other conventional weapons. It could be argued that, in peacetime, the emplacement of weapons on the continental shelf by both the coastal State and other States is not in full compliance with the peaceful purposes obligation except for legitimate self-defence as recognised by the UN Charter.[263] In addition, deploying weapon systems by a foreign State in a nearby marine area poses direct threats to a coastal State's security interests, along with the possibility of causing irreparable damage to the marine environment, and interferes with the exercise of the rights and freedoms by other States in the EEZ.[264]

Submarine cables, including the repeaters, could also be used for military purposes.[265] The military may build, purchase or lease a submarine fibre optic cable for a variety of purposes, including telecommunications, acoustic monitoring and bilateral communications.[266] The US

[259] UNCLOS Articles 56(1)(b)(ii), 246(1)–(2).
[260] UNCLOS Articles 56(1)(b)(iii), 192.
[261] UNCLOS Article 236.
[262] 1971 Seabed Treaty Articles 1–2.
[263] UNCLOS Articles 88, 301; UN Charter Article 51.
[264] Lowe (1986) 180.
[265] For the freedom to lay submarine cables and their protection, see Chapter 5 in this volume.
[266] J. Ashley Roach, 'Military Cables', in Douglas R. Burnett, Robert C. Beckman and Tara M. Davenport (eds.), *Submarine Cables: The Handbook of Law and Policy* (Brill 2014) 339, 339–343.

Navy, for example, maintains two cable laying/repair ships to transport, deploy, retrieve and repair undersea cables.[267] Moreover, the military could use a purpose-built submarine or unmanned underwater vehicle to physically tap communication cables in order to collect, alter or jam any traffic transmitted through them, particularly in relation to cyber operations.[268] Furthermore, as technology develops, the military could build undersea data centres associated with or without a submarine cable.[269] The freedom to lay submarine cables, including uses associated with the operation of cables, should apply to military cables.[270] Tapping operations of submarine cables in the EEZ do not constitute a violation of the rights of the coastal State unless they interfere with the exploration and exploitation of the seabed and its natural resources.[271] The establishment of military undersea data centres, either an installation or structure, by a foreign State in the EEZ would be questionable if it interferes with exercise of the rights of the coastal State.[272]

It is relevant to clarify the scope of a coastal State's jurisdiction under Article 60 over the use of installations and structures in the EEZ.[273] The coastal State's 'exclusive right to construct and to authorize and regulate the construction, operation and use of' installations and structures is limited to those 'for the purposes provided for in Article 56 and other economic purposes' and those that 'may interfere with the exercise of the rights of the coastal State in the zone'.[274] Apart from resource-related activities, these economic purposes include 'other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water, currents and winds', marine scientific research, and the protection and preservation of the marine environment.[275] A plain reading of this provision may lead to the conclusion that the

[267] United States Navy's Military Sealift Command, 'Special Mission (PM2)', Cable Laying & Repair Ships: USNS Zeus and CS Global Sentinel.

[268] Tallinn Manual 2.0 (2017) 168–169, 253; Marcia Wendorf, 'Operation Ivy Bells: The U.S. Top-Secret Program That Wiretapped a Soviet Undersea Cable', Interesting Engineering, 17 August 2019 https://interestingengineering.com/innovation/operation-ivy-bells-the-us-top-secret-program-that-wiretapped-a-soviet-undersea-cable.

[269] Tallinn Manual 2.0 (2017) 234–235.

[270] UNCLOS Article 58(1).

[271] Tallinn Manual 2.0 (2017) 257; UNCLOS 79(2).

[272] Tallinn Manual 2.0 (2017) 235; UNCLOS Article 60(1)(c).

[273] For the coastal State's jurisdiction over artificial islands, installations and structures, see Chapter 4 in this volume.

[274] UNCLOS Article 60(1)(b)–(c).

[275] UNCLOS Article 56(1)(a)–(b).

use of military objects on the seabed, which generally are not for resource-related purposes, is exempted from the exclusive right of the coastal State. However, a coastal State may find legitimate grounds to challenge the use of foreign military installations or structures if they interfere with the exercise of its rights and jurisdiction in the EEZ. The extension to potential interference expands and strengthens the legal basis for the coastal State to challenge the deployment of these military objects.[276]

