

Which High Seas Freedoms Apply in the Exclusive Economic Zone?*

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I. INTRODUCTION

The exclusive economic zone (EEZ) is a creature of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The zone was created for the sole purpose of granting coastal states greater control over the resources adjacent to their coasts out to 200 nautical miles (nm).¹ Early efforts by a handful of nations, like El Salvador and Peru, to broaden coastal state authority in the EEZ to include residual competences and rights were rejected by the majority of the delegations at the Third United Nations Conference on the Law of the Sea (UNCLOS III).² What the Conference negotiators finally agreed on was Articles 55, 56, 58 and 86, which accommodate the various competing interests of coastal states and other states in the EEZ. On the one hand, Articles 55 and 56 make clear that the EEZ is *sui generis* and that certain high seas freedoms relating to natural resources and marine scientific research (MSR) do not apply in the EEZ. On the other hand, Articles 58 and 86 make equally clear that all other high seas freedoms (i.e., non-resource related) and other internationally lawful uses of the seas related to those freedoms (e.g., military

* Submitted: 22 December 2009; Admitted: 31 January 2010; Published online: April 2010.

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¹ Satya N. Nandan and Shabtai Rosenne, gen. eds., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Herndon, Va.: Brill, 1993), vol. 2 [hereinafter Nandan and Rosenne, *Commentary*, vol. 2], pp. 491-821.

² Nandan and Rosenne, *Commentary*, vol. 2, at pp. 529-530.

activities) apply seaward of the territorial sea and may be exercised by all states in the EEZ without coastal state notice or consent.³

II. COASTAL STATE RIGHTS AND JURISDICTION

Article 56 provides that coastal states have sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources of the zone and with regard to other activities for the economic exploitation and exploration of the zone. The term “sovereign rights” was deliberately chosen to make a clear distinction between coastal state rights and jurisdiction in the EEZ and coastal state authority in the territorial sea, where coastal states enjoy a much broader and more comprehensive right of “sovereignty.”⁴ The coastal state also has limited resource-related jurisdiction in the EEZ with regard to the establishment and use of artificial islands, installations and structures, MSR, and the protection and preservation of the marine environment. The use of the term “MSR” was deliberate in order to distinguish MSR from other types of marine data collection that are not resource-related, such as hydrographic surveys and military oceanographic surveys.⁵ For instance, Article 19(2)(j) of UNCLOS prohibits “research or survey activities” for ships engaged in innocent passage. Article 40 applies a similar restriction to ships engaged in transit passage – “marine scientific research and hydrographic survey ships may not carry out any research or survey activities” without prior authorization of the states boarding the strait. The same restrictions apply to ships engaged in archipelagic sea lanes passage (Article 54) or ships transiting archipelagic waters in innocent passage (Article 52). Article 56 and Part XIII of the Convention, on the other hand, only refer to MSR, and not to other “survey” activities.⁶

Unfortunately, some states that were unable to achieve their objectives at UNCLOS III to retain residual rights and competencies in the EEZ have sought to unilaterally expand their control over lawful activities in the EEZ, such as hydrographic surveys, military activities and law enforcement operations. These efforts are not supported by state practice, the Official Records of UNCLOS III or a plain reading of UNCLOS, and are clearly illegal under international law.

Coastal state illegal restrictions in the EEZ take a number of forms, but, for the most part, are directed at foreign military activities. For example, Bangladesh, Brazil, Iran, Kenya, Malaysia, Mauritius and Uruguay purport to restrict military activities in the EEZ.⁷ Burma, on the other hand, only attempts to restrict freedom of navigation and overflight through the EEZ, while Cape Verde imposes restrictions on “non-peaceful uses” of its EEZ.⁸ China has the most expansive excessive claims in the EEZ, purporting to regulate military activities, hydrographic surveys, and the laying of cables and pipelines. China also

³ Satya N. Nandan and Shabtai Rosenne, gen. eds., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Herndon, Va.: Brill, 1993), vol. 3 [hereinafter Nandan and Rosenne, *Commentary*, vol. 3], pp. 60-71.

⁴ UNCLOS, Art. 2; see also Nandan and Rosenne, *Commentary*, vol. 2, at pp. 531-544.

⁵ *Accord* UNCLOS, Art. 19(2)(j), 40, 54, 87(1)(f) and Part XIII.

⁶ UNCLOS, Article 87(1)(f), also only refers to scientific research.

⁷ *DoD Maritime Claims Reference Manual*, <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>.

