

# The Regime of the Exclusive Economic Zone: Issues and Responses

**A Report of the Tokyo Meeting**



**Sponsored by the Ship and Ocean Foundation (SOF) and the East-West Center**

**(EWC) and supported by a grant from the Nippon Foundation.**



# **The Regime of the Exclusive Economic Zone: Issues and Responses**

**A Report of the Tokyo Meeting  
19–20 February 2003**

This document reports on discussions held at the Tokyo Meeting, a gathering of senior officials and analysts from countries of the Asia Pacific region cosponsored by the Institute for Ocean Policy, Ship and Ocean Foundation (IOP/SOF), and the East-West Center (EWC). The Meeting facilitated unofficial, frank, and not-for-personal-attribution discussions of issues concerning military and intelligence gathering activities in EEZs. This Report reflects the diverse perspectives of the participants and does not necessarily represent the views of the IOP/SOF, EWC, or any particular participant.

This Report was drafted by Workshop Co-coordinator, Mark J. Valencia, based on and including excerpts of the papers presented, as well as notes of the discussion by Jenny Miller Garmendia, with input to the draft from the participants and IOP/SOF records.

Ordering Information:

Publication Sales Office  
East-West Center  
1601 East-West Road  
Honolulu, Hawaii 96848-1601  
Email: [ewcbooks@EastWestCenter.org](mailto:ewcbooks@EastWestCenter.org)  
Tel.: (808) 944-7145  
Fax: (808) 944-7376  
Website: [www.EastWestCenter.org](http://www.EastWestCenter.org)

Institute for Ocean Policy, Ship & Ocean Foundation  
Kaiyo Senpaku Building  
1-15-16 Toranomom, Minato-ku  
Tokyo 105-0001 Japan  
Email: [info@sof.or.jp](mailto:info@sof.or.jp)  
Tel.: (81) 3-3502-1942  
Fax: (81) 3-3502-2127  
Website: [www.sof.or.jp](http://www.sof.or.jp)

## TABLE OF CONTENTS

Session I. Introduction	1
Session II. Summary of the Bali Dialogue	3
Session III. Perspectives on Critical Questions	12
Session IV. Operational Modalities and ‘Rules of Engagement’ of Navies Operating in the Region	15
Session V. Specific Cases	35
Session VI. The Implications of 11 September 2001 and the ‘War on Terrorism’	50
Session VII. The Implications of New Technology	62
Session VIII. Options for Resolving Disagreements	73
Session IX. The Way Forward	80
Appendix 1. SOF Chairman Masahiro Akiyama’s Intentions for the Project	83
Appendix 2. Agenda	85
Appendix 3. List of Participants	89

## Session I: Introduction

Technological advances and increased activity in Exclusive Economic Zones (EEZs) by both coastal and foreign states have increasingly brought these actors into conflict. Accordingly, contrasting positions have arisen regarding the respective rights and responsibilities of coastal and maritime states in the EEZ. This is particularly the case for the regime of military and intelligence gathering activities.

Several factors bring this set of issues to the fore. First, there is the issue of military activities in the EEZ. These were a controversial issue during the negotiations of the text of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and continue to be so in the state practice. Some coastal states contend that other states cannot carry out military exercises or maneuvers in or over their EEZ without their consent. Their concern is that such uninvited military activities could threaten their national security or undermine their resource sovereignty. Others specifically state the opposite. Indeed, maritime powers such as the United States insist on the freedom of military activities in the EEZ out of concern that their naval and air access and mobility could be severely restricted by the global EEZ enclosure movement.

Second, as technology advances, misunderstandings regarding military and intelligence gathering activities in foreign EEZs are bound to increase. There have been vast improvements in the range and accuracy of both weaponry and intelligence collection including *Aegis*, satellites, submarines, aircraft carriers, missiles, and over-the-horizon weaponry. Indeed, some argue that technology has so dramatically changed the art of warfare and intelligence gathering that extending restrictions in the EEZ to constrain military and intelligence gathering will be largely ineffective. However, there are still some distinct advantages in being able to operate in and over foreign EEZs, such as showing the flag, testing the response of the coastal state, or gathering certain intelligence, and thus maritime powers will most likely continue to resist any restrictions on such activities. Third, it seems that there is some confusion and even double standards regarding the current regime and stark differences of opinion abound.

Fourth, there is a growing dialectic between coastal states and maritime powers. Military and intelligence gathering activities by foreign nations in or over others' EEZs are becoming more frequent due to the accelerating pace of globalization, the tremendous increase in world trade, the rise in the size and quality of the navies of many nations, and technological advances that allow navies to better utilize oceanic areas. Other conflicts result from the increasingly scarcity of resources, the growing threat to the marine environment, and concerns with safety of sea lanes. At the same time, coastal states are placing increasing importance on control of their EEZs. Of the 1,700 warships expected to be built during the next few years, a majority will be smaller, coastal patrol vessels and corvettes, suggesting even further coastal state emphasis on control of their EEZs.

Fifth, the end of the Cold War and new threats such as the spread of weapons of mass destruction and smuggling of drugs and humans further encourage both coastal and maritime states to extend their control or surveillance beyond their territorial seas, in some cases to others' EEZs. Certainly in the aftermath of September 11, 2001, many nations, and the United States in particular, have increased their scrutiny of both military and commercial aircraft and ships approaching from near and far. Sixth, it is not always clear where one nation's jurisdiction ends and another's begins.

These developments imply that certain UNCLOS provisions formulated 25 years ago in a very different political and technological context must be interpreted in the light of the new circumstances. But what are the specific issues, and what, if any modifications are necessary?

To address these issues, the East-West Center and the Center for Southeast Asian Studies Indonesia initiated a dialogue in Bali 27–28 June 2002. The Bali Dialogue explored the issues, defined areas of agreement and disagreement, and formulated a multinational, multidisciplinary research and dialogue agenda designed to promote mutual understanding, and, ultimately, consensus. This agenda will be addressed in a series of conferences supported by background research to be co-sponsored by the IOP/SOF and the EWC. The Tokyo Meeting, here reported, was the first step in the process.

## **Session II: Summary of the Bali Dialogue**

by Mark J. Valencia, Senior Fellow, East-West Center

### **Key Questions Regarding Military and Intelligence Gathering Activities in the EEZ**

Some disagreement focuses on the nature of the activity involved. Does UNCLOS provide adequate guidance regarding such activities or should we rely on customary rules and state practice? Can countries engage in military exercises and maneuvers, including the firing of weapons, in the EEZ of another country? UNCLOS addresses this question in Article 58 (1):

In the EEZ, all States, whether coastal or landlocked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Article 87 recognizes the freedom of navigation for all states in the high seas, and Article 58(1) thus confirms that this same right also exists in the EEZ, subject, however, to the qualifications found in Article 58(3):

In exercising their rights and performing their duties under this Convention in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

When Brazil signed the Convention on December 10, 1982, it issued a Declaration containing the following language:

(3) The Brazilian Government understands that the provisions of Article 301, which prohibits “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,” apply, in particular, to the maritime areas under the sovereignty or the jurisdiction of the coastal State.

(4) The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out in the EEZ military exercises or maneuvers, in particular those that imply the use of weapons or explosives, without the consent of the coastal State.

Is Brazil's "understanding" of the Convention correct? Since then similar declarations have been filed by Cape Verde, India, Malaysia, Pakistan, and Uruguay, and sharply opposing declarations have been filed by Germany, Italy, the Netherlands, and the United Kingdom.

What is the effect of these "declarations" and "understandings"? UNCLOS Article 309 prohibits ratifying countries from reservations that would have the effect of opting out of any of the Convention's obligations, but Article 310 does permit states to make declarations explaining the relationship of the Convention's provisions to their own laws "provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State."

Also relevant to the analysis of what military activities are permissible near the coasts of other countries is Article 2(4) of the United Nations Charter which says that: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This limitation is reinforced by UNCLOS Article 88, which says that "[t]he high seas shall be reserved for peaceful purposes," and which explicitly applies to the EEZ pursuant to Article 58(2). Are there some military activities in the coastal area that could be viewed as inherently threatening? Are there some that would threaten the marine environment and resources in the EEZ, which the coastal state is obliged to protect and authorized to exploit? Could a coastal state rightly require that it be notified prior to military maneuvers occurring in its EEZ pursuant to the overarching international law obligation to consult with affected states prior to engaging in activities that might threaten their interests?

One commentator has characterized the issue of military uses in the EEZ as "one of the most difficult aspects of the work of the Third Conference on the Law of the Sea" and another has called it "one of the most controversial issues" of the Law of the Sea Convention. When the question of military activities in the EEZ came up at a meeting in Honolulu in 1984, Tommy T.B. Koh, who had represented Singapore and served as the second and final President of the Third United Nations Conference on the Law of the Sea, analyzed this problem as follows:

"Nowhere is it clearly stated whether a third state may or may not conduct military activities in the EEZ of a coastal state. But it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted. I therefore would disagree with the statement made in Montego Bay by Brazil, in December 1982, that a third state may not conduct military activities in Brazil's EEZ." At that same 1984 meeting, David Colson, then the Assistant Legal Adviser for Oceans and International Environmental and Scientific Affairs at the U.S. Department of State, denounced the Brazilian declaration as "frankly outrageous" and indicating "that they are not really very serious about the law that the Convention would seem to create." But

other countries took exception, arguing that having made strategic sacrifices during the Convention's negotiations in order to achieve a universally acceptable Convention, they were—and still are—uneasy about other countries' military activities close to their coasts.

During the negotiations, some countries expressed strong opposition to military activities in the EEZ because of the threats such activities present to coastal communities and marine resources. Delegates focused particularly on military activities that involve the use of weapons, the launching of aircraft, reconnaissance, interference with coastal communications, and propaganda aimed at the coastal communities. Among the nations that expressed concern were Peru, Brazil, Albania, the Khmer Republic (Cambodia), North Korea, Costa Rica, Ecuador, El Salvador, Pakistan, the Philippines, Portugal, Senegal, Somalia, and Uruguay. Of particular interest from our present perspective is a statement by the delegate of China, who said “freedom of scientific research in the past has meant espionage” and who sought clarification about what activity would be considered legitimate scientific research in the EEZ. The United States took the consistent position during these negotiations that military activities on the high seas and in the EEZ were consistent with the “peaceful purpose” requirement if they were conducted in a nonthreatening fashion in order to prepare for legitimate self-defense.

One recent article asserts that the “vast weight of authority” supports the view that the language in UNCLOS was designed to permit at least some military operations in the EEZ but also recognizes the inherent ambiguity in the language of the text of UNCLOS, the sharp differences of opinion that still exist regarding the proper interpretation of this language, and the need for further negotiated agreements to resolve these differences. Some commentators have observed that “the feeling has been expressed that many states will in the future be inclined to restrict military uses of the EEZ.”

Governing principles of international law emerge from multilateral treaties and from state practices undertaken with a sense of legal obligation, which provide evidence of an international consensus that certain behavior is required. Where the text of a governing treaty leaves certain matters ambiguous or unresolved, the subsequent practices of states become particularly important to determine the proper interpretation of the Treaty's provisions. However, some argue that in the case of military activities in the EEZ no prevailing orientation or trend can be inferred from present state practice. This leaves many critical questions unanswered.

For example, can a ship passing through the EEZ legally focus its fire-control radar on shore batteries? Can a spy ship in the EEZ announce its purpose and intent and operate with legal impunity? Is there a difference between military surveillance and spying, with the latter possibly having ‘hostile intent’? Indeed, is a spyplane or military vessel gathering intelligence about the coastal country and its military defenses by definition engaged in ‘peaceful’ acts?

Several uses do not neatly fit into the specific activities allowed by either user states or coastal states. For example, can live fire exercises adversely affect the environment or living resources and thus be banned? And do some intelligence activities border on ‘hostile intent’ or ‘threat of force?’

Another unresolved question sharply dividing nations is whether some of the intelligence gathering activities carried out by maritime powers in the EEZs of other nations should be considered ‘scientific research’ which, under the Convention, is permitted only with the consent of the coastal state. Regarding the difference between hydrographic surveying and scientific research, some data collected by a navy are not shared outside that navy and are not released for public purposes. These data are only used for military purposes, specifically for the protection and defense of ships and submarines. However, hydrographic surveying can also be for the making of charts to be released and used internationally. Thus the rule may hinge on intent.

### **Military Activities and the Regime of the EEZ**

Some conclude that the EEZ is a special regime, neither high seas nor territorial seas. It is a zone of shared rights and responsibilities. Coastal states have primary rights to the natural resources in the zone, while foreign states retain the freedom of navigation and overflight through this zone. However, as a relatively new regime in international law, the precise nature and full extent of coastal and other nations’ rights and responsibilities in the EEZ are still evolving.

If the EEZ is considered fundamentally coastal waters to which some rights were reserved for other states, then any unassigned or residual rights might well be considered as accruing to coastal states. Conversely, if the EEZ is considered as essentially high seas, with a certain set of rights and jurisdictions assigned to the coastal state, then any rights not explicitly assigned to the coastal state might belong to all states, as part of the pre-existing residual rights associated with freedoms of navigation on, in, and over the high seas out of which the EEZ has been carved. Military activities permissible in the high seas would then be included in that set of residual rights.

As agreed upon at UNCLOS, however, residual rights were unassigned and each side is required to exercise its rights in the EEZ *with due regard* for the rights of the other. Thus the regime is ambiguous. The apparent exclusion of the subject from formal negotiations, combined with the silence of the Convention ‘on legal questions connected with military uses’, render suspect, to some, the conclusion that military uses were intended to be permitted in the EEZ under the Convention. Article UNCLOS 58 says that in the EEZ countries have the same freedoms that exist on the high seas, that is, “navigation and overflight...and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircraft.” The first paragraph of Article 58 contains text that is not repeated in Articles 87–115. The implication is that if the activity is not associated with and does not affect resources or

the environment, then it is allowed. However, when user states exercise these rights they have to take into account the rights of coastal states. This would indicate that the delicate balance is solely between the economic rights of coastal states and the navigational freedoms of user states.

For example, some would argue that the use of explosives would be prohibited in the EEZ because it would introduce harmful substances, negatively impact living resources, and interfere with economic activities of the coastal state. But the maritime states insist that the coastal state must specify and demonstrate what is endangered and why, and not just simply declare that the activity “endangers” the environment. There is also the question of whether the foreign activity interferes with the ability of the coastal state to manage its resources, e.g., via surveillance and enforcement activities.

Another view holds that there is nothing specific in UNCLOS permitting military activities in the EEZ. The difference in interpretation stems from contrasting legal philosophies: one argues that what is not expressly prohibited is permitted; the other argues that what is not expressly permitted is not allowed.

What about military activities that are not listed in UNCLOS? It has been argued that these activities were lawful before UNCLOS and are thus lawful now. And if they are not specifically prohibited it can be argued that they are permitted. However, some nations have adopted national laws prohibiting such activities. For example, China apparently prohibits hydrographic surveying in its EEZ without its consent.

A third view holds that UNCLOS is very specific about which military activities are not allowed and where. In the territorial sea and the EEZ, anything that threatens the sovereignty of the coastal state is prohibited. Specific activities listed in Article 19(2)(a) such as intelligence gathering, the launching and landing of aircraft or military devices, and the interference with communications are not allowed in the territorial sea. Can it therefore be inferred that they are permitted in the EEZ? This view holds that this proscription in one jurisdictional zone but not the other was purposeful. On the other hand, some of the activities listed as not allowed in the territorial sea, for example, acts interfering with coastal state communications, would not be allowed anywhere.

To explore the significance of these differences, it was suggested that we need to look at specific user state activities and categorize them as to their impact on coastal states. For example:

- What is the ‘normal mode’ of a vessel?
- What is the potential impact of an activity on coastal states rights?
- What is ‘hostile intent’?
- When—if ever—does the gathering of military intelligence ‘threaten the use of force’?
- What is a ‘peaceful’ versus a ‘non-peaceful’ purpose and what is the difference between peaceful ‘purpose’ and peaceful ‘activity’?

Some argue we should refer to the historical background of the negotiations on UNCLOS. Others would prefer to let the International Tribunal on the Law of the Sea decide. Still others argue we also need to look at state practice in this regard. But state practice is likely to differ widely.

For example, some navies will take a first strike before returning fire, but the U.S. Navy will fire first if it detects ‘hostile intent’ as it unilaterally defines and determines it. And the South Korean Navy has issued new operational guidelines that allow firing for effect at suspicious ships in its waters after only a single warning round. Another example is the use of fire control radar. When Iraq turns on its fire control radar, the United States may consider it a hostile act that may be responded to with force. But the United States has reportedly turned on its fire control radar in China’s EEZ. If so, what is the difference?

As another example of a state position, the United States views the determination of ‘hostile intent’ as very specifically context-based. And there are specific guidelines to help commanders determine hostile intent and the appropriate response. Sometimes turning on fire control radar can be a means of communication or it can be a probe designed to elicit a reaction. Thus it is difficult to categorize hostile intent without context. In general, however, U.S. commanders are instructed that ‘peaceful purposes’ means non-aggressive actions.

### **Due Regard**

Some hold the view that there is no absence of rules regarding military activities in the EEZ, although they are an abstraction from UNCLOS, for example, Articles 56(2) and 58(3). These Articles hold that there are rights so long as there is no disregard of the rights of others. So part of the answer may hinge on the meaning and interpretation of ‘due regard’.