Under the 1958 Convention on the Continental Shelf, the coastal State is entitled to construct and maintain or operate on the continental shelf 'installations and other devices' necessary for the exploration and exploitation of its natural resources.[277] Under UNCLOS, the language was changed to 'installations and structures' and the term 'devices' is used separately elsewhere.[278] This distinction indicates that the two terms have a different connotation. The term 'devices'[279] refers to objects that operate in certain mechanical or chemical ways or have attributes permitting their use for the performance of certain tasks, while the term 'structures'[280] refers only to those lacking operative characteristics or functional attributes.[281] The term 'structures' is a narrower concept than 'devices'.[282] This interpretation is confirmed in Article 209, where the two terms are phrased as 'vessels, installations, structures and other devices', indicating that the term 'devices' includes 'structures'.[283] Consequently, 'devices' that cannot be considered as 'structures' are not objects that fall under the exclusive rights and jurisdiction of the coastal State.[284]

Under contemporary international law, it is arguable that any State can use the ocean floor of the EEZ and the continental shelf to deploy and service military devices, installations and structures that do not fall under the jurisdiction of the coastal State, even with the contrary argument from a coastal State that is often backed by political objections.[285]

[276] Treves (1980) 841.
[277] Convention on the Continental Shelf Article 5(2).
[278] UNCLOS Articles 56(1)(b)(i), 79(4), 80.
[279] UNCLOS Articles 19(2)(f), 145(a), 194(3)(c)–(d), 209(2), 274(b).
[280] UNCLOS Articles 1(5)(a)-(b), 56(1)(b)(i), 60, 79(4), 80, 207(1), 208(1), 209(2), 214, 246(5)(c), 268(c), 269(a).
[281] Rex J Zedalis, 'Military Installations, Structures, and Devices on the Continental Shelf: A Response' (1981) 75 Am J Int'l L 926, 930.
[282] Treves (1980) 841.
[283] UNCLOS Article 209(2).
[284] Treves (1980) 841.
[285] O'Connell (1982) 488.

Nevertheless, the uses of these military objects must fulfil important obligations. First, such uses of the seabed must be for peaceful purposes only, and weapons systems should not be deployed unless for legitimate self-defence purposes. Second, the operating State must comply with the due regard obligation, whereby there should not be any unreasonable interruption to the exercise of rights and freedoms of other States, particularly those of the coastal State. However, there is a considerable difference between the operating State fulfilling its obligations and the coastal State forbidding these activities, as the latter denies such uses as a freedom.

6.3.5 *Remarks on Conflicting Practices*

The preceding discussion demonstrates that, even though there is no clear attribution of jurisdiction over military activities in the EEZ, both coastal States and other States routinely conduct such activities. The key controversies are that States have different interpretations of whether a foreign State may conduct certain military activities in the EEZ of another State, and what kind of restrictions are placed on the operating State.

The resolution of conflicts regarding the conduct of military activities in the EEZ should follow the formula provided by Article 59. Certain foreign military activities would be restricted to give priority to the coastal State's economic interests in the EEZ.[286] For example, foreign military activities must not involve the exploration and exploitation of natural resources in the EEZ, nor can they unduly interfere with the exercise of the EEZ-related rights of the coastal State.[287] Military manoeuvres, especially those that involve the use of weapons, should be balanced with the coastal State's sovereign rights either through notification or consultation. However, military activities that do not interfere with the coastal State's sovereign rights can be carried out by all States. These activities include military navigation and overflight, espionage, intelligence gathering, surveillance, military survey and the use of military devices.

The exercise of the right to conduct all peacetime military activities, by both the coastal State and other States, must fulfil the reciprocal due

[286] Nordquist, Nandan and Rosenne (1993) 560.
[287] UNCLOS Articles 56(1), 58(3).

regard obligation to other States. Military activities that have a severe impact on natural resources or cause irreparable damage to the marine environment could be considered as violating the coastal State's rights and jurisdiction.[288] For example, if foreign military manoeuvres and ballistic exercises take place in a fishing area, or in close proximity to an active offshore oil platform, or as near as 13 NM from the coast, the coastal State may oppose or impose certain requirements.[289] In turn, the coastal State should not conduct any military activities that unduly impair the freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.

In cases where the coastal State determines that the foreign warship or military aircraft has abused its rights in the EEZ, the coastal State, even though it cannot exercise enforcement jurisdiction, may require the departure of foreign military entities from this maritime area.[290] In addition, if the alleged wrongful act has caused any loss or damage to the coastal State, the flag State must bear international responsibility for such wrongdoings.[291] In cases where the foreign State asserts that its freedoms have been affected by the coastal State's conduct of a military activity, it may challenge such conduct initially through diplomatic channels. States must be cautious as to what measures are used against another State's warship or military aircraft. As a warship is 'an expression of the sovereignty of the State whose flag it flies', 'any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State' and hence 'imping[e] on the maintenance of international peace and security'.[292]

[288] UNCLOS Article 56(1)–(2).

[289] Oxman (1983–1984) 826–827.