⁸ *Id.*

claims jurisdiction in its EEZ over security matters, as well as customs, fiscal, immigration and health matters.⁹ India also restricts military activities in the EEZ and requires 24 hours advance notice before ships carrying hazardous and dangerous goods, like oil, chemicals, noxious liquids and radioactive material, can transit through its EEZ.¹⁰ Maldives takes the prior notice requirement one step further, requiring all ships to obtain prior permission to enter its EEZ.¹¹ North Korea purports to prohibit conducting surveys and the taking of photographs in its EEZ, while Portugal only permits innocent passage in its EEZ.¹² Finally, Pakistan restricts military activities in the EEZ and requires foreign state aircraft to file flight plans before transiting over the EEZ.¹³ Indonesia and the Philippines have not officially enacted domestic regulations or made public statements restricting military activities in their EEZ, but they have, on a few limited occasions, objected to foreign military activities in their EEZ. For example, Indonesia joined Malaysia in objecting to a proposal by Singapore at a meeting of ASEAN Regional Forum (ARF) in Manila to conduct an ARF military exercise, part of which would have taken place in the Malaysian and Indonesian EEZ.

In addition to the seventeen coastal states that have EEZ-specific excessive claims, seven additional countries illegally claim territorial seas in excess of 12 nm. These countries include: Benin (200), Congo (200), Ecuador (200), Liberia (200), Peru (200), Somalia (200) and Togo (30).¹⁴ The practical effect of these excessive territorial sea claims is to only allow innocent passage through the territorial sea. Customary international law, as reflected in UNCLOS, Article 3, makes clear that the breadth of the territorial sea may not exceed 12 nm. Additionally, three nations – Cambodia, Sudan and Syria – illegally claim jurisdiction over security matters in their 24 nm contiguous zone.¹⁵ In accordance with customary international law, as reflected in UNCLOS, Article 33, coastal states may only exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, as well as punish infringement of the aforementioned laws and regulations committed within its territory or territorial sea.

III. USER STATE RIGHTS AND FREEDOMS

While Part V of the Convention grants coastal states broad resource-related rights and jurisdiction in the EEZ, the Convention also preserves the high seas freedoms referenced in Article 87 for all states in the EEZ. Article 58(1) specifically provides that, in the EEZ, all states enjoy “the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea” related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines” Article 58(2) further provides that

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

“Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.” Many of the high seas freedoms in Part VII of the Convention apply to the EEZ – the question is which ones apply?

A plain reading of Article 58(1) makes clear that the high seas freedoms of navigation and overflight and of the laying of submarine cables and pipelines apply in the EEZ. Article 58(2) further provides that Articles 88 to 115 also apply to the EEZ as long as they are compatible with Part V. The application of Article 89 to the EEZ emphasizes that the coastal state only enjoys “sovereign rights” in the EEZ, not “sovereignty.” Articles 95 and 96 apply the principle of sovereign immunity to the EEZ. Likewise, the duty to render assistance to persons in distress at sea, articulated in Article 98, equally applies to the EEZ, as do the duties to prohibit the transport of slaves (Article 99), to cooperate in the repression of piracy (Articles 100-107), to cooperate to suppress the illicit traffic in narcotic drugs (Article 108), and to cooperate to suppress unauthorized broadcasting from the high seas (Article 109). Finally the right of visit (Article 110) and right of hot pursuit (Article 111) apply in the EEZ. It is therefore permissible, for example, for a coalition warship to approach, query and board a ship located in Oman’s EEZ if the warship reasonably suspects the ship is engaged in piracy.

However, Article 58(1) additionally indicates that all states enjoy the freedom to engage in “other internationally lawful uses of the sea” related to the high seas freedoms previously mentioned, “such as those associated with the operation of ships, aircraft and submarine cables and pipelines ...,” and Article 58(2) provides that “other pertinent rules of international law” apply to the EEZ. What exactly is permitted by these phrases – “other internationally lawful uses of the sea” and “other pertinent rules of international law”?

With regard to military activities, the United States has relied primarily on the “other international lawful uses” language in Article 58 to argue that military activities can be lawfully conduct in the EEZ without coastal state notice or consent as a high seas freedom. During the negotiations of the Convention, the United States and other nations took the position that the right to conduct military activities in the EEZ would continue to exist in the EEZ. This point was articulated by the U.S. delegation at the conclusion of UNCLOS III:

All States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. *Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone.* This is the import of Article 58 of the Convention.¹⁶ [Emphasis added.]

The Official Record and state practice prior to and after entry into force of UNCLOS support this conclusion. Over the years, the U.S. Government has continued to rely on this language, to the exclusion of Article 86 and its negotiating history, to justify its

¹⁶ Official Records of the Third U.N. Conference on the Law of the Sea, vol. 17, Plenary Meetings, Doc.A/CONF.62/WS/37 and ADD.1 and 2 (New York: United Nations, n.d.), p. 243.

military activities in foreign EEZ. However, it is time for the United State to also focus its argument on the second sentence of Article 86, which clearly supports and solidifies the U.S. position in this regard.