Some would argue that ‘due regard’ is subject to the regulations of the coastal state because UNCLOS provides that the user state “shall” [must] comply with the regulations of the coastal state. Others would argue that the coastal state must have ‘due regard’ for the navigational rights of others. It may be a matter of balancing these interpretations of ‘due regard’. The problem is that ‘due regard’ is usually left to the ship’s captain or aircraft pilot to decide. For example, the United States gives its commanders guidelines for ‘due regard’ as well as for ‘hostile intent’. However some ‘due regard’ situations, such as the very scheduling and design of exercises in another country’s EEZ cannot be left to the operator on the spot.

### **The Relevance of Recent Court Decisions and the 1982 Law of the Sea Convention**

What can a coastal state do in its EEZ to protect its resources and environment? The judgments in the *Saiga* case, the *Red Crusader* case and the *I’m Alone* case argue against the use of excessive force. Indeed, they require countries to engage in other

significant steps before using force, and they make it difficult for states to justify the use of force based on a 'state of necessity'. Specifically, the coastal state cannot fire without warning and should do everything possible to protect human life.

But can a vessel carrying arms or missiles be forcefully stopped, boarded and *detained* in the EEZ on the basis of self-defense, even if the nations involved are not officially at war? And what can the coastal state do if two warships of different countries appear about to engage in conflict in a third coastal state's EEZ?

What is the relevance of the peaceful purposes reservation, i.e., Articles 88 and Article 301, to the regime of military and intelligence gathering activities in the EEZ? More fundamentally, are military activities, by their very nature, peaceful or not? What activities are 'peaceful' and what are not 'peaceful', and why? Moreover, since it can be argued that most military activities are carried out for 'peaceful purposes', should there be a distinction between 'peaceful purposes' and non-military purposes?

A key foundation for the peaceful purposes reservation is 'good faith'. Article 300 refers to 'good faith' and that is why Article 301 on peaceful purposes follows Article 300. But some argue that 'good faith' may have no application to intelligence gathering. After all, the purpose of at least some military intelligence gathering by states is to gain military advantage over other states, hardly a 'good faith' action.

However, it can also be argued that military intelligence gathering is a force for peace because it acts as a deterrent. Moreover, there are many intelligence gathering activities that are part of arms control verification agreements and serve a critical role in confidence building and thus peacekeeping. Therefore there is a continuum in both the theory and practice of 'good faith'.

### **Areas of Consensus**

- The EEZ is neither territorial sea nor high seas.
- If the activity demonstrably impinges on the economic resources or marine environment of the coastal state, the coastal state has a right to take preventive action.
- The coastal state, in the exercise of its jurisdictional authority, should not interfere with or negatively affect internationally lawful uses of the sea.
- There is freedom of navigation, overflight, and laying of submarine cables in the EEZ.
- These freedoms are subject to the principles of 'due regard' and the non-abuse of the rights of others.
- Military vessels are subject to immunity, but the flag states are liable for any damage these vessels cause to the environment and resources of other states.
- No specific rules exist governing military activities in the EEZ. However, it can be deduced that they must be peaceful, that is, non-hostile and non-aggressive, that they must refrain from use of force or threat thereof, and that they must not adversely affect economic resources or the environment, or the management thereof.

- At a minimum, consultations among countries as to rules of the road, rules of engagement, and communications protocol can enhance transparency and clarify existing international norms.
- Continuing dialogue is important to clarify different states' positions and practices on these issues.

### **Areas of Disagreement**

The areas of disagreement range from interpretation of relevant provisions of the Law of the Sea Convention to the means of resolving disagreements—or even the need to do so. For example, states disagree on the meaning of freedom of navigation and overflight; 'other internationally lawful uses'; 'due regard'; 'non-abuse of rights'; 'peaceful' activities; 'hostile intent'; 'threat of force'; and the differences between hydrographic surveying and marine scientific research. States also have fundamental disagreement over whether military activities in the EEZ should have any limits, including self-identification as a ship or aircraft passes through another country's EEZ. States also disagree about the circumstances under which a foreign ship can be stopped and boarded in another country's EEZ.

The views on how to address these disagreements are equally disparate and wide-ranging. Some feel there is no need for rules because there is no pattern of behavior or incidents requiring them as there was prior to the U.S./Soviet INCSEA agreements. Others feel that these issues were discussed in great detail during the UNCLOS negotiations and that the resulting Convention contains the consensus and necessary guidelines. And yet other believe the best approach is to do nothing and let customary practice and evolving soft law resolve these issues over time. Indeed, new practices and domestic laws are being developed in this area and those may eventually become accepted practice.

However, some believe that the situation is sufficiently urgent, complicated, and rife with misunderstanding that concerned states should be pro-active. Some of these proponents of action favor *ad hoc* confidence-building measures and consultations on a bilateral and regional basis. They would like to see guidelines developed that would include commitments: (1) to give 'due regard' to other users and uses; (2) to refrain from use of force or the threat thereof; and (3) to exercise good faith in both communication and actions.

Clearly, problems occur when countries do not agree on, or follow, the unwritten 'rules'. During the Cold War, both the U.S. and Soviet navies engaged in dangerous harassment, leading to serious incidents and stimulating the need for an INCSEA agreement. Perhaps an extension or expansion of INCSEA to other countries would be appropriate. Also, there are already commonly understood 'rules of the road' for mariners. For example, if a warship encounters a fishing vessel, the warship must give

way to the fishing vessel. Perhaps similar ‘rules of the road’ could be established for military activities.

### **Critical Questions for Research and Dialogue**

The Bali Meeting made it clear that subsequent meetings were needed to involve more ‘operators’ of military vessels and aircraft from a wider range of countries so that a better idea can be gained of their interpretation of the rules of engagement and if and how these interpretations differ in critical ways. Moreover, it was clear that there are ambiguities and disagreements regarding interpretation of some critical UNCLOS provisions and thus a need to focus on and clarify these differing interpretations. It was also clear to some that more bilateral ‘understandings’ are needed within the Asian region.

It was also considered by some necessary to analyze the impact on the existing regime, institutions, and state practice of new technology; the aftermath of September 11, 2001; increasing fragmentation of national authority; and the increasing use of the sea for nefarious purposes. It was felt that in this way, this continuing Dialogue and supporting research could contribute to agreements or arrangements that are currently being negotiated and/or implemented, as well as highlight new areas where mutual understanding needs to be enhanced.

## Session III: Perspectives on Critical Questions

### Panel and Open Discussion

The issues being discussed have to be viewed in historical perspective. They are extremely controversial and UNCLOS does not provide much guidance. Freedom of the seas has always been a critical issue, particularly in the colonial period when all other rules were subordinate to the freedom of the seas. However such absolute freedom led to interference by some maritime powers in the affairs of the coastal states. Thus coastal states began to feel that the freedom of the seas was a form of tyranny.

After WWII, it was the United States that led the way in extending its jurisdiction over its continental shelf, and all other states followed. Then came agreement on a 12 nm territorial sea and then the EEZ. These jurisdictional extensions were seen as helping the coastal state curb abuses of freedom of the seas. At the same time maritime powers, including the United States, continued to argue that they have the absolute rights of the old freedom of the seas in the EEZ, and that was the essence of their agreement to the EEZ concept. Ultimately, UNCLOS came to be interpreted through the practice of states.

Put bluntly, coastal states need to feel secure. This is the critical issue. Of course passage must be allowed, but with due regard to the interests of the coastal state. Thus it is argued that coastal states have the right to regulate military activities. However, we need to develop clear criteria for military activities that may or may not be conducted in the EEZ as well as for freedom of navigation and overflight and the use of military equipment and weapons in the EEZ. Indonesia, for example does not permit other states to conduct military activities in its EEZ if they can be assumed to be a threat to Indonesia's security. Thus Indonesia believes navigation and overflight of the EEZ should be for 'peaceful purposes' only.

We may seek some guidance regarding the definition of 'peaceful use' from the outer space treaty discussions in 1966 and those on peaceful uses of the deep seabed. The outer space treaty says that non-aggressive military use is allowed. Moreover, the right of self-defense is also included in the space treaty. There may be some application of these precedents for the interpretation of 'peaceful use' of the EEZ.

In the summer of 2000, Japan publicized Chinese intelligence gathering activities in Japan's EEZ. It also formally protested China's conduct of scientific research in Japan's claimed EEZ without its consent. There are thus two categories of activities by China—one is scientific research and resource exploration, and the other is the collecting of intelligence in Japan's EEZ. Japan says the latter means China is expansionist and a threat to Japan. But China says it has no hostile intent toward Japan. It says that the Chinese navy needs to learn more about oceans because it is in the process of transforming from a focus on coastal defense to offshore defense. Nevertheless these activities worry its neighbors.

Regarding hydrographic surveys, the word ‘surveys’ was used in UNCLOS because the Treaty drafters consulted the International Hydrographic Bureau. The understanding was that ‘surveys’ related to territorial seas and straits used for navigation, not the EEZ. Hydrographic surveys meant surveys to enhance the safety of navigation and were not considered marine scientific research. If this is to be the understanding, when surveys are undertaken in the EEZ, they should be under a consent regime and the results should be made available to the coastal state.

One may try to differentiate these activities as follows. Research in the EEZ can be divided into three types: hydrographic surveys, research by military vessels, and marine scientific research. Marine scientific research can be divided into advancing ‘pure’ scientific knowledge and resource exploration. Marine scientific research is subject to the consent regime in the EEZ. The difference between marine scientific research and hydrographic surveys is that the latter are designed not just to increase general or resource knowledge for the benefit of all humankind but to make navigation safer. Thus hydrographic surveys are not subject to coastal permission. Marine scientific research and military research can be similar. But military research is not focused on resources or economic development so it is argued that it is not subject to a consent regime.

In this connection, UNCLOS should not be considered an immutable bible. Indeed, it has been interpreted and changed in same ways by Agenda 21 and other subsequent conventions. The recent safety at sea convention goes much further than UNCLOS. At the time of UNCLOS, SOLAS was the model, but the recent convention enhances the regime. If hydrographic surveys are being used unjustly for other purposes we need to look at the context. There is no reference to hydrographic surveys elsewhere in UNCLOS. This was on purpose because it was considered outside the purview of marine scientific research. If this question could be resolved, then growing suspicions might be alleviated and we could avoid the rationale of ‘safety of navigation’ being used for other purposes.

In December 2002, China’s National People’s Congress passed a law stating that any survey or mapping activities cannot involve state secrets or hurt the state and all such surveys must have prior permission. This is not a new law, but an elaboration of its 1998 EEZ law. But the United States holds that China’s action is inconsistent with international law. It argues that the vessel which sparked this reaction, the *USNS Bowditch*, is an unarmed hydrographic survey ship run by a civilian agency and that data it collects are available to the public after the military has finished with it. The United States allows foreign vessels and aircraft to conduct such activities in its EEZ. However, in China’s view, the *Bowditch* is an intelligence-gathering vessel and threatens its security. To resolve such issues, we need more technical information on hydrographic surveys and what they entail.

We must also clearly define the concerns of coastal and maritime states. Until we focus on the real concern, we will not resolve the issue. Is it only security? The EEZ was established to assist the economic development of the coastal states. Clearly one concern is that these activities are impacting resources. In this case, the coastal states' interest must predominate and the user state must have due regard for coastal state rights in the EEZ. But if the EEZ is purely a resource zone, than any law enacted by the coastal state for the EEZ that is not related to resources would be inconsistent with part 5 of UNCLOS. However, there are other sections of UNCLOS that may apply, e.g., the peaceful purposes reservation. Perhaps the navy people can describe in some detail their activities and their possible impacts and then we can determine if they are consistent with UNCLOS or not. There is no objection to navigation in the EEZ *per se*, but to the content of operations during that navigation. That is what we should focus on.

Some feel the difference between the EEZ and high seas and between the EEZ and territorial seas is being obscured. There are two trends, one is to internationalize the EEZ and the other is to territorialize the EEZ. The question is 'what is the extent of the freedom of navigation in the EEZ,' i.e., how much freedom do other countries have and what is the scope of the rights of the coastal state?

The anti-terrorist campaign in recent months has exacerbated this issue. Due to attacks on ocean transportation and an increase in piracy, countries are stepping up inspection and boarding of foreign ships in their EEZ. The port authorities and coastguards are tracking cargos from port to port. Now with the North Korean nuclear crisis, Japan intends to increase its control and scrutiny of all vessels entering and leaving its EEZ. China will also take such action. And these activities may affect other EEZ issues. These are new problems and sources of conflict that we must face.

We must also address the bigger issue. We must go beyond UNCLOS and put it in context. The global political dynamics have changed and the legal framework must evolve to be consistent with the current context. What is 'threat or use of force'? What is the meaning of 'fair'? These terms were defined in a bi-polar era that is long gone. Technology has marched far ahead of UNCLOS. We are all both coastal states and maritime states. But there are sharp inequities in the power structure that is producing the problems we face today.

## **Session IV: Operational Modalities and ‘Rules of Engagement’ of Navies Operating in the Region**

### **Introduction\***

The maritime setting in Northeast Asia is dominated by overlapping claims to islands and ocean space and illegal activities such as piracy, poaching, and smuggling. In response coastal states are strengthening their naval forces and transparency is very limited. Further, actual naval conflicts are occurring with increasing frequency due to increasing naval activities, including naval exercises.

UNCLOS establishes a regime for the oceans that includes a number of ‘zones’ in addition to the traditional divisions of internal waters, territorial seas, and high seas. Although explicitly applicable only in peacetime, these new zones have a spillover effect on the law of naval warfare, particularly in the relationships between belligerent and neutral states. This spillover effect is most pronounced in the expanded territorial sea of twelve nautical miles and in archipelagic states. Mechanical extension of rules that were formulated for narrow three-nautical-mile territorial seas to these broader areas of national jurisdiction is likely to create additional tensions between neutrals and potential belligerents, perhaps widening the areas of conflict and drawing neutrals into it.

Despite these dangers, the developing law, as reflected in the military manuals of several maritime states, seems to accept the old rules as applicable to the new and expanded national zones in the oceans. While the provisions of UNCLOS concerning internal and archipelagic waters, the territorial sea and the contiguous zone are largely intended to apply international law to existing practices, the concept of an EEZ is essentially new and its adoption is largely attributable to the enhanced technology which renders feasible control of such areas. To exercise control over an EEZ requires substantial investment by the coastal state and the cost may not always seem worthwhile.

The question which confronts many coastal states is whether the exercise of control over its EEZ is a naval task. Naval planners point to the need for a blue-water capability in order to police the entire zone and insist that warships provide the only effective deterrent to foreign pirates, poachers and smugglers. Indeed, the concept of an EEZ has afforded the protagonists for navies another argument. Not only is a navy regarded as essential for defense in war and for diplomacy in peacetime, but a naval presence is now believed by naval strategists to be indispensable to the maintenance of a nation’s sovereign rights over its resources in its EEZ. In fact, UNCLOS has spawned a huge industry for the supply of hardware to enable surveillance and policing in maritime zones, and naval planners have not been slow to explain that those functions can be carried out at marginal costs by properly equipped warships.

---

\* Summary of a paper presented by Kim Duk-Ki.

The arguments in favor of using naval vessels for law enforcement in an EEZ have fundamental weaknesses. First, there may be few if any activities of significant interest to a state in its EEZ. Second, it is unlikely to be cost-effective to employ a warship for routine policing which can be carried out at a fraction of the cost by a civilian patrol vessel. There is also no purpose in patrolling the borders of an EEZ unless there are specific reasons for doing so. While most countries are intent on protecting their fisheries from poaching, which may require firm action, it is not necessary—and even dangerous—to employ warships for that purpose. The use of warships becomes even more ridiculous when it is realized that by far the most frequent violations in fishing zones are perpetrated by local fishermen. Nor is it politically wise to employ the defense force of a country to police the activities of its own nationals.

The employment of naval forces to police EEZs also risks the future freedom of navigation of navies. Although UNCLOS avoids imposing constraints on the passage of foreign warships through EEZs mainly at the insistence of naval powers, states developing their navies to dominate their EEZs will perceive advantages in extending the concept of a territorial sea to include the EEZ when and if UNCLOS is renegotiated. Countries without the means to maintain navies will undoubtedly support such a move. Not only will that oblige the international community to respect full national jurisdiction over EEZs, except perhaps for the innocent passage of ships, but small or poor nations will be spared interference in their affairs through gunboat diplomacy. Foreign warships cruising some 200 nm offshore are not likely to pose the same threat as those approaching to 12 nm.

At present, warships in principle enjoy the freedom to carry out their military missions under the regime of the high seas subject to three basic obligations. First, they have the duty to refrain from the unlawful threat or use of force. Second, they have the duty to have ‘due regard’ to the rights of others to use the sea. Third, they must fulfill applicable obligations under other treaties or rules of international law. These same requirements apply in the EEZ with the additional obligation of ‘due regard’ to the rights and duties of the coastal state in the EEZ.

This conclusion is equally applicable in times of armed conflict. The juridical nature of the zone does not change with the transition from peace to war. There is thus no basis for concluding that, except for the duty to have due regard to the rights of the coastal state for the exploitation of the economic resources of the zone, the conduct of hostilities by belligerent states in the EEZ of a neutral state is subject to greater restraints than is their conduct on the high seas. However, there is no basis for concluding from UNCLOS that the EEZ is to be equated to the territorial sea insofar as the application of the rules of neutrality are concerned.

Nevertheless, there have been suggestions from states and in the literature that some states may regard the regime of the EEZ as encompassing the right of coastal states to restrict military operations in the EEZ. For example, in addition to its assertions

concerning military maneuvers in the EEZ, Brazil also requested the Legal Committee of International Civil Aviation Organization (ICAO) to hold that the rules of overflight of the EEZ were the same as for those over land territory and the territorial sea. The Legal Committee rejected this request, holding that such a position was totally incompatible with the provisions of UNCLOS, which equate the EEZ with the high seas insofar as freedom of overflight is concerned. Although the positions stated by Brazil, Cape Verde, and Uruguay were directed explicitly to a peacetime situation, one may infer that they might be asserted with respect to the conduct of hostilities and other military operations in their EEZs in wartime.