[290] Julio Cesar Lupinacci, 'The Legal Status of the Exclusive Economic Zone in the 1982 Convention on the Law of the Sea', in Vicuna (1984) 103; 金永明,《专属经济区内军事活动问题与国家实践》,法学,2008年第3期,118–126,第125–126页 (JIN Yongming, 'Foreign Military Activities in the EEZ and State Practice' (2008) 3 Legal Science 118, 125–126).

[291] UNCLOS Article 31; International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', (2001) 2(2) YB ILC 31, Articles 1, 2, 36.

[292] 'ARA Libertad' Case, paras 44, 46–47, 94, 97; Separate Opinion of Judge Chandrasekhara Rao, para 16; Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018–2019, p. 283, para 110.

It is noteworthy that disputes concerning military activities are optional exceptions to the compulsory third-party dispute settlement procedures established by UNCLOS. Upon signing, ratifying or acceding to UNCLOS, or at any time thereafter, any State may declare in writing that it does not accept the compulsory procedures with respect to 'disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service'.[293] As of 2024, twenty-four States have made declarations to exclude themselves from the compulsory procedures with regard to this exception.[294] Moreover, the United States holds the opinion that, under Article 298(1)(b), each State party has the exclusive right to determine whether its activities are or were 'military activities' and that such determinations are not subject to review.[295] The distinction between certain military activities and non-military activities, particularly survey, research and law enforcement activities has blurred considerably. The distinctive feature of a military activity is based 'primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case'.[296] Given the political nature of disputes concerning military activities, it is not very likely that this kind of dispute will soon come before an international tribunal. It is highly recommended that States reconcile their differences through mutual understanding and confidence-building measures to avoid escalation of disputes over military activities in the EEZ.

[293] UNCLOS Article 298(1)(b).

[294] UNCLOS, Declarations and Statements. The 24 States are: Algeria, Argentine, Belarus, Cabo Verde, Canada, Chile, China, Cuba, Ecuador, Egypt, France, Greece, Guinea-Bissau, Kenya, Mexico, Portugal, Republic of Korea, Russian Federation, Saudi Arabia, Thailand, Togo, Tunisia, Ukraine and the United Kingdom. Argentina withdrew its declaration of optional exception in 2012. Denmark, Nicaragua, Slovenia and Norway declared specific choices on the forum with regard to disputes concerning military activities and law enforcement activities.

[295] United States Senate, Committee on Foreign Relations, Executive Report 110-09: Convention on the Law of the Sea, 19 December 2007, 19 www.foreign.senate.gov/treaties/103-39.

[296] Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation) (Order of 25 May 2019) paras 64–66.

6.4 International Efforts to Reconcile Conflicts over Military Activities

6.4.1 Agreements to Prevent Incidents at Sea

As political tensions kept rising during the Cold War, the USSR concluded a number of bilateral agreements with Western maritime powers to prevent incidents between their military entities at sea beyond the limit of the territorial sea.[297] These agreements were formulated to reduce misunderstanding between the parties and to promote safety at sea for all interested States.

In order to prevent the accidental outbreak of nuclear war in light of several close incidents between naval forces in the 1960s, the United States and the USSR concluded the 1972 Agreement on Prevention of Incidents on and over the High Seas (US-USSR Agreement), which came into force on the same day.[298] The US-USSR Agreement obligates the parties to 'take measures to instruct commanding officers of their respective ships to observe strictly the letter and spirit of the International Regulations for Preventing Collision at Sea' and the principles with respect to conducting operations at sea as recognised in the 1958 Convention on the High Seas.[299] Specifically, it provides detailed guidelines for preventing accidents on the high seas while conducting naval operations.[300] In an amendment made by an exchange of notes between the two States in 1998, the US-USSR Agreement applies to 'waters outside the limits of the territorial sea'.[301] Consequently, these operational guidelines are applicable to both parties' navies, where each is operating in the other's EEZ.

The USSR concluded similar bilateral agreements for the purpose of reducing provocative or risky behaviour of armed forces and military aircraft beyond the limit of the territorial sea with the United Kingdom in

[297] Churchill, Lowe and Sander (2022) 282–283.

[298] Agreement between the Government of the United States of America (US) and the Government of the Union of Soviet Socialist Republics (USSR) on the Prevention of Incidents On and Over the High Seas, 25 May 1972 (US-USSR Agreement) https://2009-2017.state.gov/t/isn/4791.htm (archived content).

[299] Ibid Article II.

[300] Ibid Article III.

[301] Russian Federation (12957), Agreement Amending the Agreement of May 25, 1972, on the Prevention of Incidents On and Over the High Seas, Treaties and Other International Acts Series 12957 (in force 28 May 1998) www.state.gov/12957.