The first sentence of Article 86 of UNCLOS makes clear that the EEZ is a *sui generis* zone that is not part of the high seas.¹⁷ However, the second sentence indicates that nothing in Article 86 abridges the “freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.” In other words, any activity that is lawful on the high seas, to include military activities, can be conducted in the EEZ without coastal state notice or consent, subject only to the rights and jurisdiction conferred on the coastal state by Part V of the Convention. So, for example, the high seas freedom of fishing, the freedom to construct artificial islands and other installations and the freedom to conduct MSR, are all subject to coastal state control in the EEZ. However, all other customary international law rights, duties and freedoms reflected in Part VII – e.g., navigation, overflight, laying of submarine cables and pipelines, hydrographic surveys, military activities (e.g., surveillance and reconnaissance operations, oceanographic surveys, military exercises, use of weapons, flight operations, etc.), immunity of warships and other government non-commercial vessels, prohibition of slave trade, repression of piracy, suppression of unauthorized broadcasting, suppression of narcotics trafficking, approach and visit, rendering assistance, and hot pursuit – may lawfully be conducted in the EEZ without coastal state notice or consent. The Official Record of UNCLOS III supports this conclusion.

Delegations struggled with the definition of high seas during the first three sessions of UNCLOS III. However, by the fourth session, the emphasis was placed on ensuring that the regime of the high seas would apply in the EEZ to the extent it was not incompatible with Part V.¹⁸ As indicated by the Chairman of the Second Committee:

There could be little debate as to which of the provisions ... on the high seas apply in the exclusive economic zone, whether [the EEZ is] included in the definition of high seas or not. ... In simple terms, the rights as to resources [in the EEZ] belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication¹⁹

Similarly, the President of the Conference indicated at the opening of the Fifth Session of UNCLOS III that:

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

¹⁷ The first sentence of Article 86 provides that “the provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”

¹⁸ Nandan and Rosenne, *Commentary*, vol. 3, pp. 63-64.

¹⁹ Nandan and Rosenne, *Commentary*, vol. 3, p. 64.

indispensable to the maintenance of international relations, commercial and otherwise.²⁰

Discussions during the Sixth Session resulted in a text that emphasized that the high seas was a separate maritime zone from the EEZ, but preserved certain user state rights and high seas freedoms in the EEZ.²¹ In this regard, U.S. Government officials should note that early efforts in 1972 and 1973 to make a distinction between waters subject to coastal States sovereignty (i.e., territorial seas and internal waters) and the high seas by using the term “international seas” to define ocean areas not subject to coastal state sovereignty or jurisdiction were rejected by UNCLOS III.²² Albeit well-intentioned, the U.S. tendency to use the term “international waters” to describe which navigational rights and freedoms apply in the EEZ is misunderstood and appears to be an attempt to resurrect the 1970’s debate. The rejection of this term in 1973 emphasizes the need for the United States to refrain from using the term “international waters” when referring to legitimate military activities in foreign EEZs, particularly when referring to U.S. military activities in China’s claimed EEZ. Continued use of the term “international waters” by the United States clouds the debate and allows China to divert attention from the real issues – their illegal maritime claims and their unsafe and aggressive tactics when intercepting U.S. ships and aircraft in and over the EEZ.²³

The final text of Article 86 recognizes the existence of the new regimes of the EEZ and archipelagic waters, which were previously considered high seas areas, while at the same time retaining the distinction that had previously existed between the high seas and the territorial sea and internal waters.²⁴ In short, the effect of Article 86 is that virtually all of the provisions of Section 1 of Part VII of the Convention, except those related to resources, apply in the EEZ.

IV. CONCLUSION

UNCLOS clearly distinguishes between the high seas and the other maritime zones, including the EEZ. Continued reliance by the United States on the distinction between national waters and international waters in an effort to articulate the right to engage in high seas freedoms in and over the EEZ is an anachronism and should be replaced by reference to the maritime zones reflected in UNCLOS. Moreover, the U.S. Government’s sole reliance on Articles 56 and 58, to the exclusion of other articles, to argue that U.S. forces can legitimately engage in military activities in foreign EEZs should also be refocused to include Article 86. This article and its negotiating history make clear that activities routinely conducted on the high seas, such as military exercises, weapons testing, surveillance and reconnaissance operations, military oceanographic surveys, hydrograph surveys, flight operations, right of visit, maritime security and law enforcement operations

²⁰ Nandan and Rosenne, *Commentary*, vol. 3, p. 65.

²¹ Nandan and Rosenne, *Commentary*, vol. 3, pp. 67-68.

²² Nandan and Rosenne, *Commentary*, vol. 3, pp. 61-62.

²³ Ji Guoxing, "The Legality of the Impeccable Incident", *China Security*, Vol. 5, No. 2, Spring 2009 (2009 World Security Institute, available at <http://www.chinasecurity.us/pdfs/jiguoxing.pdf>).

²⁴ Nandan and Rosenne, *Commentary*, vol. 3, p. 69.

(e.g., repression of piracy, drug trafficking, slave trade, unauthorized broadcasting, migrant smuggling, and proliferation of weapons of mass destruction) may be lawfully conducted in foreign EEZs without coastal state notice or consent. The only high seas freedoms that require coastal state consent in the EEZ are those associated with fishing, resource exploitation, and MSR. Everything else in Part VII is fair game, subject, of course, to the due regard requirement of Article 58.