This position is not supported by UNCLOS nor is it supported by several military manuals. The Canadian Draft Military Manual provides explicitly in paragraph 703 that: “The general area within which the naval forces of belligerents are permitted to conduct operations involving the use of force includes: the high seas (including EEZs).” The German Manual likewise provides, “[A]s a matter of principle, acts of naval warfare may be performed as in the high seas also in the EEZs of neutral or non-belligerent states.” Although the United States manual does not explicitly state the same proposition, it does so by omission when defining neutral territory as including the neutral’s land, internal waters, territorial sea, and archipelagic waters (if any). It thus seems incontestable that, despite the assertions of a few states and publicists, the EEZ is presently equated to the high seas insofar as the application of the law of neutrality is concerned.

The following are tentative recommendations for reforming the rules of naval warfare affected by the emergence of new zones in UNCLOS.

1. When hostile operations by naval forces are conducted within the EEZ or the waters or airspace above the continental shelf of a neutral state, the belligerent states shall have due regard to the rights and duties of the coastal state for the exploitation of the economic resources of the EEZ and the continental shelf. They shall, in particular, respect the neutral state’s artificial islands, installations, structures, and safety zones.
2. Within neutral waters, hostile acts by belligerent forces are prohibited. A neutral state may exercise such surveillance and enforcement measures to prevent violation of its neutral waters by belligerent forces. Hostile acts include attack or seizure of enemy warships or military aircraft; laying of mines; visit, search or capture; detention of a prize or establishment of a prize court; and use as a base of operations.
3. Subject to the duty of impartiality, and under such regulations as it may establish, a neutral state may, without jeopardizing its neutrality, permit the following acts within its neutral waters: innocent passage through its territorial sea, and where applicable, its archipelagic waters, by warships and prizes of belligerent states (for the purpose of exercising the right of innocent passage, the warship or prize may employ pilots of the neutral state); replenishment by a warship of its food, water

and fuel sufficient to reach a port within its national territory; repairs of warships found necessary by the neutral state to make them seaworthy (such repairs may not include repair of battle damage nor increase the belligerent's fighting strength).

4. A belligerent warship may not extend its stay in neutral waters for longer than 24 hours unless the neutral state grants an extension because of weather or route of innocent passage of such length as to require more than 24 hours for passage whereupon the time allowed should be equivalent to the normal time of such a passage for that vessel.
5. Belligerent warships and military aircraft may exercise the right of transit passage through neutral international straits and archipelagic sea lanes passage through neutral archipelagic waters while within neutral waters comprising an international strait or an archipelagic sea lane, belligerent naval forces are prohibited from carrying out any hostile act.
6. Should a neutral state be unable or unwilling to enforce its neutral obligations with respect to hostile military activities by belligerent naval forces within its neutral waters, the opposing belligerent may use such force as is necessary within such neutral waters to protect its own forces and to terminate the violation of neutral waters.
7. A neutral state shall not be considered to have jeopardized its neutral status by exercising any of the foregoing neutral rights nor by allowing a belligerent state to exercise any of the privileges permitted to a belligerent state.

Naval strategy is shifting from global war with a large and capable adversary toward regional warfare with a medium-size power. The operational focus is changing to littoral warfare and greater reliance on rapid crisis response. The focus on operations in the littoral environment raises new problems of political legitimacy and credibility, effective initial operations, and sustainment. Political legitimacy requires that the states of the area in particular and some significant majority of the world community regard the operation as justified. The Restore Hope operation in Somalia is a case in point. Credibility means that as the deployed force becomes visible, it looks like it intends to do the job, and it can. Effective operations and sustainment require mastery of the littoral, an operational environment rather different from the more familiar high seas. In virtually all cases, such challenges are better met with the cooperation of third countries.

### **Rules of Engagement (ROE)\***

The definition of ROE is clear and unambiguous: 'the matching of *political control* to executive power in a clear and readily understood fashion.' The key words here are political control and they lie at the root of the European approach to the matter. Yet, there is a natural tension between the politician and the military man. The first will

---

\* Summary of a paper presented by Alexander Skaridov.

seek to keep all options open, avoid escalation, and yet achieve the objective. The second will seek clear guidance and comparative freedom to decide on the use of force, if required, to meet the objective. There will, therefore, always be some degree of tension in the formulation of ROE so that the commander on the spot has a clear objective, sufficient authority and sufficient tactical freedom to achieve the objective and protect his vessel or his force. There is no doubt that ROE are paramount to the control of military forces and there is a tendency for an increasing amount of control to be demanded as the political process becomes more complex and as the politicians themselves appreciate the hazards of international relations and adopt a more cautious attitude.

ROE are a phenomenon of the latter part of the 20th century and reflect the complexity and political sensitivity of limited military operations or intervention operations that can lead to military conflict. They also reflect a greater political awareness of all aspects of international relations and particularly those in which some form of intervention, whether by national forces or those operating under the auspices of an international organization, is required. Often they are designed to keep the threshold of conflict high so that military action is avoided, and they have become as much a feature of peacekeeping as peace-making and limited war operations. Indeed once conflict has broken out, ROE are likely to become less complex.

The growing importance of ROE reflects a much greater degree of control by politicians over the military, and politicians are likely to become more significant in any operation that uses military force, short of all-out war. No longer can nations resolve a local difficulty with impunity. Even the United States, the one remaining superpower, has to take into consideration the impact of its actions in the light of international opinion and concerns. Thus ROE are paramount to the control of military forces in what is a sensitive and unstable era and their application is facilitated by the veritable explosion in communication technology that provides the capability and capacity that permits comprehensive information exchange in real time.

When one examines three nations—France, the United Kingdom and the United States—which have developed the concept of ROE to the greatest extent based on their substantial military experience, it is possible to identify a common thread. In particular, their navies, by nature of their global and thus wide-ranging perspective and experience, have more sophisticated ROE and a significantly greater awareness of the concept of the rules and their application. Their armies and air forces, on the other hand, are more limited in experience. The 1990–91 Persian Gulf operation underlined the need for these branches to adapt to ROE, and the gap in this regard between ground, and air forces and their maritime counterparts.

In a world that has become more dangerous as a consequence of the demise of the bi-polar structure with its clearly accepted spheres of influence, there are new and less traditional menaces to political and economic stability. Thus the strategy to contain perceived threats to world order has changed and is now much more likely to be focused

on littoral operations. There is also an additional concept regarding the employment of maritime forces, brought about as much by UNCLOS, which spawned a consciousness of the significance of EEZs, as by the conventional diplomacy between nations.

At sea the environment in which naval forces operate, once so simple, is now immensely complex. The commanding officer has a comprehensive communication and intelligence service of the highest quality and capacity. But this also means he is at the immediate beck and call of his superiors. The commanding officer must bear in mind the provisions of UNCLOS and the issues commonly associated with EEZs which concern the protection of resources. But he should also include counterterrorism and anti-drug smuggling operations and the growing threat, particularly in Far Eastern waters, of piracy. Further there will be humanitarian assistance activities that can best be conducted by disciplined naval forces and, more contentious, the monitoring and control of mass population movements by sea. In this context it is worth recalling that the Italians felt compelled to use naval escorts to deal with the problem of a high influx of Albanian refugees in 1991.

From the perspective of a major or medium maritime power there is a cautious awareness that not only are many of the emerging nations equipping themselves with relatively small vessels acquired with the aim of policing EEZs, but also that they are sometimes armed with high quality weapons not always germane to such roles. There are few 'low tech' threats any more and the smallest nation could severely embarrass the most powerful force, either of a single nation or a coalition, if not considered and assessed with circumspection. For example, it was very noticeable in the campaign of 1991 how much emphasis was placed on the early destruction of the relatively small and insignificant Iraqi Navy. Also had Iraq, or indeed a sympathetic state, prepared to interdict the sea train or possessed a submarine capability, there would have been a marked difference in the balance of forces required for the protection of reinforcement and resupply shipping and the routing arrangements of this vital link that provided over 90 percent of the logistic support for the operation.

It is thus not difficult to understand the very considerable concern being expressed in many circles at Iran's acquisition of Russian Kilo-class submarines, which alters the whole strategic balance of the area. Nor is this potential threat confined to the Persian Gulf, for there are over 20 navies of Third World and emerging nations possessing between them more than 200 submarines. The emphasis has now moved away from open ocean anti-submarine warfare, the province of the larger navies, to coastal operations essential to all, and anti-submarine capability is a significant feature of all but the smallest of newly constructed naval vessels. In light of these complexities, coupled with increasing diplomatic interchange, it is not surprising that a viable system of ROE has become essential to the conduct of operations at sea. The tragic consequences of the *Stark* and *Vincennes* incidents only serve to underline the perilous tightrope and very fine margin that exists between the two extremes of self-defense and aggressive action.

Nevertheless, the existing ROE were considered too elaborate by the leadership of the Russian Navy, and political control hampered war fighting. So by the end of the 1980s the rules were rewritten around three key elements. The first was to avoid a mixture of prohibitions and permissions, which is a dangerous combination because eventually they will conflict. Permissions should be confined to the operation order because they refer to missions, while limitations should be contained in the ROE.

The second key element was to determine the political objective from three choices—de-escalation, preserving the *status quo*, or escalation. Once this objective is established it is most important to have sufficient forces to be able to enforce the given ROE. Closely aligned with the determination of the political objective is the principle of adopting a profile of operations which in practice means that the force is allocated a group of rules that conform to the desired profile and objective of the force concerned. This does not mean that changes cannot be made as circumstances change, but it provides an initial suite of complementary rules designed to meet the aims of the operation. Although these changes gave the politicians many options in responding to a given situation, they initially had difficulty in accepting that the rules provided a wide choice largely because they feared giving the military too much power. On the other hand there is a feeling among the military that the infrastructure for the implementation of rapid and effective ROE is in place, yet expeditious response could still be constrained by the political process.

We need to divide clearly two related areas—rules of engagement and rules of behavior. Control of engagement, which involves anything which might lead to the firing of any weapon, is very firmly in the hands of a government. However, rules of behavior, which involve every other aspect of interaction between forces, such as proximity of approach to potentially hostile targets or the stopping and boarding of ships, including electronic countermeasures, remains under the control of the military. In general this system is considered simple to manage and also has the advantage of giving the military more responsibility than other methods in use.

Second, naval forces operating in the same EEZ must have the same ROE or share their ROE. A ship isolated by its rules is not in a position to respond and may well receive retribution because this becomes evident to enemy forces. On the matter of ROE for multinational forces, all units should have the same rules and operational difficulties. For example, France agreed that Western European forces had to have ROE that were common with those of NATO and that the situation that existed in the Gulf of individual nations using differing ROE was unacceptable. Nonetheless the French government is strongly against liberal use of ROE covering hostile intent, because it feels it results in far too loose a system of control. Like the British, the French are disposed to allow the opponent in an uncertain situation to take hostile action before retaliating.

After the invasion of Kuwait by Iraq in 1990, relatively few nations deployed land or air forces to support the allied operations, but many sent naval units to the area, to the

extent that there was an embarrassment of resources. This complicated the embargo operations, particularly as the national ships or groups operated under differing ROE. Worse, the reluctance of nations to compare ROE precluded, with very few exceptions, combined boarding operations. If nations found it easier to allocate ships to the allied effort, the ROE attitude of each nation soon revealed their real commitment to effective action. Although, the precise rules were not known, it was evident that differences in ROE stemmed from the differing robustness of nations in putting themselves forward with real intent. Among the main players Australia, France, the United States and the United Kingdom did not initially share rules, although eventually the last two were virtually in harmony. The Dutch, although under some political constraint, were known to be in unison with the United Kingdom.

The rules today must have adequate authority in accordance with a clear political directive, thus avoiding the need to refer back to the operating authority and allowing the force commander sufficient robustness to defend his own unit. When operating under UN auspices, it is essential that no member nation's forces should be put in a position of danger with ROE less robust than their national rules. With increasing interdependence and the likelihood of both formal and *ad hoc* alliances undertaking operations a cross the spectrum of humanitarian operations to conflict, a great deal remains to be achieved in this field.

### **The Russian Approach to ROE\***

The first rules relating to the application of arms against hostile acts at sea were adopted in Russia in 1896. These regulations have not changed much. ROE are not understood in the Russian military system in the same manner as, for example, in the U.S. Navy. For the U.S. Navy, ROE are "directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces." However, for the Russian Navy, ROE can be interpreted as "Rules of Arms Application" (ROAA). The main difference is that in the U.S. Navy, the government adopts ROE for the specific situation in the specific area, and they may differ for each incident. In the Russian Navy, the government adopts rules for the application of arms without taking into consideration the specific situation. In short they are not designed to control conflict and manage crises.

The rules of arms application and the rules for preventing firing against maritime and air vessels violating the law in Russian space are specified in the following normative legal documents: (1) Federal laws, namely: "EEZ of the Russian Federation," 1998; "Continental Shelf of the Russian Federation", 1995; "the Frontier of the Russian Federation", 1993; "Internal Waters, Territorial Sea and Contiguous Zone", 1998. (2)

---

\* Summary of a paper presented by Alexander Skaridov.

instructions of the RF Government: #977, 1994, “Rules of Arms and Military Equipment Application for the Protection of the Frontier of the Russian Federation in Air Space”; 31208, 1996, “Procedure of Arms Application by Warships and Aircrafts of the Federal Frontier Guard Service of the Russian Federation for the Protection of EEZ and Continental Shelf of the Russian Federation”; #20, 1998, “Procedure of Arms and Military Equipment Application for the Protection of the Frontier of the Russian Federation”; and #1310, 1999, “Procedure of Arms and Military Equipment Application for the Protection of the Frontier of the Russian Federation in the Underwater Space”.

Analysis of these documents indicates that there are some differences in the rules and procedures of arms application against sea and air vessels. Warships and aircraft of the Russian Frontier Guard Service and Navy are enabled to apply arms without warning in the following cases:

- a) suppression of armed provocation at the Frontier such as repulsion of a sudden or armed attack;
- b) suppression of armed resistance during the stoppage and arrest of a vessel trespassing the frontier which violates the established rules;
- c) suppression of explicitly hostile armed acts of foreign vessels against Russian artificial islands, installations and structures based on the continental shelf of the Russian Federation.

The basis for taking action and applying arms and military equipment for the protection of the Frontier of the Russian Federation are:

- a) surmounting of opposition to regulatory requirements for observance of rules related to the Frontier and its regime, entry point regime, accident prevention, and arrest of the trespassing vessels and persons violating the rules, and their delivery to the units and subdivisions of Russian Frontier Guard Service for ascertainment of the circumstances;
- b) repulsion of attacks directed against warships, aircraft, military stations, guarded objects, structures, detachments and cargos;
- c) in cases when the captain of the warship, after giving the trespassing vessels internationally accepted signals to stop, is certain that the signals are ignored and the vessel tries to escape; and
- d) prevention of hijacking of air and sea crafts, riverboats and other transport facilities without passengers on board.

Warships and aircraft can apply arms against trespassing vessels in the EEZ or on the continental shelf, as a response to their use of force. Arms can also be applied in other exceptional cases when pursuing a ship in accordance with international law when all possible measures that could have been taken in such circumstances to stop the violation and arrest the ship are exhausted. Before the captain of the warship or aircraft can apply arms, he must:

- give the trespassing vessel a signal to stop accepted in international practice; the signal should be given at a distance that would provide visibility or audibility of the signal;
- during the pursuit of a trespassing vessel, give a signal accepted in international practice which would warn the vessel that if it does not stop, arms will be applied against it;
- fire preventive shots guaranteed to miss a trespassing vessel or other vessels and aircraft located in the area; the decision to fire preventive shots is made by the captain of the warship or aircraft;
- make certain that a trespassing vessel has not fulfilled the requirement to stop and is trying to escape despite having received signals and preventive shots.

The decision to apply arms against a trespassing vessel is made by the Commander-in-Chief or his deputy.

The application of arms against trespassing vessels is prohibited, if, due to adverse conditions, they cannot be guaranteed to miss the target and other vessels and aircraft in the area. Each use of preventive shots or arms application against foreign vessels must be immediately reported to the Ministry for Foreign Affairs of the Russian Federation.

Signals used for warning trespassing vessels are established in accordance with Russian legislation but must be acknowledged internationally. Among these signals are: SN – You must stop immediately. Do not try to leave. Do not lower boats. Do not negotiate through the radio. In case of defiance, we will fire; SQ1 – You should stop or heave to, otherwise we will open fire. In case of disobedience, the commander then opens fire. The Rules provide that artillery should be applied. Rifles can only be used when the application of artillery is complicated or impossible. Three shots (volleys or fragment-tracer shells with self-destruction mechanisms) should be used. They should have sufficient elevation and be performed in sectors that would ensure missing the target—trespassing vessels or any other vessels and aircraft located within the area. The firing should be from one artillery mount. For average caliber rifles, single shots should be used. Fire control radar is not to be used.

When an aircraft uses cannons, the shooting should be in an area which is safe for all the objects located therein. Missing the target should be guaranteed. Preventive shots should be made twice, by the aircraft commander personally or at his command by one of the flight crewmembers. In the first instance, two short volleys should be made; the second time, there should be three volleys. The decision to apply arms at a trespassing vessel should be taken by the aircraft commander or at his direct command. For warships, the decision to target a vessel is made by helicopters based on the warship and taken by the captain of the ship. The application of arms should cease after the trespassing vessel has fulfilled the requirement to stop.