1986,[302] with Germany in 1988[303] and with France, Canada and Italy in 1989[304] (USSR Prevention of Incidents at Sea Agreements). It is notable that all of these agreements have adopted practical measures to assist the State parties in fulfilling their obligations, including the requirements for an annual meeting to review the implementation of the terms, and the use of mutually agreed special signals for communication or marks to be used by the ships and aircraft.[305]

The USSR Prevention of Incidents at Sea Agreements suggest that, at least among contracting parties, all States have an unfettered right to conduct weapons exercises, naval manoeuvres and other military activities beyond the territorial sea, including in a foreign EEZ. Moreover, it is important for States to exchange information and clarify their intentions when conducting military activities, not out of a legal obligation of general international law but for good faith, political and security purposes, in order to promote mutual trust and avoid misunderstandings and thus reduce the chance of potential conflicts.

Since the end of the Cold War, China has been a consistent challenger to the military activities conducted by the United States within its EEZ through operational means.[306] By 'recognizing the need to promote common understanding regarding activities undertaken by their respective maritime and air forces when operating in accordance with

[302] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the USSR Concerning the Prevention of Incidents at Sea beyond the Territorial Sea, 15 July 1986, (1987) 10 LOSB 97–102 (Agreement between the UK and USSR).

[303] Agreement between the Government of the Federal Republic of Germany and the USSR Concerning the Prevention of Incidents at Sea outside Territorial Waters, 25 October 1988, (1989) 14 LOSB 15–27 (Agreement between Germany and USSR).

[304] Agreement between the USSR and the Government of the French Republic Concerning the Prevention of Incidents at Sea Outside Territorial Waters of 4 July 1989, (1990) 16 LOSB 23–34 (Agreement between USSR and France); Agreement between the Government of Canada and the USSR Concerning the Prevention of Incidents at Sea beyond the Territorial Sea, 20 November 1989, (1991) 18 LOSB 25–32 (Agreement between Canada and USSR); Agreement between the Government of the Italian Republic and the USSR Concerning the Prevention of Incidents at Sea Outside Territorial Waters of 30 November 1989, (1990) 16 LOSB 35–46 (Agreement between Italy and USSR).

[305] US-USSR Agreement, Articles III(5), IX; Agreement between the UK and USSR Articles IX and Annex; Agreement between Germany and USSR Article 9 and Annex; Agreement between USSR and France Article IX and Annex; Agreement between Canada and USSR Article IX and Annex; Agreement between Italy and USSR Article IX and Annex.

[306] Pedrozo (2010) 13; Pedrozo (2021) 49–50.

international law, including the principles and regimes reflected in the [UNCLOS]', the United States and China concluded the Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety in 1998 (US-China Agreement).[307] It establishes a stable channel for consultations between the two States consisting of three mechanisms, namely annual meetings, working groups of subject matter experts and special meetings for consulting on specific matters.[308] The US-China Agreement has played a momentous role in dealing with incidents between the two States. For instance, the two sides held several special meetings in Beijing after the April 2001 collision discussed earlier in the chapter, which led to an agreement on compensation, the release of the crew and the return of the EP-3 plane, resolving this incident without causing serious setbacks to the relationship between the United States and China.[309] In 2014, the two States signed two memoranda of understanding (MOUs) establishing voluntary confidence-building measures intended to manage risk, enhance mutual understanding and avoid miscalculation between the two militaries: the Notification of Major Military Activities MOU and the Rules of Behavior for Safety of Air and Maritime Encounters MOU.[310] The actual value of the US-China Agreement and MOUs, however, might not have been fully realised, since it has not prevented conflicts from arising.[311] In particular, the bilateral dialogue has been interrupted by the tension in the South China Sea and the Taiwan Strait where both sides blame the other State of provoking actions that threat the stability of the region.[312]

[307] China (12924), Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety, Treaties and Other International Acts Series 12924 (in force 19 January 1998), Article 1 (US-China Agreement) www.state.gov/12924.

[308] Ibid Article II.

[309] Kan (2001) 21–23.

[310] Caitlin Campbell, 'China Primer: U.S.-China Military-to-Military Relations', Congressional Research Service, In Focus, 4 January 2021 https://crsreports.congress.gov/product/pdf/IF/IF11712.

[311] Pedrozo (2010) 28–29; Zhang (2010) 46; 刘惠荣和田杨洋,《沿海国专属经济区内外国军事活动管辖权辨析》,中国海洋大学学报,社会科学版,2014年第3期,14–19,第18–19页 (LIU Huirong and TIAN Yangyang, 'The Analysis of Jurisdiction over Foreign Military Activities in the EEZ of the Coastal State'(2014) 3 Journal of Ocean University of China, Social Science Edition 14, 18–19).

[312] Campbell (2021); 余敏友和雷筱璐,《评美国指责中国在南海的权利主张妨碍航行自由的无理性》,江西社会科学,2011年第9期,13–19,第17页 (YU Minyou and LEI Xiaolu, 'Comment on the Irrationality of the United States' Accusation that China's Rights Claims in the South China Sea Impede the Freedom of Navigation' (2011)

It is noteworthy that an agreement to prevent an escalation of tensions between militaries at sea would have more influence if it was agreed to and obeyed by many State parties. In 2014, at the Western Pacific Naval Symposium, a series of biennial meetings of Pacific nations to discuss naval matters, naval chiefs of twenty-one States adopted a non-binding Code for Unplanned Encounters at Sea (CUES) that has been subsequently amended.[313] CUES is a set of rules-of-the-road standardising safety protocols, basic communications and basic manoeuvring at sea for ships and aircraft to avoid misjudgement, misunderstanding and mismanoeuvring among navies.[314] Despite of its non-binding nature, CUES may contribute to the improvement of good order at sea and prevent accidental conflicts should the navies follow these rules.

Given that the most controversial practice is between the coastal State that seeks to halt foreign military operations in its EEZ and other States that continue to conduct them, a bilateral agreement or arrangement to prevent conflicts and avoid escalatory events seems necessary and appropriate. An agreement to avoid accidents is one of the confidence-building mechanisms that enhances mutual knowledge and understanding of military activities at sea between the State parties, consequently reducing the possibility of conflict by accident, miscalculation, or failure of communication.[315] These practices provide a functional framework for States

9 Jiangxi Social Sciences 13, 17); Niharika Mandhana, 'How Beijing Boxed America Out of the South China Sea', The Wall Street Journal, 11 March 2023 (online); 2023 China Military Power Report 5-6, 125, 136-137, 184 .

[313] Australian Navy, Western Pacific Naval Symposium (WPNS), as of 2023 WPNS includes 22 Member States and 8 observer nations. The Member States are: Australia, Brunei, Cambodia, Canada, Chile, China, Fiji, France, Indonesia, Japan, Malaysia, New Zealand, Papua New Guinea, Peru, Philippines, Republic of Korea, Russia, Singapore, Thailand, Tonga, United States of America and Vietnam. www.navy.gov.au/media-room/publications/semaphore-14-06 (last visited in December 2023); 'Document: Code for Unplanned Encounters at Sea', USNI News, 17 June 2014 https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea.

[314] 'Western Pacific Naval Symposium, Workshop 2014, Nanjing, China, 14–17 January 2014, Minutes', para 41 http://img.mod.gov.cn/reports/201310/bzdd/site21/20140213/4437e6581cab14667a2734.pdf; Wang Xinjuan, 'The Western Pacific Naval Symposium serves as an important platform for countries to deepen friendship, promote exchanges and enhance mutual trust' 25 April 2014 http://eng.mod.gov.cn/xb/News_213114/NewsRelease/16303567.html.

[315] US-USSR Agreement, Preamble; US-China Agreement, Preamble.

to pay mutual respect to military uses of the sea, and should be implemented effectively and efficiently.

6.4.2 *Regional Disarmament Efforts*

The international community is moving steadily towards peace and security, including global nuclear non-proliferation and disarmament through strengthening political and legal frameworks.[316] Global disarmament efforts affect the general acceptance and use of weapons at sea. States have adopted a number of regional arrangements and treaties that indicate their support for limiting the use of weapons at sea, particularly nuclear weapons, weapons of mass destruction and other strategic weapons.[317] These regional frameworks not only apply to the territorial sea and the EEZ of the State parties but also extend to the high seas. These agreements should be compatible with UNCLOS without affecting the enjoyment of rights or the performance of obligations by States but, nevertheless, may to varying degrees affect the conduct of military activities involving nuclear-armed warships.[318]

The Antarctic Treaty was adopted in 1959 with the aim to reserve the Antarctic for peaceful purposes only and to promote scientific research.[319] It covers the area south of 60° South latitude, within which State parties shall prohibit 'any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons'.[320] The demilitarisation of the Antarctic has eliminated potential armed conflicts or military incidents arising from the complex territorial disputes in the region.[321] By acceding to the Antarctic Treaty, State parties agreed to abolish the military use of

[316] United Nations Office for Disarmament Affairs (UNODA), 'Areas of Work' https://disarmament.unoda.org/.

[317] Securing Our Common Future: An Agenda for Disarmament (United Nations 2018) 61–65 www.un.org/disarmament/sg-agenda/en/.