The “Rules of Arms Application” in the EEZ have a few peculiarities. For example, aircraft can apply arms without warning only when they repulse an attack suppress armed resistance of the trespassing vessels when detaining and arresting the ship or suppress explicitly hostile acts by foreign vessels directed against the Russian coast, Russian artificial islands, installations and structures, provided the hostiles are armed. The decision to apply deadly fire after preventive shots is made by the head of the regional department of the Russian Frontier Guard Service.

Only the Naval Command has the power to apply arms against underwater objects. Aircraft arms can only be applied at the command of the captain who gives a relevant audible warning signal; the Commander of the Navy who carries out a preventive bombing, or the Commander-in-Chief of the Navy who destroys the underwater target. The signal is given by means of an explosion from a distance that would enable the trespasser to hear it. The signal can be repeated using hydro acoustic equipment. The captain must report to the Commander of the Navy (if the trespasser does not react to the signal within 10 minutes) and, by his order (provided reliable data on location of the trespasser with regard to the warship or aircraft is available), perform preventive bombing that guarantees missing the trespasser and other vessels and aircraft located in the area; report to the Commander of the Navy (in case the trespasser does not react to the preventitive bombing within 10 minutes) and, by his order (provided the previous stipulated conditions are complied with), perform a second preventive bombing; report to the Commander of the Navy on completion of all preventive actions specified by the present Rules, continue tracking the trespasser and be ready to apply deadly force. The captain of the warship or aircraft can hit the target (or apply arms against the trespasser) only under the direction of Commander-in-Chief of the Navy. When the pursuit of the trespasser begins in internal waters or the territorial sea of the Russian Federation, and the trespasser does not stop after signals to stop have been given from a distance enabling the trespasser to hear them, the arms of warships and aircraft can be applied outside the territorial sea of the Russian Federation until the trespasser enters the territorial sea of his country or a third country.

Arms and military equipment can be applied without warning in the following cases: repulsion of an armed intrusion; a sudden assault or armed attack against military personal or citizens, ships or aircraft; and armed resistance or escape with arms by the detained trespassers. If the trespasser gives an emergency or alarm signal indicating his location, or if he surfaces and does not move, and gives signals for help, the captain of warship or aircraft should inquire as to his nationality, report to the Commander of the Navy, and act in accordance with his direction. Regarding areas outside Russian jurisdiction, arms can be applied in the case of a flagrant attack; and when the pursuit of the trespassing ship began within the Russian EEZ (or continental shelf) and is continuous.

Since 1998, the application of arms in Russia's EEZ has become commonplace. On 21 February 1998, the patrol vessel *Pagella* and later the frontier vessel *Kamchatka* tried to stop and arrest a trespassing vessel near Shikotan Island. It turned out to be a Russian ship, the *Albatross 101*. In accordance with an agreement on cooperation, the Headquarters of the 17<sup>th</sup> District of the U.S. Coast Guard was notified of the event and the latter used an aircraft to determine the location of the ship. Russian frontier guards also operated an AN-72 to locate the vessel and applied fire since the crew of the vessel did not heed the command to stop.

On March 1998, the frontier vessel *Dzerzhinsky* applied deadly arms against the Chinese seiner *Zong Hong 37*. The shooting was initiated after a long pursuit and a few audible and light signals and preventive shots. *Zong Hong 37* was carrying large quantities of fish and caviar and had no papers authorizing the trade. The ship was escorted to Petropavlovsk-Kamchatski for a close examination.

On November 1999, frontier guards opened fire at the Japanese schooner *Maycy-Mary 128* which was poaching near the Commander Islands. In 2000, the frontier guards applied arms 17 times. On 21 February 2001, sea frontier guards opened fire against a Russian trespassing vessel CTM-17 using a Japanese flag which was trying to escape.

One important aspect to consider for the further development and formation of the Russian concept of arms application (which was not taken into account during the Soviet period) is that arms application cases can be appealed in court. For instance, on 21 December 2001 the Petropavlovsk-Kamchatski city court considered case 2-5659/01 based on the complaint against the activities of the frontier ship, which led to the loss of the Chinese vessel *Zong Hong 37*. The court decided that there were no grounds to consider the actions of the frontier authorities illegal. The order to open fire in the case of the *Albatross-101* was also recognized as lawful (decision of Petropavlovsk-Kamchatski city court 2-5659/01), although there are still some doubts regarding the name and nationality of the ship.

Regarding the application of ROE, there is a need to pay attention to such key concepts as "threat," "danger", "challenge" and "risk". We need to understand the essence of these terms and their relationship to the degree of tension. The modern ROE interprets threat as "intimidation, or promise to cause someone damage or trouble", "promise to cause damage or trouble", or "intention to cause physical, material or any other damage to state interests or certain military interests". In Russian ROE, threat has two constituents: subjective intentions and objective opportunities to cause damage.

First, threat differs from danger in the level of readiness to cause damage. Threat is a stage of extreme aggravation of contradictions a preconflict state in which one actor is ready to apply force against another actor to achieve his goals. Danger can be interpreted as a stage of conception and satiation of contradictions, when one of the actors has the potential but is not yet ready to apply force or threat of force to achieve his interests. Second, threat should contain two constituents: intentions and opportunity to cause

damage to security. As for danger, it has only one of the constituents. Third, threat always has a personified, address-specific nature, which presupposes the presence of an actor (source of the threat) and an object to which this threat is addressed. Unlike threat, danger normally has a hypothetical, non-specific nature and the subject and object of danger are not clearly present. Fourth, danger includes a potential threat to cause damage to these interests, but requires the accumulation of opportunities and the formation of intentions. As for threat, it is a direct intent and opportunity to cause damage and in order to realize the threat, one only needs time and the availability of appropriate conditions.

Of course, far-fetched and alleged danger is not to be regarded as a possible threat. But at the same time, alleged danger and the possibility that damage can be caused by it cannot be regarded as a real danger. Along with traditional terms like “threat” and “danger” we should also consider ‘challenges’ and ‘risks’. Threat is the opportunity of a country, or group of countries to threaten; challenge is the opportunity to counteract, and risk is the opportunity to impede the achievement of security aims.

In this range of destabilizing factors—risk, challenge, danger and threat—risk is primary. Challenge, danger and threat are different degrees of the risk of causing some specific damage to security, which means they are secondary factors. In Russian, ‘risk’ has two principal meanings: one is possible danger and misfortune; the second is ‘to take a chance hoping for the best outcome’. We should pay attention to the coincidence of the lexicographic meanings of these two terms: threat and risk. Both can be interpreted as possible danger. Consequently, a combination of factors representing a challenge, danger or threat at sea can be considered risk factors. Regarding the degree of risk of causing any damage, challenges represent the least risk, dangers represent average risk, and the greatest risk is threats to security interests. In this respect, the peacetime ROE understood “risk” as a separate initial stage of the process of tension escalation. Risk affects the degree (extent) of possible damage that can be caused by one of these destructive factors (challenge, danger, and threat).

Over the last 10 years ROE has been the subject of continuous research in the Russian Navy. ROE should be based on some principles including the following:

1. the general framework for ROE should be established by the government;
2. all ROE provisions should be based on international and domestic law, including the Law of Armed Conflict, domestic foreign policy, and operational considerations;
3. the Commander in Chief of the Navy should establish and implement timely development of mission-specific ROE and ensure that a verification and testing process is incorporated in the process for declaring a unit operationally ready for employment. He should also develop standards for scenario-based, context-informed training on ROE, both before a mission and in theater, with provision for additional training whenever there is confusion or misunderstanding, and
4. the Naval Commanders on all levels should develop and put in place a system for monitoring the transmission, interpretation and application of ROE, to ensure that all

ranks understand them, and develop an adjustment mechanism to permit quick changes, that are in turn monitored to comply with the intent of the Main Defense Staff.

ROE refer to the operational directions that guide the application of armed force in a theater of operations and define the degree, manner, circumstances and limitations surrounding applications of force. It is evident that the absence of internationally acknowledged ROE is a serious impediment to the resolution of issues related to safety of Naval Forces, and multinational naval activity. Russia discussed this matter with the United Kingdom and the United States in the format of the RUKUS games. Some positive results were achieved during those naval games which could be applied to joint ROE. The main provisions of those Joint Rules of Engagement (one level below wartime status) could be as follows:

- do not approach within a certain distance of any naval vessel;
- a vessel approaching a naval vessel must operate at a maximum speed within a certain distance;
- violations of the Naval Vessel Protection Zone (or any other zone adopted for security reasons) are a felony offense punishable by the law of the coastal state or international law;
- any vessel approaching the special warning zone (or any other zone adopted for security reasons) must contact the naval vessel (or the coast guard vessel) on VHF-FM, Channel 16 and follow given instructions;
- if the captain of the vessel receives a command to stop and fails to heed it, the commanding officer of the naval vessel should attempt to hail the encroaching vessel and stop it. If there is still no response, the commanding officer of the naval vessel is authorized to fire a warning shot and if this does not produce the desired result, he is authorized to use deadly force.

Current Russian military and law doctrine as well as that of some other navies, recognizes the principles of necessity and proportionality as two elements of self-defense. The principle of necessity states that the application of armed force in self-defense requires that a hostile act occur or a force or terrorist unit exhibit hostile intent. The principle of proportionality states that the force used must be reasonable in intensity, duration, and magnitude, based on all facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of forces. But the most controversial questions concern approval to use particular weapons systems and the adoption of geographic restraints in specific areas of the high seas or foreign EEZs. The key point of all ROE is that the interpretation of hostile act or hostile intent or the threat of imminent use of deadly force by a foreign force or terrorist unit is in the hands of each commanding officer of the naval ship or aircraft.

## **A Chinese Perspective on ‘Operational Modalities’\***

### The Problem of the Peaceful Use of the EEZ

UNCLOS repeatedly emphasizes “peaceful use of the sea”, e.g., in Articles 19, 40, 45, 52, 53, 54, 88, Article 141 and 301. International treaties containing the clauses “peaceful purposes” or “peaceful use” stipulate this principle with two principal meanings. The first is complete non-militarization, for example, in the Antarctic Treaty (1959). Article 1 of that treaty stipulates that “The Antarctic Pole is used only for peaceful purposes and all measures of military characteristics including establishing military bases, building fortifications, holding military maneuvers and carrying out tests of any kind of weapons are prohibited.” So far as this Treaty is concerned, “peaceful purpose” means the prohibition of all measures or activities with military characteristics. The second meaning is to prohibit particular military measures or activities such as in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967). Article 4 of this treaty lists those military activities which are specifically prohibited.

In the 1960s and 1970s when the United Nations Seabed Committee discussed the problem of peaceful use of seabed, there were two basic viewpoints about the meaning of “peaceful purpose”. One was that “peaceful purpose” meant non-militarization, i.e., prohibition of the use of the seabed for any military purposes. The other viewpoint argued that prohibition depended on whether or not the military activities in question were defensive in nature or complied with the United Nations Charter.

At the Third United Nations Conference on the Law of the Sea, there were similar disputes regarding the problem of peaceful use of the sea. Ecuador and the United States could be taken as representing opposing viewpoints. At the New York Session of 1976, the Ecuadorian representative proposed that “The use of maritime space only for peaceful purpose must mean complete non-militarization and ruling out of all military activities.” He also maintained, “The future Convention on the Law of the Sea should give a clear definition to the concept of peaceful use and provide guarantee for preventing use of maritime space for nuclear confrontation. UNCLOS must establish special zones of peace and security with the emphasis on establishment of nuclear-weapon-free zones. UNCLOS should also ensure that ‘legal use’ shall be always ‘peaceful’ use, thereby discarding the viewpoint advocated by some big powers, that is, ‘legal use’ could include military use.”

The American representative argued that “[t]he term ‘peaceful purpose’ certainly does not rule out military activities in a general way. The United States has persistently held that carrying out military activities for peaceful purpose is entirely in line with the United Nations Charter and principles of international laws.”

---

\* Summary of a paper presented by Cheng Xizhong.

Also, at this conference, some countries proposed that specific actions should be prohibited to satisfy the “peaceful purpose” provisions. These included: establishment of facilities for purposes other than economic reasons in national administrative zones without clear permission of the coastal state; the threat of force or use of force; building of fortifications and bases; nuclear tests and deployment and storage of nuclear weapons; naval exercises; rocket tests; the display of maritime power; the exercise of the rights conveyed by international law in a way which threatens developing countries; and establishment of security zones on the high seas far from the establishing country. But because of the opposition of the United States and the Soviet Union, these problems could not be thoroughly discussed at the Conference. Thus the international community never reached a unified understanding and explanation of “peaceful purpose” under the law of the sea.

It is the same today with peaceful use of the EEZ. China holds that the “peaceful purpose” provision in international treaties is a clear legal stipulation in that the use of certain sea areas for non-peaceful purposes is illegal. Even if the “peaceful purpose” provision does not mean complete non-militarization, and does not prohibit normal passage of naval vessels and military aircraft within EEZs, it does not permit countries to engage in “aggressive” activities or to undertake activities contrary to the United Nations Charter. China views the legal obligation of the “peaceful purpose” provision in a broad way. It believes it includes the obligations to refrain from any action which would infringe upon the national security interests of coastal countries, the obligation to respect and observe laws and rules formulated by coastal countries for maintaining their national security interests, and the obligation to submit to executive measures taken by coastal countries to maintain peace, tranquility and good order in their maritime space.

#### Marine Scientific Research in the EEZ

It is very difficult to completely separate marine scientific research from other marine activities. The Convention deals specifically with marine scientific research. It should be conducted with appropriate scientific methods and means compatible with the Convention; it should not unjustifiably interfere with other legitimate uses of the sea compatible with the Convention; and it should be in compliance with all relevant regulations adopted by various countries in conformity with the Convention. The specific requirement is that marine scientific research in the EEZ and on the continental shelf should be conducted only with the consent of the coastal state. Article 246 of the Convention provides that 1) marine scientific research in the EEZ and on the continental shelf should be conducted with the consent of the coastal states; and 2) coastal states, “in normal circumstances”, should grant their consent for marine scientific research “exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind.” China believes that if marine

scientific research is undertaken for other purposes, the coastal state may exercise its discretion whether or not to grant its consent.

In order to further emphasize the rights of the coastal state regarding marine scientific research in areas under its jurisdiction, paragraph 5 of Article 246 of the Convention also enumerated and stipulated some reasons that a coastal state may withhold its consent to the conduct of marine scientific research of other states in its EEZ or on its continental shelf. But these reasons are not exhaustive. China holds that the regime governing marine scientific research in the EEZ provided in the Convention gives coastal states considerable discretion to ensure that the marine scientific research activities are being conducted for peaceful purposes. This discretion includes checking on whether the activities concerned are indeed “marine scientific research” and whether they are for “peaceful purposes”.

In practice, according to their needs, some countries sometimes blur distinctions between marine scientific research and intelligence collection or hydrographic surveys to elude the jurisdiction of the coastal state. Some countries carry out “military hydrographic survey” activities in the EEZs of coastal states without their permission. China believes that in a military sense, this is a type of battlefield preparation and thus a threat of force against those countries, thus violating the principle of peaceful use of the sea.

#### The Problem of the Two “Due Regards” Concerning Activities Carried Out in the EEZ

In Articles 56 and 58, UNCLOS stipulates the principle of “due regard” when the coastal state and the non-coastal state exercise their rights and duties in the EEZ. Paragraph 2 of Article 56 states that “in exercising its rights and performing its duties under this Convention in the EEZ, the coastal state shall have due regard to the rights and duties of other states and shall act in a manner compatible with the provisions of the Convention.” Paragraph 3 of Article 58 states that “in exercising their rights and performing their duties under this Convention in the EEZ, states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”

First, the legal objects referred to by the two “due regards” are not equal. What the coastal state should duly regard is the right that other states enjoy in the sea areas of the coastal states. But this right has already been restricted by the principles and regulations of general international law and the regime of the EEZ. What non-coastal states should duly regard are the rights that coastal states have been enjoying in their sea areas according to principles of general international law, and the regulations of other international laws, sovereign rights, and the exclusive jurisdiction that the coastal states enjoy under the regime of the EEZ.

Secondly, the scope of duties under the two “due regards” are asymmetrical. The “due regard” duty of the coastal states is mainly embodied in the national laws and regulations worked out and implemented by them with regard to the EEZ. Specifically, the right of passage and overflight by other states must not be denied. This duty does not mean that the coastal states must allow any and all activities of other states in their EEZs, especially those activities that are harmful to their national security or resource interests. The “due regard” duty of non-coastal states in the EEZ of the coastal states is much broader. First, while carrying out activities in the coastal state EEZ, other states must not violate the basic principles of international law in the United Nations Charter, and should not threaten force or use force against the territorial integrity and political independence of the coastal state, or thereafter force or use force in any other form that does not conform to the basic principles of international law states in the United Nations Charter. Second, while carrying out activities in the coastal state EEZ other states must not interfere with or violate the normal rights exercised by the coastal state, that is to say, other states must not violate the national EEZ laws and rules of the coastal state and must submit to the jurisdiction of the law enforcement authorities concerned.

#### The Problem of Regulations for Military Vessels and Aircraft When They Encounter Each Other in the EEZ

First, actions of military vessels and aircraft are limited by the principles and regulations of general international law when they encounter each other in the EEZ. These limits include respecting the territorial sovereignty, maritime rights and interests of the coastal state clearly defined by UNCLOS and abiding by laws and rules made by the coastal states in accordance with UNCLOS, and other international laws and regulations. Second, these actions are limited by regulations and the usual practice of international navigation and aviation including International Regulations for the Prevention of Collisions at Sea (1972), the Chicago Convention on International Civil Aviation and the rules for navigation and aviation promulgated by the coastal state in implementing these international legal agreements. Third, while carrying out activities in the EEZ, when foreign military vessels and aircraft encounter those of the coastal state, the operators should navigate and fly with proper technique, and take measures to avoid collisions, as well as dangerous military actions and misunderstandings.

Presently, there are no uniform regulations for such interaction of coastal state and foreign military vessels and aircraft. There are some useful bilateral examples such as the Agreement of the United States and Russia on Preventing Dangerous Military Activities and rules between the United States and its allies. However, these regulations are not universal and do not meet practical requirements.

Such universal regulations should be established on the basis of a common understanding of international law. However, there are very large differences in the understanding of international law among various countries. Moreover, the

implementation of such regulations should be on the basis of basic mutual trust. But this does not yet exist. The diversity of military activities undertaken by military vessels and aircraft, the complexity of the tactical background to the interaction of vessels and aircraft at sea and the randomness of the sea area where vessels and aircraft may encounter each other also prevent the international community from formulating uniform regulations. We believe that developing regulations for encounters of coastal state and foreign vessels and aircraft on either a bilateral basis or a multilateral basis would enhance maritime safety, avoid dangerous actions and misunderstandings, and be beneficial to maintaining normal international relations as well as a peaceful maritime order.

In sum, China believes the following actions have hostile intent:

- carrying out military reconnaissance activities in a foreign EEZ; this is interpreted as an electronic invasion and a threat to the coastal state;
- military vessels or aircraft navigating or flying across the path of the coastal state's vessel or aircraft in the EEZ;
- carrying out military activities or employing forces in a foreign EEZ;
- carrying out close observation or simulated attack in a foreign EEZ; and
- the entrance of submarines into the EEZ without permission of the coastal state, or their carrying out a simulated attack therein.

## **Discussion**

To refine our analysis, we need to differentiate between military activities and rules for intelligence or military gathering. Military activities are undertaken only by the military while intelligence gathering can be accomplished by non-military agencies. Information gathering by electronic means or satellite may be subject to a separate regime. If the information gathering has no hostile intent, can we accept a regime of prior notification?

Some disagree that military exercises are a threat. They may be a political message, or they may just be practice or maintenance of readiness. Military activities include replenishment, exercises, and training. These are normal procedures and do not necessarily threaten anyone. In this view, as long as the vessel or aircraft does not affect or damage resources, it is not the coastal state's business. It can also be argued that it is not feasible to make a distinction because intelligence gathering is a military activity. Civilian vessels are not suited to intelligence gathering because they have different equipment and training. Perhaps the distinction is whether the data is or will be publicly available.

Gathering intelligence or information is not in itself an illegal activity. The main determinant should be whether or not those activities are in accordance with international law. For example, the Vienna Convention on Diplomatic Relations allows the collection of data on the economic, political and social life of the country. Perhaps it is a problem

of terminology in that it is not intelligence gathering, *sensu strictu*. The issue arises when the activity threatens the political or territorial integrity of another state. Perhaps we need to draw on expertise and lessons from other fields and maybe even rethink the title and focus of these meetings.

What is permissible in the EEZ and what is not? Moving through a foreign EEZ without the discharge of weapons, without hurting economic interests, and without gathering intelligence is permissible. But some intelligence gathering is 'active' or 'interactive', e.g., interference with coastal state shore to ship communications. Is this considered a hostile act if it occurs in another country's EEZ? It may not be a hostile act, but it could be a violation of the 'due regard' obligation. Nevertheless, it would be difficult to prove, particularly in peacetime. The issue of interference in communications has been dealt with in international communication agreements. If there is massive interference with communications, that may indeed constitute a use of force.

All countries undertake military intelligence gathering activities to some degree but without ROE they can be dangerous. The United States and the USSR had an INCSEA agreement that helped alleviate misunderstandings. Without such INCSEA agreements or mutually understood or agreed rules of engagement, such activities can lead to serious incidents, as between the United States and China. However, INCSEA agreements should be distinguished from ROE. INCSEA was a special agreement to address a specific problem in a special era. The issue being discussed here should be considered a due regard issue and not an ROE issue.

Piracy is also a particular problem that requires a coordinated approach. No state seems to want to undertake the cost of investigation. Meetings in Mumbai and a meeting in Manila of coastguards on these issues will try to address the problems posed by UNCLOS. In particular, there is a problem with the definition of piracy. Piracy by definition only occurs on the high seas. Although 64 countries have ratified the 1988 Suppression of Unlawful Acts Convention (SUA), they are ignoring it or refusing to act. We need to redefine the problem to move forward. If states will condemn piracy and make it illegal anywhere, that is a start. Perhaps it can be re-termed 'maritime violence.'

There are clearly different opinions and terminology is an issue. Indeed the misunderstandings may not be as difficult to resolve as the terminology. We are located in Asia, an incredibly complex area in the throes of increased military activities. We need to develop confidence building measures at the operations level and not remain mired in theoretical discussions and concepts.

## Session V: Specific Cases\*

The following examines actual incidents and addresses other fact patterns that may arise in the future in order to promote further discussion on the principles that govern military activities by one country in the EEZ of another.

### Early Examples

Restrictions on military activities in coastal areas are not uncommon in times of war and international confrontation. The 21 Western Hemisphere countries issued the Declaration of Panama at the beginning of World War II establishing “as a measure of continental self-protection” a zone of security extending up to 300 miles from shore, in which belligerents were asked to refrain from committing hostile acts. President Franklin Roosevelt established 17 “Maritime Control Areas” during this period, some of which included areas of high seas outside U.S. territorial waters. Chinese pilots shot down a U.S. reconnaissance plane between 20 and 50 miles from the Chinese coast in the East China Sea on August 23, 1956, killing the 16 U.S. crewmen. Also in the 1950s, France seized foreign merchant ships in the Mediterranean thought to be carrying arms to the Algerian rebel movement, citing self-defense as its justification. In January 1968, North Korea captured a U.S. spy ship, the *Pueblo*, which was said to be operating in international waters more than 15 miles from the coast of North Korea.

### The Falklands/Malvinas War

After the Argentine occupation of the Falkland/Malvinas Islands in 1982, the United Kingdom declared a 200-nautical-mile military exclusion zone, banned the ships of all nations from this zone, and threatened to sink any Argentine ship in the area. The “naval establishments of several countries” viewed this claim “as a bad mistake in terms of maritime jurisdiction,” because it “strengthened the trend by which a zone 200 miles from the shore is seen to have security as well as legal implications.” Argentina responded by establishing its own 200-nautical-mile exclusion zone. “The 1958 and 1982 Law of the Sea Conventions make no provision for any such zones, but the Falklands zones were generally respected.” Several Argentine and British vessels were sunk during this period, as well as the Liberian-flag tanker, the *Amerada Hess*.

### Libya in the 1980s

In 1973, Libya asserted that the Gulf of Sidra was an historic bay and thus that its waters were internal waters of Libya. The United States rejected this claim and asserted its right to navigate through these waters and engage in military activities in them. Some strategists contended that the Gulf of Sidra contained the best region in the Mediterranean to conduct missile-firing exercises because it was relatively free from ocean traffic.

---

\* Excerpts from and discussion of a paper presented by Jon M. Van Dyke.

On March 24, 1986, three U.S. warships entered the Gulf of Sidra, and Libya responded by firing SAM-5 missiles at them. For almost 24 hours, the U.S. warships launched training flights and responded to the Libyan fire with their own bombs and missiles, killing an estimated 150 Libyans. The United States has continued to send its warships into this area during subsequent years.

### **The EP-3 Incident (April 2001)**

The United States has regularly flown technologically advanced surveillance EP-3 planes along the coast of China to intercept communications and monitor coastal and offshore activities, including submarine movements, averaging about 400 such flights each year. On April 1, 2001, two Chinese F-8 fighters flew up to greet the U.S. plane and one of them collided with an EP-3E at a location about 70 nautical miles southeast of Hainan Island, destroying the Chinese plane and killing its pilot and damaging the EP-3E sufficiently to require it to land at Lingshui Airport on Hainan Island in China. China claimed that the U.S. plane turned sharply and veered into the Chinese plane, but the United States contended that it was the Chinese plane that flew erratically, pointing out that the propeller-driven EP-3 has little maneuverability and is much slower than the F-8.

China subsequently contended that the U.S. flight “violated the United Nations Convention on the Law of the Sea, which stipulates that any flight in airspace above another nation’s exclusive economic zone should respect the rights of the country concerned. Thus the U.S. plane’s actions posed a serious threat to the national security of China.” The Chinese statement went on to say that:

The U.S. military surveillance plane violated the principle of “free over-flight,” because the incident occurred by the U.S. plane happened in airspace near China’s coastal areas and China’s [*sic*] exclusive economic waters. According to the United Nations Convention on the Law of the Sea and general international law, all countries enjoy the freedom of over-flight in the exclusive economic waters of a nation. However, the Convention and general international law stipulate at the same time that the rights of the coastal country should be considered. The U.S. surveillance plane’s reconnaissance acts were targeted at China in the airspace over China’s coastal area and its flight was far beyond the scope of “over-flight”, and thus abused the principle of over-flight freedom. The U.S. plane’s action also posed a serious threat to China’s security interests, hence it was right for the Chinese military planes to monitor the U.S. spy plane for the sake of China’s state security. The U.S. plane, in violation of flight rules, caused the crash, so the U.S. side should bear full responsibility for the incident.

In this instructive statement, the Chinese spokesperson acknowledged that freedoms overflight exist over the exclusive economic zone, but also contended that these freedoms must be balanced against the security interests of coastal states. In another article, China's position was explained as follows:

According to the stipulations of Article 58 of the UN Convention on Law of the Sea in addition to enjoying the freedom of flyover stipulated by the Convention, foreign aircraft should take into consideration the rights of the coastal countries, abide by the laws of the coastal countries and the rules of international law, and refrain from engaging in any activities which endangered the sovereignty, security, and national interests of the coastal countries. Even U.S. scholars maintain that limited by Article 58, Section 3 of the UN Convention on Law of the Sea, the freedom of flyover in an exclusive economic zone and the freedom in international waters are different in principle.

This article went on to explain that "U.S. military reconnaissance airplanes have repeatedly haunted the sky over China's coastal waters to engage in reconnaissance activities, and ignored repeated solemn representations made by the Chinese government, which is obviously a provocation against Chinese state sovereignty. Military activities such as these are way beyond the principles of 'freedom of flyover' allowed by international law."

A year after this incident, a signed article in the Chinese Army's newspaper insisted in detail that the U.S. surveillance flights along China's coast constituted "a bellicose act of provocation" that threatened China's security and must stop. The article said the U.S. surveillance flights were "totally illegal" and that although Article 58 of the Law of the Sea Convention recognized overflight rights, "foreign aircraft must show consideration for the rights of the coastal states and abide by the laws and regulations of the coastal states, and may not endanger the sovereignty, security and national interests of the coastal states. Thus, the 'free overflight' of foreign aircraft over exclusive economic waters is restricted and conditional, and is not the kind of freedom of doing as one pleases as the United States said."

About this same time, U.S. Rear Admiral William Sullivan went to Shanghai to discuss these issues with the deputy chief of staff of the People's Liberation Army navy. Subsequent meetings were held in Hawaii in August 2002, and later in Guam, pursuant to the Military Maritime Consultative Agreement which China and the United States signed in 1998 to establish "rules of the road" at sea to avoid incidents.

In June 2002, it was reported that two Chinese F-7 interceptors flew very close to a U.S. Navy E-3 while the U.S. plane was monitoring large-scale Chinese war games involving 100,000 Chinese troops along the Chinese coast north of Taiwan. Similar incidents of very close contact occurred in November and December 2002, with Chinese fighter jets coming within 300 feet of the EP-3 as it flew along the Chinese coast.

### **The “Mystery Ship” (December 2001)**

On December 18, 2001, a ship that looked like a Chinese squid fishing vessel was spotted by a U.S. surveillance satellite near Amami–Oshima Island. On December 21, the Japanese Defense Agency located the vessel and coast guard vessels then began pursuing it. The vessel proceeded away from Japan and crossed the “provisional” median line between Japan’s Ryukyu Islands and the Chinese mainland into the Chinese EEZ. After six hours of hot pursuit and after firing hundred of rounds, some of which struck the vessel, four Japanese coast guard vessels finally surrounded it. According to the Japanese government, after a gunfight, the vessel was scuttled by its crew and sank. All the crew members, thought to number 10 to 15, died. After the ship was explored and eventually raised in September 2002, it was determined that it had originated in North Korea and was thought to have been engaged in spying or smuggling. Japan agreed to pay China 150 million yen in compensation for the damage and inconvenience suffered by Chinese fishers during the salvage operation.

### **The Israeli Seizure of a Tongan-Flag Vessel Carrying Arms for Palestine (January 2002)**

Israel seized the Tongan-flagged vessel *Karine–A* in the Red Sea with a reported 50–80 tons of armaments apparently bound for Palestinian militants. As a result of this and other embarrassing incidents, Tonga declared that it planned to close its maritime registry by April 2003.

### **The *Sosan* Incident**

On December 9, 2002, a North Korean cargo vessel, the *Sosan*, apparently registered in Cambodia, was forcibly stopped in the Gulf of Aden 600 miles from the coast of Yemen by two Spanish warships, who discovered Scud missiles hidden beneath sacks of cement. After some confusion and high level negotiations, the vessel was released to continue its voyage to Yemen, where it delivered the Scuds to the Yemeni government. “Bush administration officials acknowledged that boarding the ship and taking charge of its cargo probably violated international law.”

### **Hydrographic Mapping and the Problem of Marine Scientific Research**

On March 24, 2001, one week before the EP–3 incident described above, a Chinese frigate came within 100 meters of the U.S. Navy’s unarmed hydrographic survey vessel *Bowditch* collecting data in the Yellow Sea and forced it to stop operating in China’s EEZ and depart. That same month, India also protested the *Bowditch*’s activity, after it was detected 30 nautical miles from India’s Nicobar Island, and in January 2001 India protested the surveying activities of the British vessel *HMS Scott* 190 nautical miles from Diu and near Porbadnar. The Indian Defense Minister George Fernandes explained that “India has protested to the governments of the United States and Britain that their warships were conducting unauthorized operations in our exclusive economic zone.”

When the *Bowditch* returned to the Chinese EEZ in September 2002, Chinese ships and planes harassed the vessel and China lodged a formal diplomatic protest over the incident. Then, in December 2002, China announced that it had enacted a new law explicitly requiring Chinese approval of all survey and mapping activities in China's exclusive economic zone, and stating that unapproved ocean-survey activity will be subject to fines and confiscation of equipment and data.

The position of the United States and other maritime states has been that military intelligence-gathering activities and military hydrographic surveys are distinct from marine scientific research and are not restricted by the provisions of the Law of the Sea Convention. According to this view, military intelligence gathering is different, because it is not related to resource exploitation and also would not normally be published or disseminated, as scientific research usually is. A hydrographic survey is the mapping of the sea floor in order to facilitate navigational safety, particularly for submarines, and it is usually (but not always) available to other countries and to the general public. Intelligence-gathering activities can, of course, take many forms, and activities that involve "drilling into the continental shelf, the use of explosives, or the introduction of harmful substances into the marine environment" would certainly be of concern to the coastal state and should require its consent.

Article 240(a) of the Law of the Sea Convention states clearly that "marine scientific research shall be conducted exclusively for peaceful purposes" and this limitation is expressed again in Article 246(3). Some commentators have suggested that at least some research-related activities may be impermissible because of this restriction, such as "the implanting of devices of surveillance such as those monitoring the exit of submarines from ports, as well as devices which are capable of rendering ineffective the defenses of the coastal State." "Surely, the coastal state under Article 88 and Article 211 would be justified in prohibiting a military activity which caused ecological harm." Because scientific research can, and frequently does, involve investigations of economically-valuable resources, research vessels present a similar threat to coastal countries as that posed by fishing vessels, and, therefore, "it has to be expected...that the treatment of research of fishing vessels has to be more restrictive than that of other vessels transiting the EEZ."

Scientific research of the marine environment can, of course, be undertaken by planes as well as by ships. Planes have the right of overflight over the EEZ, but if they are gathering information regarding the resources of the waters below, the coastal state must have some power to challenge the plane and investigate its activities.

### **Other Internationally Lawful Uses of the Sea Related to these Freedoms**

Article 58(1) contains the seemingly innocuous phrase giving maritime states the right to engage in "other internationally lawful uses of the sea related to these freedoms [of navigation and overflight], such as those associated with the operations of ships [and] aircraft." These words apparently contain much hidden meaning and have been

described as “superabundant and mysterious.” Although the sentence in Article 58(1) goes on to say that such uses must be “compatible with the other provisions of this Convention,” some authors have asserted that this phrase allows warships to engage in virtually unlimited activities in the EEZ of other countries. Some commentators indeed interpret this language to mean that anything a warship can do anywhere, it can also do in the EEZ of another state, including missile launching and weapons testing. Others contend that this conclusion would distort the concept of the EEZ as a unique legal creation carefully balancing rights and interests. Professor Scovazzi says, for instance, that: “It would be difficult to sustain that an extended test of weapons, such as launching torpedoes and firing artillery or the covert laying of arms within an exclusive economic zone, are to be included among the uses associated with the operation of ships, aircraft and submarine cables.” And some authors contend that warships must act with due regard for the interests of the coastal state, as Article 58(3) states explicitly, “that the limitations of military uses in the exclusive economic zone are greater than those applied to similar activities carried out in the high seas,” and that a coastal state could “demand that a warship abandon the exclusive economic zone” if it failed to respect coastal state concerns.