[318] UNCLOS Article 311(2).

[319] 'The Antarctic Treaty Explained', www.bas.ac.uk/about/antarctica/the-antarctic-treaty/the-antarctic-treaty-explained/; Antarctic Treaty (1 December 1959, in force 23 June 1961) 402 UNTS 71, Articles I–V.

[320] Antarctic Treaty Articles I(1), VI.

[321] Seven States claimed territory in Antarctica (claimants): Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. See Australian Antarctic Program, 'Antarctic Territorial Claims' www.antarctica.gov.au/about-antarctica/law-and-treaty/history/antarctic-territorial-claims/.

the treaty area, including their frozen maritime zone claims.[322] The Antarctic Treaty remains in force indefinitely, and as of 2024 has twenty-nine Consultative Parties and another twenty-eight Non-Consultative Parties that have no decision-making power.[323]

The efforts of the littoral States to establish the Indian Ocean as a zone of peace date back to the 1970s as a response to the military rivalry between the United Kingdom, the United States and the USSR in the region.[324] This led to the adoption of UNGA Resolution 2832 (1971), which recognises this movement and declared the Indian Ocean, together with the air space above and the sea floor subjacent thereto, to be a 'zone of peace'.[325] It called on all superpowers to enter into immediate consultations with the littoral States with a view to 'halting the further escalation and expansion of their military presence' and to remove 'all bases, military installations and logistical supply facilities, the disposition of nuclear weapons and weapons of mass destruction and any manifestation of great Power military presence' from the region.[326] It also called on States to make efforts to establish 'a system of universal collective security without military alliances and strengthening international security through regional and other co-operation'.[327] The *Ad Hoc* Committee on the Indian Ocean was established in 1972 to study the implications of Resolution 2832 (1971).[328] However, these efforts did not stop the steady escalation of the arms race and the competitive military presence in the region.[329] On the contrary, the United States established a military base on the atoll of Diego Garcia, a British Indian Ocean Territory, in 1971 and maintains its presence to date.[330] Due to the non-participation of many military powers (especially France, the United Kingdom and the United States), the *Ad Hoc* Committee was not been able to embark on any discussions on practical measures to implement the declaration of a

[322] Antarctic Treaty Article VI; UNCLOS Article 311(3).
[323] Secretariat of the Antarctic Treaty, 'Parties' www.ats.aq/devAS/Parties?lang=e.
[324] Rasul B Rais, *The Indian Ocean and the Superpowers: Economic, Political and Strategic Perspectives* (Croom Helm 1986) 29–33, 40–46, 172–173.
[325] UNGA A/RES/2832(XXVI), 16 December 1971, Declaration of the Indian Ocean as a Zone of Peace, Preamble and Article 1.
[326] Ibid Article 2.
[327] Ibid Article 3.
[328] UNGA A/RES/2992 (XXVII), 15 December 1972, Declaration of the Indian Ocean as a Zone of Peace, Article 2.
[329] Rais (1986) 184–185.
[330] Peter H Sand, 'Diego Garcia: British-American Legal Black Hole in the Indian Ocean?' (2009) 21(1) J Env't L 113, 114–115; Chagos MPA Arbitration paras 70–71.

'zone of peace' in the Indian Ocean.[331] In recent years, given the changes in the political environment and security priorities in the region, the *Ad Hoc* Committee has discussed changing its mandate to address non-traditional maritime threats and challenges and continued to call for all permanent members of the Security Council and the major maritime users of the Indian Ocean to support its work.[332]

States have also adopted several regional treaties that, broadly stated, prohibit the testing, use, manufacture, production or acquisition of nuclear weapons through establishing nuclear-free zones and nuclear weapon–free zones covering parts of Latin America and the Caribbean, the South Pacific, Southeast Asia, Africa and Central Asia.[333] For example, in the wake of the Cuban Missile Crisis in 1967, twenty-one Latin American States signed the multilateral Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco).[334] All State parties undertake the obligation to prohibit and prevent in their respective territories, including the territorial sea, the testing, use, manufacture, production, acquisition or any form of possession by any means whatsoever of any nuclear weapons.[335] Through Additional Protocol II, all five nuclear weapon States have committed themselves to respect the status of the nuclear-free zone and not use or threaten to use

[331] UNGA A/60/29, 26 July 2005, Report of the Ad Hoc Committee on the Indian Ocean; UNGA A/RES/64/23, 2 December 2009, Implementation of the Declaration of the Indian Ocean as a Zone of Peace.

[332] UNGA A/74/29, 31 May 2019, Report of the Ad Hoc Committee on the Indian Ocean; UNGA A/78/401, 10 November 2023, Implementation of the Declaration of the Indian Ocean as a Zone of Peace.