### **Missile Testing Into or Over Another Country’s EEZ**

“Do the rocket and missile tests that fall in the EEZ of another country constitute an exercise of the freedom of overflight or another lawful use? Although one author seems to respond affirmatively, in the case of the South Pacific the People’s Republic of China gave clear explanations for this type of testing and did not repeat them.”

Engaging in any live-fire military exercises creates dangers and requires the establishment of a warning or exclusionary zone to protect others using the affected ocean area. The U.S. Navy has defended the establishment of such zones in appropriate situations:

Temporary reasonable use of areas of the high seas for military purposes has been accepted as coming within the concept of the right of self-preservation of a nation and within customary international law practice... It must be concluded, therefore, that designation of temporary zones of “use” as “warning areas” is legal where done in a reasonable manner.

But certainly these zones have the least legitimacy when declared in the EEZ of another country, because they will inevitably interfere with that country’s efforts to protect and exploit its marine resources.

### **Launching Weapons and Planes in the EEZs of Other Countries**

Warships transiting through an EEZ of another country will continue the normal training procedures that are constantly underway on such ships, and certain naval maneuvers, including even the occasional launching of a plane from an aircraft carrier or

the takeoff of a helicopter from other warships, would appear to be permissible, so long as they are conducted in a nonthreatening manner and in a fashion “compatible with other provisions of this Convention.”

### **Protecting a Sealane**

Suppose a warship of one nation was simply loitering in the EEZ of another nation to protect commercial ships utilizing an important sealane. Would the warship be exercising the “freedom of navigation” recognized in Article 58(1), or a “lawful use...associated with the operation of ships”? Would the semipermanent stationing of such a ship for such military purposes be showing “due regard to the rights and duties of the coastal state”?

### **Military Activities Interfering with Fishing Efforts**

“[U]nexpected military exercises can prevent fishing activities in areas where licenses had been granted by the coastal State.” In such a situation, which activity takes precedence? In this, as in other disputes considered in this section, Article 59 says that no presumptive priority exists and the dispute must be resolved equitably “taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.” In other words, efforts should be made to reconcile the conflicting activities somehow, and if that becomes impossible to favor the activity that is more important to the parties in conflict and the world community. Professor Scovazzi concludes that if the military activity involves “operations with weapons, the balance of interests established by Article 59 would in most cases play in favor of the coastal state. While the latter could easily put forward its right and responsibility to ensure the management of the resources and the protection of the marine environment, the other state would be asked to explain why the operations with weapons have to be conducted precisely within that particular exclusive economic zone, and not on the high seas or within its own exclusive economic zone.” Even military commentators concur with this general analysis: “[W]hile a naval exercise is permissible in the EEZ, it must not significantly interfere with coastal State fishing activities in the area. Balancing the rights of the coastal State and the maritime State would likely require the exercise to shift elsewhere. Similarly, warships in international waters must comply with international law governing pollution.”

### **Other Permitted Activities in the EEZs of Other States**

Article 58(2) permits maritime countries to engage in permissible high seas activities in the EEZs of other states “in so far as they are not incompatible with this Part.” This would appear to authorize—and even require in some instances—maritime countries “to engage in a series of non-economic activities” in the EEZs of other states, “such as assistance and rescue of persons and ships, repression of piracy, suppression of

illicit trade in narcotic drugs and psychotropic substances, suppression of unauthorized broadcasting, visit of ships, hot pursuit.”

The full implications of these possibilities require considerable study and analysis. Can, for instance, a governmental vessel exercise the right of hot pursuit across a third country’s EEZ to pursue the offending vessel? What if it is necessary to cross this third-country EEZ in order to enter into the offender’s territorial sea?

Can countries around the world descend upon a particular EEZ to police it for drug trafficking? Suppose the adjacent country has a drug policy different from the one prevailing in most of the world? The question whether outside maritime powers can enforce rules against drug trafficking against their own ships or against ships flying flags of other countries in the EEZs of other countries has been hotly disputed in recent years.

### **Do Any Special Rules or Limitations Apply in Semi-Enclosed Seas?**

Military maneuvers by maritime states may be perceived as particularly threatening and inappropriate in crowded semi-enclosed seas that are entirely within the EEZs of the neighboring countries, such as the Black Sea, the Sea of Okhotsk, the Persian Gulf, the Red Sea, the Aegean and Adriatic Seas, and, indeed, the Mediterranean Sea as a whole. Under Article 123 of the Convention, the countries bordering on such seas have a special responsibility to cooperate and manage their resources, and this responsibility may require imposing limits on military activities that interfere with resource preservation and exploitation.

### **Is the Law of the Sea Convention Applicable in Times of War?**

The question of the Convention’s applicability in times of military conflict remains unresolved. Does the Convention apply in its entirety? Does it apply, but with modifications as deemed necessary to accommodate the conflict? Do some provisions still apply, while others are in abeyance? What meaning would Articles 88 and 301 have if they can be swept aside when armed conflict erupts? The United States apparently accepted the right of Iran to search U.S.-flag vessels on the high seas for contraband during the Iran–Iraq war, and the United States, in turn, declared a five-mile “moving bubble” identification zone around its warships in the Persian Gulf requesting aircraft and vessels to identify themselves before entering this bubble. If the aircraft did not comply with the request, it was in danger of being fired upon.

Some commentators have written that UNCLOS was designed “to regulate the uses of the seas in time of peace,” implying that it may not be applicable in times of war. Others have observed more cautiously that the 1958 Convention on the High Seas was clear in applying only to peacetime situations, and that “[t]he same notion might apply to the 1982 Convention where the application during times of armed conflict is not clearly articulated.” Another commentator has suggested that these questions may be of only academic importance, because “the maritime powers would hardly accept restrictions on their wartime military activities.”

Perhaps the most sensible summary was offered in 1986 at a meeting in Honolulu, to wit, “there is no doubt that the law of the sea, which has been codified for times of peace, is bound to be modified during armed conflicts. These rules have been modified during previous wars, particularly in light of the more fundamental rules such as the right of self defense.”

### **Air Defense Identification Zones (ADIZ)**

The United States established an Air Defense Identification Zone (ADIZ) extending 300 miles from the coasts of the United States in September 1950, which it still maintains, but with varying widths—the ADIZ on the East Coast now extends, for instance, to 200 nm. Canada has a similar requirement. Aircraft seeking to enter into U.S. or Canadian territory are required to identify themselves and provide their destinations. These zones were originally designed to provide coastal protection, by identifying all planes about an hour before they would reach the coast. Although these zones do not directly restrict overflight, planes that do not provide the required identification face the possibility of even being escorted to a military base or even being fired upon. However, in peacetime, force would not be used based on ADIZ regulations alone.

Other countries have other types of military warning zones of different widths. China established a military warning zone in the 1950s that extended up to 50 miles off its coast. North Korea has claimed such a zone extending 50 nautical miles from its coast and Myanmar (Burma), India, and Vietnam have such zones extending 24nm from their coasts. In the 1970s, South Korea established a zone extending 150 miles into the Sea of Japan (East Sea) and 100 miles into the Yellow (West) Sea. In 1983, Nicaragua declared a 25-mile security zone applicable to ships and planes, requiring advance permission prior to entry.

The status of these zones under international law has always been uncertain and controversial. The United States has argued that ADIZ do not interfere with free navigation and overflight because they only apply to aircraft that seek to cross over U.S. land territory, and would not apply to an aircraft flying along the U.S. coast without any intention of entering the United States. One commentator defended the establishment of these zones by analogizing them to previous claims by coastal countries to continental shelves and contiguous zones, and ultimately by relying on the doctrine of necessity. Another commentator has concluded that the practice of establishing ADIZs “does not seem to have a significant support in the international community.” Even the United States does not recognize the legitimacy of ADIZs established by other countries if they require “identification by aircraft that are merely transiting the zone without seeking entry to national airspace.” Other U.S. commentators have observed that even though planes merely passing through the ADIZ (and not entering national territory) need not abide by the identification requirement, “[a]s a matter of comity and safety, however, most usually do.”

### **Restrictions on Navigational Freedoms Based on the Cargo Being Transported**

Countries have recognized recently the legitimacy of regulating and restricting coastal navigation in relation to the cargo being transported, albeit only to an extent that is consistent with UNCLOS. UNCLOS recognizes the necessity to establish special regulations for “[n]uclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances” in Articles 22 and 23. After the oil spill caused by the break up of the tanker *Prestige* in November 2002, Spain and France decreed that all single-hulled oil tankers more than 15 years old passing through their EEZs will be subject to being stopped and inspected, and that those ships found to be not seaworthy will be prohibited completely from their EEZs. Earlier, France had banned vessels over 1,600 tons from coming within 7nm miles of the coast around Cherbourg and Brest, to protect the fragile coastal environment. Many other recent examples can be cited to illustrate that recognition and protection of coastal resources can justify restrictions on navigational freedoms.

Commentators have observed that: “While territorial integrity may require the containment of the EEZ’s military uses, international security may require a certain military use of the sea. It is the balance between these contradictory realities which international law must achieve with regard to the EEZ’s use for peaceful purposes.” Although navigational and overflight rights clearly exist in the EEZ, they must be balanced against the resource interests of the coastal state. “[T]he coastal State has the right to demand that there be no interference in its economic utilization of that [exclusive economic] zone.” Even the United States recognized the primacy of the resource interests in its 1983 EEZ Proclamation, which said that these freedoms are to be enjoyed “[w]ithout prejudice to the sovereign rights and jurisdiction of the United States,” and Professor Oxman has recognized that military maneuvers in the EEZ will not be permissible if they prevent the lawful enjoyment of natural resources by the coastal state.

In light of the creation and acceptance of the EEZ and the recognition of coastal state resource rights, “further limitations on the said freedoms [of navigation and overflight] must be accepted. These limitations are both “of a political nature” related to the security concerns of coastal states and “derived from economic rights” stemming from coastal state sovereignty over the resources of the EEZ.

Article 59 explains that conflicts between coastal and maritime states regarding activities in the EEZ are 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 31 makes it clear that countries are liable for harm caused by their warships that is inconsistent with the requirements of UNCLOS. But, regrettably, these disputes will generally not be resolvable through the dispute resolution procedures established by UNCLOS, because Article 298(1)(b) allows countries to exempt “disputes concerning military activities” from these procedures.

These disputes must, therefore, be addressed and resolved through the sometimes chaotic and unruly process whereby countries assert and defend their positions through state practices, followed by protests by disagreeing countries, and then eventually by the give and take of diplomatic negotiations.

### **Discussion: Operators' Perspectives on 'Specific Cases'**

From an operator's perspective, we could be taking the concept of the EEZ to places that we never thought it would go. From the Australian perspective, anything we do must be within international law. We do have peacetime ROE. But how closely one follows ROE has great impact on all the personnel on board ship. If the operators do not understand the ROE there is bound to be trouble.

Maritime operations remain uncomplicated in many important ways. There is innocent passage which can be cancelled by coastal states but only for good reasons. In the EEZs of other countries one can operate in normal mode, which includes launching planes and submarines navigating submerged. However, vessels operating in a foreign EEZ must have due regard to the resources and environment in that EEZ, because that is the purpose of the EEZ. But it is up to the coastal state to inform the operators where the resources are regarding their operations. Regarding the use of fire control radar in foreign EEZs, warships check their equipment daily to make sure it is working. Weapons can be fired in foreign EEZs although more than 10 miles away from any sea lane.

From an operator's perspective, the complexities of the legal regime are already a disadvantage. For example, in border protection operations in Australia's EEZ, action could not be taken until the illegal immigrants entered Australia's contiguous zone, because it was not a resource issue. Other operators also reaffirmed their belief that EEZ jurisdiction for coastal states should be restricted to resources and the environment. Otherwise they fear the development of 200nm territorial seas and a buffer zone beyond that. In this view, military transit and intelligence gathering should be allowed in the EEZ unless the activity damages resources or interferes with resource management by coastal state. Also in this view, the flights of the EP-3s over China's EEZ are legal. However, some operators agreed that military maneuvers may indeed impinge on fishing, impede resource-related activities and/or damage the environment.

Other participants think that although all military activities should not be prohibited, they should instead be subject to coastal state approval even if they will not impact EEZ resources. Also if the activity impinges on the security of the coastal state, then it should not be allowed. Malaysia, among others, argued this at UNCLOS. Indeed, some countries have issued declarations and even laws that assume military activities present a threat to coastal communities and/or marine resources and cannot be undertaken without their consent. This position is based on UNCLOS Article 301, which prohibits any threat or use of force against the state's territorial integrity or political independence. The United States and other states which have blue water navies insist that military activities in the EEZ are preparations for self-defense and thus consistent

with the peaceful purposes resolutions. These positions are based on different political perspectives. Traditional maritime states think that peace can be kept by deploying their navies over-the-horizon. Coastal states, particularly former colonies are afraid that the peace may be broken when foreign warships appear on the horizon.

Another view holds that in an age of borderless crimes and global terrorism, a fleet confined solely to a country's territorial waters cannot accomplish its mission. Only by deploying the fleet over the horizon can the nation defend itself from these new threats. Navies should be free to assume various duties in international waters. Indeed, perhaps we should begin to regard naval forces as international public goods when coping with global threats. In this view national defense is an inherent right of the state, so military activities for national defense, including exercises, transiting and intelligence gathering, should be allowed in all sea areas except foreign territorial seas and internal waters. In the EEZ, these activities can only be precluded if they damage resources and/or the environment or interfere with resource or environmental management by the coastal states.

However, the questions of what constitutes 'hostile intent', 'threat of force', 'use of force', and 'due regard' remain. And more analysis is required to clarify which military exercises or maneuvers can damage resources and the environment of the coastal state. More generally, national defense is not a just matter of the EEZ. If military forces pose a threat or use of force to another country, this would be an illegal activity in or out of the EEZ. However, military intelligence is an essential and fundamental element of self-defense for every state. To resolve these problems, confidence building, transparency, and perhaps INCSEA agreements are important to preventing accidental conflict. In this regard, the "Military Maritime Consultative Agreement" signed between China and the United States in 1988 is being used by the two parties to resolve the EP-3 incident and prevent future incidents.

It was thought that the laws applicable in wartime are different. Maritime control of areas, military exclusion areas, prevention of supply of war materials, visit and search, capture and blockade come into play. The case of the Israeli seizure of a Tongan flag vessel carrying arms for Palestine falls under provisions which give belligerent countries the right of visit and search of neutral country flagships. Thus in wartime, the law of armed conflict would take precedence. In essence, the Geneva Convention would be the priority concern of the belligerent states. Indeed many of the cases presented should be considered under wartime international law. UNCLOS is law for peacetime and cannot be applied in war time. In time of war, reserving the high seas for peaceful purposes would already have been violated.

Regarding the 'mystery boat,' the question has been raised as to whether it was legitimate for the Japanese coastguard to fire warning shots in another country's EEZ. Various legal rationales have been advanced to justify Japan's actions. However, one view is that if the commander on the spot thought it was a fishing boat fishing illegally, it would have been better not to open fire. Actions by the coast guard should be

proportional to the offense. Also if there is some concern about environmental impact, when the vessel flees to another country, that country must be informed.

Would the North Korean vessel have been safe if it openly admitted it was spying instead of disguising itself as a fishing boat and fleeing? One can argue that it was threatening Japan's security and should have been addressed as a maritime security threat rather than as control of illegal fishing. In this view, if the North Korean boat acknowledged it was a spy boat, it should have been arrested on the basis of self-defense and brought to Japan to be investigated by the appropriate authorities. When the mystery boat entered China's EEZ, the Japanese government contacted the Chinese government and although the boat appeared to be Chinese, China said it was not a Chinese ship. In this view, the vessel then became a ship without nationality and was treated correctly as such under international law.

It is clear that marine scientific research is subject to the consent regime and that is not a matter of dispute. However, military intelligence gathering is outside this regime. If Japan established the same consent law as China has promulgated regarding military information gathering, many of the activities that China undertakes in Japan's waters would violate this law.

We need to understand better the meaning of 'military activities' and 'operations' in the EEZ. In peace time, as soon as the naval ship's crew receive an order to head out to sea, they immediately begin to exercise and train. This is the nature of military service and is normal naval practice. But we are talking about something else that is not routine. Thus we have to define appropriate rules for naval activities in foreign EEZs. We need to have a list of permissible activities for warships, agreed regulations for military flights, and for hydrographic surveying. The existing provisions in the internal legislation of some countries reflects the contradiction between their lack of ability to protect their interests with their own naval forces and the attempt to use law to fill this gap. Certainly, coastal state security may at times require restrictions on military uses in foreign EEZs. But international security may require certain military uses of the sea.

"Can countries engage in military exercises and maneuvers, including the firing of weapons, in the EEZ of another country?" For Russia the answer seems to be a qualified "yes". Russian law and recent practice interprets the EEZ as just that with a specific legal regime established in UNCLOS Part V where the rights, jurisdiction, and duties of the coastal state are limited by the provisions of Article 56. The Russian navy interprets the meaning of 'due regard' as subject to the regulation of the coastal state, and meaning that 'naval users' must comply with the regulations of the coastal state, but within the framework of UNCLOS. In other words, the rights of navigation and overflight (and others like laying of submarine cables and pipelines) and all naval activity related to these freedoms should be recognized as lawful. For Russia, the precise question is 'does the coastal state have any evidence that a particular foreign naval activity is violating the economic and environmental rights of the coastal state'? For example, anti-aircraft training or the launching and landing of aircraft does not, in the Russian view, violate the

provisions of the UNCLOS. The coastal state may be concerned for its security, but this is not an EEZ issue.

However, military exercises in the EEZ, including the use of weapons, must also have some limits. A naval vessel using antisubmarine weapons like torpedoes or depth charges is directly influencing the environment and living resources of the EEZ and would be violating the rights of the coastal state. Exercises create danger and require the establishment of a warning or exclusionary zone to protect others using the affected ocean area. But ensuring the safety of other users of ocean and airspace can be provided according to recognized International Maritime Organization and ICAO regulations. This is a legal and temporary use of the high seas for military purposes.

Regarding the collection of intelligence information, one view is that we cannot deny the fundamental rights of freedom of navigation and overflight. Usually, this is not an 'open' activity. For more than 35 years both the United States and Soviet navies were involved in extremely close maneuvering and during that time the collection of intelligence information was routine for both. The question is not really about the permissibility of this activity in foreign EEZs, but rather its effect, which could be legal or illegal according to the interpretation of the coastal state. For example, imagine military aircraft overflying a foreign EEZ and using intelligence gathering equipment. There are no international legal provisions which prohibit such flights. But if the aircraft drops hydro acoustic buoys to examine underwater conditions, the coastal state could argue that the foreign military aircraft was collecting information about the underwater environment and that this violates the sovereign right of the coastal state. So the question is not about the activity itself, but whether this activity could be considered as exploring and exploiting the natural resources or interfering with their management.

It is similar with hydrographic surveying and scientific research. Submarines collect data for targeting, stealth and other military purposes. These data are not released for economic purposes. But they *could* be used for making charts for economic purposes. And a hydrographic survey vessel towing outboard equipment could be accused by the coastal state of illegal scientific research. UNCLOS Article 240(a) states clearly that "marine scientific research shall be conducted exclusively for peaceful purposes" and this limitation is expressed again in Article 246 (3). Hydrographic surveys can include the mapping of the sea floor to facilitate navigational and targeting operations of submarines. Such activities, as well as implanting of surveillance devices for monitoring the underwater environment, are not scientific research. Scientific research can, of course, also be undertaken by aircraft as well as by ships. Aircraft have the right of overflight over the EEZ, but if they are obviously gathering information regarding the resources of the waters below, the coastal state should have the authority to challenge the plane and investigate its activities.

The U.S. ADIZs were adopted in the early 1950s to protect its air boundaries. They set a new precedent. In the Russian perspective, this was not "to facilitate air traffic into the United States and ... the United States needed to sort out for interception those

aircraft that do not respond to requests for identification.” This zone was adopted basically to intercept Soviet military aircraft. No provisions of the 1944 Chicago Convention or any other international agreement authorize the necessity of an aircraft to identify itself.

There is no particular reason not to respect the law of another country, even if it is stricter or broader than international law. But once a foreign aircraft approaches foreign airspace other than airspace over the territorial sea, even while carrying out an intelligence mission, permission, authorization, or prior notification should be a good faith gesture. The U.S. action in the airspace of the Gulf of Sidra proved that Libya’s requirements were not acceptable to the United States. However, restrictions on military activities in coastal areas are not uncommon in times of war and international confrontation.

For Russia, the question of the military use of semi-enclosed seas like the Black Sea or the Sea of Okhotsk is very sensitive. Under UNCLOS Article 123, the countries bordering on such seas have a special responsibility to cooperate and manage their resources. But this responsibility does not require imposing limits on military activities if they do not directly interfere with resource and exploitation of environmental protection.

Regarding any attempt to compare U.S. military activities with Chinese marine scientific research and resource exploration activities in Japan’s EEZ, they are different in quantity, quality, and number. Around China, the United States undertakes more than one surveillance flight a day, while China has only undertaken such activities in Japanese waters about ten times. The Chinese activity is primarily marine scientific research designed to familiarize itself with this maritime area. The U.S. flights are for gathering of military intelligence. So the purpose is different. And the Chinese marine scientific research and resource exploration activities are primarily in China’s claimed EEZ, while the U.S. activity originates from very far away. However, some of China’s activities do include intelligence gathering in Japan’s EEZ’s and straits between islands.

Thus questions still remain. One can empathize with the wish of the operators that these issues would go away. But confrontations continue. And even if we restrict the regime of military activities in the EEZ to those activities that have impact on resources and the environment, there are still problems.

Clearly, there are conflicting views of the use of EEZ space. This has and will continue to cause confrontation and even conflict. The list of dissenters is long and growing. The reasons are political. UNCLOS is up for discussion next year and we are hoping that Canada and the United States will ratify it and think it is a good document. Unfortunately the dispute resolution mechanism is not being used. There is a Law of the Sea Tribunal but it does not get many cases. The Tribunal should have more jurisdiction and fill these legal lacunae. Meanwhile, this dialogue is enhancing our mutual understanding of the respective rights of the coastal states and the user states.

## **Session VI: The Implications of 11 September 2001 and the ‘War on Terrorism’\***

### **Introduction**

While the events of September 11, 2001, have brought to fore the issue of maritime security, it is not a new issue of major concern. Maritime security at sea continues to be threatened in many ways. These threats include not only the movement of terrorists and their means of financing, and the shipment of weapons of mass destruction and conventional arms, but also the smuggling of drugs and migrants, and piracy and armed robbery at sea. The international community has so far responded in different ways to these varied threats.

### **Al Qaeda and the Taliban**

The initial responses by the United States and the international community as a whole to the attacks of September 11, 2001, were to invoke the rights of collective and individual self-defense against al Qaeda and the Taliban. To the extent al Qaeda and the Taliban continue to pose a threat of imminent attack against the United States and U.S. interests, these authorizations continue to provide a legal basis for actions against those threats.

However, not all threats at sea are similarly situated or require the same response. The following are other responses.

### **Maritime Security**

The International Convention for the Safety of Life at Sea was amended last December by the adoption, *inter alia*, of the International Ship and Port Facility Security Code.

On June 28, 2002, the World Customs Organization unanimously passed a resolution that will enable ports in all 161 of the member nations to begin to develop programs using the U.S. Customs Service Container Security Initiative (CSI) principles, including collection of data concerning both outbound shipments in electronic form, use of risk management to identify and target high risk shipments, and use of radiation detection and large-scale technology to identify containers that pose a security threat.

The Legal Committee of the International Maritime Organization (IMO) has undertaken to expand the coverage of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf. Draft protocols to both instruments are presently under consideration by a correspondence group led by the United States.

---

\* Excerpts from and discussion of a paper presented by J. Ashley Roach.

The International Labor Organization is revising Convention 108 to deal with the concerns for improving seafarer identification and facilitating shore leave post-9/11/2001, with a view to its adoption at the 91st International Labor Conference in June 2003.

### **Smuggling and Unsafe Transport of Migrants by Sea**

Between 1998 and 2000, the international community adopted two instruments designed to thwart the growing problems of smuggling and unsafe transport of migrants by sea. The smuggling of migrants by sea is addressed in Chapter II of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime, Palermo, December 15, 2000. The IMO has issued guidelines for combating unsafe practices associated with the trafficking or transport of migrants by sea.

### **Piracy and Armed Robbery at Sea**

In its annual piracy review for 2002, the International Chamber of Commerce's International Maritime Bureau (IMB) (which characterizes all such attacks as piracy) reported that the number of pirate attacks rose to 370 worldwide in 2002—up from 335 in 2001—and the number of cases involving capture and taking of the whole ship rose from 16 to 25. The IMB attributed this rise to the greater involvement in piracy by organized crime networks. In 2002, the number of seafarers killed declined from 21 to 10, but 24 passengers or crew remain missing and are presumed dead.

For calendar year 2001, the IMO received 370 reports of attacks, a decrease of 101 from calendar year 2000. The total number of attacks reported to the IMO since 1984 through April 2002 had increased to 2650. Most of the attacks reported to the IMO during 2000 and 2001 occurred in the coastal states' territorial waters while the ships were at anchor or berthed. In many of the reports received by the IMO, the crews were violently attacked by groups of five to ten people carrying knives or guns. During 2001, the IMO noted 17 crew members of the ships involved were killed, 42 wounded, and five are missing; 16 ships were hijacked, two ships are missing, and one was destroyed. On four occasions the attackers used explosive devices.

### **Enforcement at Sea: Shipboarding Procedures**

- Under the law of the sea, a ship may sail under the flag of one state only and is subject to its exclusive jurisdiction on the high seas.
- A ship may not change its flag during a voyage save in the case of a real transfer of ownership or change of registry.
- Ships have the nationality of the state whose flag they are entitled to fly.
- A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality.

- A warship which encounters on the high seas a foreign commercial ship is not justified in boarding it unless there is reasonable ground for suspecting that the ship is, *inter alia*, without nationality.
- In such a case, the warship may proceed to verify the ship's right to fly its flag.
- To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further inspection on board the ship, which must be carried out with all possible consideration.
- If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
- How then are these rules applied in the various situations previously described?

### **Terrorism Conventions**

Of the dozen international anti-terrorism conventions, only the 1988 SUA convention deals with acts of terrorism at sea. However, it contains no provisions on assisting the flag state in suppressing these criminal acts. As a consequence of the events of September 11, 2001, the IMO is in the process of considering amendments to the SUA Convention and its protocol. The amendments presently under consideration include the addition of new offenses and provisions on shipboarding.

The proposed provisions are based on existing provisions of international treaties concerning law enforcement at sea. Nevertheless, during their initial consideration by the IMO Legal Committee in October 2002, concerns were expressed about the "potential lack of compatibility between the proposed boarding procedures and the principles of freedom of navigation and flag state jurisdiction" and "[d]oubts were also expressed as to the compelling need of such an Article, and the potential for abuse in its practical application." In particular, some in the Legal Committee suggested that the standard "reasonably suspected to being involved in, or reasonably believed to be the target of" lacked "objectivity for triggering criminal law". Apparently the delegates felt this formulation strayed too far from the "reasonable belief" standard which has widely-accepted precedents in UNCLOS (Article 108) and the 1988 Vienna Drug Convention (Article 17.2 and 17.3).

The delegates also seemed to believe that the proposed shipboard provisions departed from basic law of the sea principles regarding flag state jurisdiction as did Article 17 of the Vienna Drug Convention. Apparently the delegates were unaware of the long-standing practice of states to permit a flag state to request assistance of other states and to assent to requests from other states for authorization to board their ships to deal with criminal acts on their behalf.

### **Drug Smuggling by Sea**

Article 108 of the Law of the Sea Convention provided the first, albeit modest, multilateral rules for dealing with illicit traffic in narcotic drugs or psychotropic substances:

1. All states shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any state which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other states to suppress such traffic.

These rules were amplified in Article 17, Illicit Traffic by Sea, of the Vienna Convention for the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

### **Smuggling of Migrants by Sea**

A later treaty that reflects the experiences garnered with drug smuggling at sea provides procedures for dealing with the smuggling of migrants by sea. One of the protocols to the 2000 UN Convention against Transnational Organized Crime seeks to promote international cooperation in the suppression of the smuggling of migrants by land, sea and air. Articles 7 to 9 relate to smuggling by sea.

### **Unsafe Transport of Migrants**

In 1998, the IMO adopted interim, non-binding measures for the prevention and suppression of unsafe practices associated with the trafficking or transport of migrants by sea, pending entry into force of a convention against transnational organized crime including trafficking in migrants.

### **Piracy and Armed Robbery at Sea**

The universal crime of piracy and permissible reaction to incidents of piracy are detailed in the law of the sea. Modern incidents are not necessarily piracy in the traditional sense, and have been addressed in other ways. Enforcement at sea, however, remains based on the traditional rules.

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, with its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988, was adopted under the IMO's auspices. These instruments can fill many of the jurisdictional gaps highlighted when the acts endanger the safety of international navigation and occur on board national or foreign flag ships while underway in the territorial sea, international straits, or international waters. The Convention requires states parties to criminalize such

acts under national law and to cooperate in the investigation and prosecution of their perpetrators. While the Convention has been in force since 1 March 1992, except for China, none of the states in whose waters these acts are occurring are party. The Convention is presently being updated by the IMO in response to the attacks on the United States of September 11, 2001. However the SUA Convention contains no provisions regarding enforcement at sea although efforts are underway to include in the Convention such provisions.

## **Application to Selected Shipboarding Incidents**

### Canadian Seizure of al Qaeda Suspects

On July 13, 2002, Canadian maritime patrol aircraft operating in support of Operation Enduring Freedom in the Gulf of Oman spotted three 8-meter long aluminum high-speed boats suspected of smuggling migrants. A French warship was vectored to inspect the boats. One of the speedboats was carrying ten Afghans, two of whom were later identified as suspected terrorists. The speedboats were subsequently stopped again after fleeing. An eight-strong Canadian boarding party boarded one speed boat and removed two suspects. It can be presumed that the boarding was pursuant to the right of self-defense recognized in the post-September 11th context by the Security Council.

### The M/V *So San* Incident

On December 9, 2002, the Spanish Navy boarded a merchant ship in the Indian Ocean and discovered 15 Scud missiles hidden on board. On December 11th, the vessel was released and proceeded to Yemen where the missiles were off loaded. Why was the ship boarded and why was the vessel released?

According to press reports, the vessel was suspected of transporting North Korean missiles that had been sold and was tracked from when it departed Korean waters. The vessel was displaying the name *So San*. The Spanish Navy was participating in Operation Enduring Freedom, seeking to prevent the escape by sea of al Qaeda and Taliban forces. On December 9th the *So San* was observed with a North Korean flag painted out on the ship's funnel, the Korean characters for "So San" on the hull were observed to be painted over with fresh paint, and no flag was flying. When queried by the Spanish Navy, the master replied that the vessel was registered in Cambodia, and carrying a cargo of cement for Socotra Island, Somalia. No ship by the name of "So San" was identified in international registers of ships.

As the master claimed his vessel was registered in Cambodia, the Cambodian Government was requested to confirm the claim of nationality, and if nationality was confirmed, to authorize boarding of the ship to examine the ship's papers, question the persons on board, and search the vessel. The Cambodian Government confirmed that a vessel meeting the description was registered in Cambodia under the name "Pan Hope".

Under these circumstances, the Spanish Navy suspected the vessel was without nationality and sought to exercise its right of visit. However, the *So San* maneuvered to prevent a boarding. Consequently, rappellers from helicopters boarded the ship.

Once on board, the boarding party inspected the ship's papers which indicated the vessel was registered in Cambodia. The ship's manifest indicated the cargo was 40,000 bags of cement. However, upwards of two dozen 14 by 40 foot sealed containers were observed even though they were not listed on the cargo manifest. The boarding party opened the containers to reveal 15 Scud missiles and associated material.

When queried about this case on December 11, 2002, the White House spokesman stated that the ship was boarded because it "was an unflagged vessel" but was permitted to proceed to Yemen because "[t]here is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea." The spokesman stated further that "[w]hile there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen and therefore the merchant vessel is being released."

In summary, the Spanish forces boarded the ship under the internationally recognized right of visit to verify its nationality. The vessel was suspected of being without nationality because the ship's name and indications of nationality on the hull and funnel were obscured and it was flying no flag. Further, the master's claim of Cambodian registry was inconsistent with the image of a North Korean flag painted on the ship's funnel. While the conflicting evidence with respect to nationality provided a legal basis for the boarding and search, there is no international law rule prohibiting the transport of conventional arms.

#### The M/V *Sabrax* Incident

The *Sabrax* was a Panamanian-flag coastal freighter that was engaged in the Haitian coastal trade. With a new Dominican master, the ship set sail from Haiti in early December 2002 with a crew of three nationals from the Dominican Republic, one each from Haiti and the Bahamas, and four Cubans. On December 25, 2002, the four Cuban crew armed with knives hijacked the ship in an attempt to direct the vessel to Puerto Rico, scuttle the vessel, and claim asylum. The hijackers permitted the master to go to his cabin where he surreptitiously used his cell phone to call the ship's agent in Miami. The agent contacted the U.S. Coast Guard and requested assistance. The U.S. Coast Guard located the ship on December 26th in international waters about 35 nm ENE of the Dominican Republic. A U.S. Coast Guard law enforcement detachment boarded the ship with the authorization of the Government of Panama, and the boarding team took control of the vessel from the hijackers. The United States then relayed the results of the boarding to the Government of Panama which ultimately did not object to the Cubans being returned to Cuba for prosecution.

In this case, the United States conducted the initial boarding pursuant to flag state authorization. However, the flag state did not respond to requests to exercise its flag state responsibilities. It simply did not object to the ultimate disposition of the hijackers to Cuba.

#### The F/V *Chern Maan Shyang 1* Incident

Nine Chinese crew allegedly hijacked the Taiwan F/V *Chern Maan Shyang 1*. At the request of the Taiwan authorities, the U.S. Coast Guard intercepted the vessel 40 nm SW of Guam on July 27, 2001. The Taiwan engineer and Chinese assailant were killed during an altercation and the master was evacuated from the ship because of significant stabbing injuries. Taiwan officials determined the case to be an internal labor dispute and Taiwan authorities arrived in Guam on August 5, 2001, to pilot the vessel back to Taiwan. Again, in this case, the U.S. Coast Guard conducted the boarding in international waters with the consent of the flag authority and disposition was entirely in accordance with its desires.

#### The F/V *Full Means 2* Incident

In this case, on the Seychelles-flagged fishing vessel *Full Means 2*, 32 Chinese crew were intercepted by the U.S. Coast Guard on March 18, 2002, 180 nm SSE of Hilo, Hawaii. With the authorization of the flag state, the U.S. Coast Guard boarded the ship. The boarding team found the body of the first mate (a Chinese national) in the ship's freezer and the Taiwan master was missing. On board investigation revealed one Chinese national apparently murdered the master and first mate over a personal dispute. The rest of the crew was able to overpower the alleged murderer, put him in a stateroom and weld the door shut. The United States obtained authorization from the Seychelles government to exercise jurisdiction over the vessel over the alleged assailant after the FBI completed a homicide investigation in port Honolulu. The prosecution pends. U.S. authorities released the vessel and remaining crew after conclusion of the homicide investigation.