[333] UNODA, 'Nuclear-Weapon-Free Zones' https://disarmament.unoda.org/wmd/nuclear/nwfz/.

[334] Treaty for the Prohibition of Nuclear Weapons in Latin America (14 February 1967, in force 22 April 1968) 634 UNTS 281 (Treaty of Tlatelolco). In the first amendment of the Tlatelolco Treaty in 1990, the words 'and the Caribbean' were added to the legal name of the Treaty. See Agency for the Prohibition of Nuclear Weapon in Latin America and the Caribbean, CG/E/Res.267 (E-V), 3 July 1990, Modification to the Treaty for the Prohibition of Nuclear Weapons in Latin America, para 1 www.opanal.org/wp-content/uploads/2015/12/CGE05res267i.pdf. See also Paul D. Beamont and Thomas Rubinsky, 'An Introduction to the Issue of Nuclear Weapons in Latin America and the Caribbean', ILPI Nuclear Weapons Project Background Paper No. 2, December 2012, 3 www.academia.edu/7707739/Nuclear_Weapons_Project_Background_Paper_Nuclear_Weapons_In_Latin_America_and_the_Carribean.

[335] Treaty of Tlatelolco Articles 1–4; Nuclear Threat Initiative (NTI), 'Tlatelolco Treaty' www.nti.org/learn/treaties-and-regimes/treaty-prohibition-nuclear-weapons-latin-america-and-caribbean-lanwfz-tlatelolco-treaty/.

nuclear weapons against any State parties to the Treaty of Tlatelolco.[336] This Treaty created the first nuclear weapon–free zone, which promoted the development of nuclear non-proliferation within this region and beyond, and served as a model for four other nuclear weapon–free zones in the South Pacific (1985), Southeast Asia (1995), Africa (1996) and Central Asia (2006).[337] These zones have been recognised as contributing to 'the security of members of such zones, to the prevention of the proliferation of nuclear weapons and to the goals of general and complete disarmament'.[338]

In summary, States' efforts to regulate military activities at the international level are limited to establishing guidelines to prevent misunderstandings and promote co-operation, and the only agreed prohibition is with regard to the use of nuclear weapons on a regional basis that are largely restricted to areas under the sovereignty of the contracting parties. This confirms that not only is there no general prohibition on conducting military activities in the EEZ under international law[339] but also that States are unable to develop precise legal obligations to regulate such uses. In order to prevent further conflicts at sea, States must take further steps to build mutual trust, including the adoption of good practices for military activities at sea, especially in regions where such activities are most frequently challenged.

6.5 The Way Forward

States regularly conduct a wide range of military activities at sea to protect their respective security interests. The proposal to include coastal State security interests in the EEZ was raised but rejected during the Third Conference, as was the proposal to include military activities as a preserved freedom for all States. As a result, UNCLOS intentionally left military issues out of the EEZ regime. Moreover, the optional exceptions

[336] NTI, 'Tlatelolco Treaty: Additional Protocol II'.

[337] Susan F. Burk, 'OPANAL Commemoration of 45th Anniversary of the Treaty of Tlatelolco', Panel on Lessons Learned and Good Practices in the Creation and Consolidation of Tlatelolco, Mexico City, 14 February 2012 https://2009-2017.state.gov/t/isn/rls/rm/187535.htm (archived content); IAEA, 'Nuclear-Weapon-Free-Zones' www.iaea.org/topics/nuclear-weapon-free-zones.

[338] UNGA A/RES/3472(XXX) A/B, 11 December1975, Comprehensive Study of the Question of Nuclear-weapon-free zones in All Its Aspects, Preamble.

[339] Churchill and Lowe (1999) 427.

in the dispute settlement mechanism make it possible for States to exempt any disputes concerning military activities from compulsory adjudication. Given the absence of clear attribution of jurisdiction, the right to conduct an activity with military elements falls under the residual rights provisions in the EEZ and the resolution of associated conflicts following the formula contained in Article 59 and the general principles of attributing and exercising rights and duties in this *sui generis* regime.

Conflicts with regard to military activities in the EEZ need to 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'.[340] The formula provided by Article 59 gives no priority to either the coastal State or other States. According to the general rules of attributing rights and duties in the EEZ, it is recognised that the EEZ was established to reserve vital economic interests to the coastal States. Hence, when a military activity concerns economic interests, the priority is inevitably vested with the coastal State; when it is closely associated with the operation of ships or aircraft without impairing the coastal State's economic interests, the priority is granted to the operating State.[341] According to the general rules of exercising co-existing rights in the EEZ, the operating State must ensure military activity is conducted for peaceful purpose only and must have due regard to the rights and obligations of other States.[342] As a result, most military activities are tolerated within the EEZ and only in limited circumstance may they be legally challenged. For example, the coastal State may challenge a foreign military activity in its EEZ if it harms its sovereign rights to natural resources, whereas a non-coastal State may challenge the coastal State's military activity if it unduly impedes its exercise of the freedoms of navigation or overflight.

The international legal system, including the law of the sea, develops in parallel with the changing demands of States. There are certain developments in the international arena that may influence the law on military uses of the sea. The first is the changing balance of power among States in the international arena over the last half century. Fundamentally, the rules of military uses of ocean space serve the military interests of the

[340] UNCLOS Article 59.
[341] UNCLOS Articles 56, 58; Nordquist, Nandan and Rosenne (1993) 569; Klein (2011) 209.
[342] UNCLOS Articles 56(2), 58(3), 88, 301.

States that have the capability to utilise them.[343] Emerging maritime States such as China, India and Brazil, which had previously strongly opposed and challenged these rules, have now gained the capability to use them. For example, the Chinese navy started to conduct military intelligence collection operations in the EEZ of the United States in 2012, and is in the process of expanding its global presence and influence.[344] As these emerging States put increasing emphasis on their security interests at sea, they face the dilemma of restricting foreign military activities in the adjacent area of their coast on the one hand while seeking free and open access to other States' EEZs for military purposes on the other.

Secondly, there has been an international movement of disarmament and non-proliferation of nuclear weapons, and the promotion of confidence-building measures to facilitate collaboration among States rather than reinforcing their separation, showing the universal need for peace management and demilitarisation of the ocean.[345] However, the momentum built after the Cold War is under increasing pressure with the breakout of the war between the Russian Federation and Ukraine, the growing assentation of the Democratic People's Republic of Korea, as well as the mounting tension between China and the United States in the South China Sea and the Strait of and Taiwan.

Thirdly, military forces have been given increasingly diverse functions at sea, including law enforcement, disaster relief assistance, escorting civilian vessels through dangerous areas and engaging in international co-operation programmes in foreign EEZs.[346] While these activities will increase the presence of military forces in foreign EEZs, they may not

[343] Pirtle (2000) 7–8.

[344] Kathrin Hille, 'Chinese Navy Begins US Economic Zone Patrols', Financial Times, 2 June 2013 (online); Kimberly Hsu and Craig Murray, 'China's Expanding Military Operations in Foreign Exclusive Economic Zones', U.S.-China Economic and Security Review Commission Staff Research Backgrounder Paper, 19 June 2013 www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder_China%20in%20Foreign%20EEZs.pdf; 2023 China Military Power Report 52–53, 149–163.

[345] Kraska and Pedrozo (2013) 9; Securing Our Common Future: An Agenda for Disarmament (2018).

[346] G. Lammons and J. Ervin, 'Naval Oceanography Turns Data into Decisions' (2011) 17(2) Ocean News & Technology 34, 35–36; United Nations Security Council, 'Security Council Renews Authorization for International Naval Forces Fighting Piracy off Somali Coast, Unanimously Adopts Resolution 2554 (2020)', Press Release, 4 December 2020 www.un.org/press/en/2020/sc14373.doc.htm.

necessarily cause tension with the coastal States, since they primarily have a civilian purpose.

States will continue to use the EEZ for military purposes despite different interpretations and practices on its legality. It is in the interests of all States to find a balance between maximising their individual maritime rights and jurisdiction in adjacent maritime areas and maintaining the common interest of all States to use the multi-functional EEZ.[347] Subject to observing the peaceful purpose requirement, States could avoid conflicts if both sides obeyed the mutual due regard obligation in good faith and refrained from provoking activities that raise tensions with concerned States. For many of the coastal States that frequently challenge foreign military activities in their EEZs, which challenges are determined from a pure coastal State perspective, might gradually change when their navies are capable of conducting the same activities in a foreign EEZ.

Given the political sensitivity of military activities and the lack of clear legal framework, States will maintain different interpretations of the legitimacy of certain military activities in a given situation. Further, States should not take an all-or-nothing approach, whereby all military activities are either subject to the prior consent of the coastal State or subject to an absolute right of all States without any form of prior notification and consultation with the coastal State.[348] This is an approach that both the rules to attribute residual rights and the reciprocal due regard obligations were apparently designed to prevent. To avert destabilising incidents, it is important for States to take the necessary measures to improve mutual understanding and build trust and confidence in order to increase stability, international peace and security at sea.

[347] Stephens and Rothwell (2012) 705–706; Tanaka (2019) 471–472.
[348] Prezas (2019) 115–116.