Once again, the boarding and search were conducted in international waters with the authorization of the flag state. The U.S. prosecution was undertaken because the alleged perpetrator was found in U.S. waters where the vessel had gone for safety. Accordingly, U.S. authorities had unrestricted access to witnesses and physical evidence. Because the U.S. legislation implementing the SUA Convention creates jurisdiction in cases involving acts of violence in maritime navigation when the "offender is later found in the United States after such activity is committed," the U.S. had adequate domestic law to accommodate the prosecution as authorized by the Seychelles Government.

#### The *Nataly I* Case

The U.S. Coast Guard boarded this Panamanian flag long-line fishing vessel in international waters on July 25, 1995. The decision of the 9th U.S. Circuit Court of

Appeals reports that the vessel was originally boarded with the permission of the vessel's master who authorized a preliminary search of the vessel. As the boarding team's suspicions were not confirmed, the team left the vessel. Overnight, the Government of Panama authorized the U.S. Coast Guard to board and search the vessel for cocaine. Ultimately, the U.S. Coast Guard found cocaine hidden in two fuel tanks. The Government of Panama was notified of the results of the search and, on July 28, 1995, gave permission for the United States to seize the vessel and cocaine and enforce U.S. law against the master and crew. They were subsequently convicted of possession of cocaine with intent to distribute on board a vessel in violation of 46 U.S. Code Appendix section 1903(a) (1994), and that conviction was affirmed by the Court of Appeals. Thus, the boarding in this case was conducted in accordance with the international law reflected in Article 17 of the Vienna Drug Convention.

#### The *Esperanza* Case

On February 7, 2002, the U.S. Coast Guard encountered the Ecuadorian-flag fishing vessel *Esperanza* 318 nm WNW of Manta, Ecuador. A U.S. maritime patrol aircraft detected the commercial fishing vessel operating outside of known fishing areas with a large tarpaulin on deck and no visible fishing gear. The aircraft crew reported at least 40 persons under the tarpaulin when the aircraft approached. Authorities diverted a U.S. naval vessel with a Coast Guard law enforcement detachment embarked, which was conducting a counter-drug patrol nearby, to investigate. Upon arrival on scene, the U.S. authorities noted a homeport of Ecuador painted on the stern and the master made a verbal claim of Ecuadorian nationality for the vessel. Coast Guard personnel observed over 100 persons on the deck of the 90 foot vessel and sought the master's consent for a boarding. When the master refused to consent to a boarding, the United States sought and obtained authorization from the Government of Ecuador. The boarding team located 141 undocumented and illegal aliens who had paid to be smuggled into the United States via Guatemala and Mexico. In addition to the 106 Ecuadorians and 16 Peruvians aboard *Esperanza*, U.S. authorities also located 19 Iraqi nationals attempting to enter the United States illegally. Coming less than five months after the attack on the World Trade Center, the presence of a group of Iraqi nationals among a much larger group of South Americans attempting to migrate to North America naturally raised concerns of potential terrorist infiltration along existing migration routes. The Government of Ecuador authorized the U.S. Coast Guard to take control of the vessel and escort it to Manta, Ecuador for further investigation by U.S. and Ecuadorian authorities.

The boarding and disposition in this case were conducted with *ad hoc* flag state authorization. While this case implicated neither the right of visit nor illicit narcotics trafficking, the United States conducted the boarding in accordance with the framework articulated in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime.

### The Kota Sejarah Case

In early December 2001, the Singapore chartered container ship *Koto Sejarah* was boarded and searched using ‘precautionary force’ by U.S. Navy Seals and Marines in international waters off Pakistan. Two crewmembers were injured. The four-hour search failed to turn up any terrorists, weapons or suspicious cargo. Singapore protested the action.

From all the foregoing it should be evident that the criticisms levied during LEG 85 at the draft shipboarding Article for the SUA Convention had some merit even if not clearly articulated. As originally drafted, the Article did not reflect all the protections contained in earlier law enforcement treaties with a shipboarding component and, naturally, did not reflect later developments after it was submitted. The draft Article can be revised to rectify its deficiencies.

### **Conclusions**

Threats to maritime security at sea are myriad, and the vulnerabilities of maritime conveyances and coastal approaches are equally numerous. Notwithstanding the array of threats and vulnerabilities, cooperation between flag and coastal states presents a powerful tool for improving mutual security while respecting the principles of sovereignty. Such cooperation should be based on the principles of international law, and respect for the sovereign equality of states and the freedom of navigation. Moreover, cooperation based on these principles is not confined to a limited number of substantive offenses, but is applicable to interventions involving any threat to maritime security at sea seaward of any state’s territorial sea.

The international community can draw on existing and proven cooperative models for law enforcement intervention in international waters, particularly the models employed to combat illicit narcotic and migrant trafficking during the past 25 years. Accordingly, regardless of the alleged illicit activity, flag states must be prepared to cooperate in suppressing, investigating, and prosecuting threats to maritime security at sea.

Cooperation should take the form of boarding states promptly seeking, and flag states promptly confirming, claims of vessel nationality. In particular, flag states should be prepared to respond to such requests at all times. Additionally, flag states should be prepared to intervene with their own law enforcement resources or to authorize the boarding and search of their vessels by others when presented by boarding states with reasonable grounds to believe that a vessel claiming nationality in the flag state is involved in illicit activity.

Each of the cases described involved ships found in international waters for which a boarding state had reasonable grounds to believe that the ship might be involved in illicit activity threatening maritime security at sea. In each case, the boarding state

employed a three-part intervention model pursuant to international law, existing conventions and *ad hoc* arrangements: first, obtain evidence regarding vessel nationality and seek its confirmation; second, upon obtaining confirmation of nationality, secure authorization to board and search from the claimed flag state; and third, if evidence of illicit activity is detected, detain the vessel, cargo, and persons on board on behalf of the claimed flag state pending expeditious disposition instructions from the flag state. The approach to the flag state often includes all three parts at the same time. This model also recognizes the well-settled principle of right of visit, as codified in UNCLOS Article 110, as a basis for obtaining evidence with respect to vessel nationality, and for limited interventions in cases of suspected piracy, slave trading, and unauthorized broadcasting.

Whatever non-military threats to maritime security at sea the international community may face, the unifying principles of mutual cooperation and flag state jurisdiction provide the legal foundation for shipboarding, and the subsequent exercise of enforcement jurisdiction. Hence, the current initiative to amend the SUA Convention presents an important opportunity to enhance the tools available to combat today's wide range of threats of terrorism at sea. It also presents an opportunity to clarify the Convention's unique role in combating other crimes of violence and threats of violence at sea. The amendments will require states to criminalize activity that poses a grave danger. More importantly, the amendments will establish uniform standards for responding to threats of terrorism and terrorist-like acts at sea. Those standards should result in rapid and definitive responses to threats, particularly when time is of the essence and response assets are limited.

## **Discussion**

After September 11th, will the coastal state have more power to manage illegal acts in its EEZ or will that power be reduced? Regarding the three stage-approach for coastal states to intervene in their EEZ, how long does this take? Also what does the coastal state presume if there is no answer from the flag state? In the context of the EEZ, the allocation of authority is not likely to change. The IMO Maritime Safety Committee adopted a new code, but the framework for boarding is in terms of the territorial sea. The coastal state and its authority still applies.

When a state is approached for the first time with questions about a suspicious vessel, it usually takes a long time for a response. That is why the drug convention asks parties to designate an authority to be available 24 hours a day that can be called about this issue. There seem to be different approaches. The large registry states have a central registry and will have a line of communication to where the political decisions can be made; these are larger countries with a lot of experience. Most of the other countries have yet to come to grips with how one deals with the situation. With the draft SUA Protocol, there is a default that if there is no answer within a certain time, one can presume to have the flag State's authority to go on board and examine the ship. But the

ultimate decision depends on the flag state. If something illegal is discovered, cooperation between the requesting/intervening state and the flag state is the only way to deal with the problem. In the absence of a default arrangement, if there is no reply, the advantage goes to the illegal actors.

However, if a suspicious vessel is in the territorial sea and/or seeking to enter a state's port, the state does not need the permission of the flag state because it is its sovereign right to act in its territorial sea or port. However, if one suspects the threat of an imminent attack on one's country, regardless of where the ship is, one has the right to intervene.

A contrary view is that these old issues are now being exaggerated to drum up concern about terrorism. These problems existed for years in the seas around Australia but were not viewed as terrorism. More consideration should be given to burden sharing, capacity building, and to helping countries deal with their own issues. Right now this is dressed up as pseudo-cooperation driven by U.S. concerns. Countries are concerned about the projected costs they will have to bear. Is the United States going to share the costs of these rather heavy-handed approaches?

The United States has been seeking to help with the cost in the container initiative. However, it would be useful for countries to identify what they need to enhance their capabilities in this time of rapid change. The initial response was U.S.-centered which is natural when one is the focus of an attack. The point is the United States realizes cooperation is essential. This is occurring with the identification of seafarers for example. The problem is worldwide and dialogue like this is very important.

Some participants felt coastal states are just as interested in suppressing crime at sea as any other state, but do not have the capacity to do so. Coastal states need help in building their capacity. What concerns them is the question of whether the United States wants to become the world's policeman. When the Council on Security Cooperation in the Asia Pacific (CSCAP) was putting together its memo on Maritime Co-operation Guidelines, the United States was not interested. But now it is. If the United States is hampered in operating in a foreign EEZ, it is because the law and practice in this area is grey. Coastal states naturally are quite reluctant to allow another country to intervene in its area without coastal state involvement. This is especially so for the territorial sea. This is the problem with the Rome Convention. However, it is clear that the United States recognizes there are serious problems at sea and strongly desires cooperation. That is all to the good.

Are Maritime Intercept Operations (MIO) legal in terms of UNCLOS or international law? It was explained that MIO is simply a mechanism to enforce the UN Charter. In the context of 9/11 related activities, and seeking to prevent the escape of combatants, from Afghanistan, the United States is invoking it as a self-defense mechanism.

Regarding the *So San* case, it was not necessary to act unilaterally. Indeed, it is usually better to approach the flag state than to act unilaterally, even if one can legally do so. Although this vessel was stateless, if there is a question of the identity of the flag state it would be better to get permission from both possible flag states. As to the use of force vis a vis the *So San*, there is a limit. It must be reasonable in the circumstances. It would have been a Spanish decision, but had the vessel not stopped, the Spanish could legally have used disabling fire to stop it. Only the minimum force necessary to stop a vessel can be used and it should be done safely, putting no one at risk.

Regarding the *Golden Venture*, the United States acted with the permission of the flag state. The crewmember who landed people without permission violated U.S. law. The vessel was in U.S. territorial waters and fled into international waters. The United States obtained permission from the flag state to arrest the ship and caught up with it in Bahamian waters.

There must be international cooperation regarding suppression of piracy and international maritime terrorism because the vessels are crossing jurisdictional boundaries making control difficult. Criminals have no respect for maritime jurisdictional boundaries. There may be a need to set up regional areas where joint patrols are conducted regularly. Navies are usually most active where they believe their interests are at stake. The U.S. Navy has been reluctant to be involved in suppressing maritime crime in this region, but some countries would welcome such involvement.

Regarding piracy, one benefit of 9/11 was that for the following two weeks there were no reports of piracy. This was very unusual. It was because the coastal states had stepped up their security to such a degree that piracy ceased. The lesson is deterrence works particularly if it is strong and coordinated. Then the criminals have no place to hide or pursue their activities.

Regarding the increased security of containers, has the bar been set too high? If someone enters the container after it has been sealed, the electronic seals would show signs of tampering. But, even so, just on the evidence of tampering alone should the vessel be stopped at sea? It is physically difficult to inspect the containers at sea and it is easier to deal with containers in port.

## **Session VII: The Implications of New Technology\***

Based on current and planned asset acquisitions, military and intelligence gathering activities in EEZs are going to become more controversial and more dangerous. In Asia, the disturbing prospects reflect the increasing (and changing) demands for technical intelligence; the robust weapons acquisition programs, and especially the increasing electronic warfare (EW) capabilities; and the widespread moves to develop Information Warfare (IW) capabilities. The scale and scope of intelligence collection activities are likely to expand rapidly over the next decade, involving levels and sorts of activities quite unprecedented in peacetime. They will not only become more intensive; they will generally be more intrusive. They will generate tensions and more frequent crises; they will produce escalatory dynamics; and on balance they will lead to less stability in the most affected regions, especially in Asia.

The intensity of peacetime technical intelligence collection operations is increasing markedly. In the 1990s, as a gross generalization, signals intelligence (SIGINT) activities in Asia essentially doubled, whether measured in terms of budgets (especially capital expenditures), numbers of major collection platforms acquired, or the types of communications transmitters and circuits and of electronic emitters targeted. They will increase by at least an equivalent amount over the next decade. More countries are determined to collect more communications intelligence (COMINT), about military, diplomatic, political, economic and technological matters, from more other countries. To effectively operate their increasingly important EW systems, defence forces now require comprehensive coverage of the electronic emissions in their possible areas of operation, which must be regularly collected by electronic intelligence (ELINT) systems. The number of SIGINT collection aircraft in East Asia could increase by three-fold over the next decade. The number of dedicated SIGINT collection ships is also increasing, at least in the case of China (with five new SIGINT ships commissioned since 1989). The development of IW capabilities, and especially of network-centric warfare and cyber-warfare capabilities, will also require more dedicated collection platforms and systems.

Technical intelligence collection operations are also becoming more intrusive. As communications (and radar) systems transmit on progressively higher frequencies (or shorter wavelengths) of the spectrum, interception systems must move closer to the transmitter. Communications satellites (COMSATS), which have replaced HF networks for trunk communications, are now operating in the X-band (8/7 GHz), Ka-band (30/20 GHz) and EHF band (44/20 GHz), which provide both spot-beam coverages and very high data rates. Modern field radio systems, transmitting in the VHF and UHF bands, have much shorter-range and less diffuse transmissions than older HF/VHF systems. The interception of terrestrial microwave relay transmissions, carrying all sorts of

---

\* Excerpts from and discussion of a paper presented by Desmond Ball.

telecommunications including computer-to-computer data traffic, requires placement of the interception systems in narrow microwave alleys, extending out to about 50 km over the earth's surface or more than 500 km at 30,000 feet.

A substantial number of unmanned aerial vehicles (UAVs) are being acquired or are being seriously considered for SIGINT collection, including large, high-altitude (70,000 feet), long-endurance UAVs such as *Global Hawk* for microwave interception and COMINT collection. Network-centric warfare and cyber-warfare activities include both covert special forces operations (often involving submarines) to attach electronic sensors and various other electronic devices to adversary communications and radar systems, and covert insertion of viruses and Trojan horses in adversary computer systems. The collection of comprehensive and up-to-date electronic order of battle (EOB) data for EW purposes, which requires coverage of radars emitting from the D-band through the J-band (i.e., 1 to 18 GHz), also requires closer interception operations.

### **Maritime Surveillance Aircraft**

In the late 1980s, reflecting the essentially maritime nature of the security environment in East Asia and the widespread efforts to enhance defence-self reliance as well as concerns about EEZs, there began a region-wide enhancement of maritime surveillance capabilities, involving the acquisition of new ground-based (e.g., HF DF), airborne and ship-based maritime surveillance systems. Over the decade from the late 1980s to the economic crisis in the late 1990s, East Asian countries acquired more than 120 new maritime reconnaissance aircraft, almost doubling the previous inventories of these aircraft.

### **Airborne SIGINT Capabilities**

The extent, variety and sophistication of airborne SIGINT operations has also increased markedly in Asia over the past decade. Russian SIGINT flights around Japan have been greatly reduced, and the *Bear D* operations to and from Cam Ranh Bay, over the East and South China Seas, have ceased entirely. But U.S. airborne activities in the western Pacific have been upgraded, while eight regional countries have been acquiring their own capabilities, viz., Japan, South Korea, China, Taiwan, Australia, Singapore, Thailand and India. Airborne systems are very expensive to operate and maintain, but they provide the only cost-effective means for regular, real-time surveillance of the electromagnetic emissions in important parts of the spectrum that are undetectable from ground sites.

The primary airborne collection mission is electronic intelligence (ELINT), involving ferret flights designed to intercept and record the emissions of radars and other radio/electronic systems—garnering data about the signal sources, strengths, and characteristics (such as operating frequencies, pulse repetition rates, antenna rotation speeds, etc.), to map air defence networks, airfields, and missile batteries for target

planning purposes. These flights are sometimes deliberately provocative, intending to generate programmed responses. Others are equipped for interception of naval radars and emitters, enabling them to locate, identify and track (and plan electronic or missile attacks against) surface ships. For many countries in Asia, airborne ELINT systems provide the primary means of ocean surveillance. Some aircraft carry both passive ELINT and active EW systems, such as jammers and electronic countermeasures, allowing them to monitor and record some signals for intelligence purposes while jamming or manipulating and deceiving other electronic systems. Others are configured for COMINT, loitering for hours in favorable radio reception areas to intercept HF and VHF radio communications. More specialised aircraft focus on the interception of the telemetry and associated signal traffic generated during foreign missile tests, or on special types of communications.

The most modern U.S. systems are able to intercept email and computer-to-computer data traffic, as well as cell phone traffic, serving cyber-warfare tasks rather than more conventional SIGINT collection missions. Special receivers have been installed on at least one U.S. Air Force SIGINT aircraft, and were reportedly also carried by the Navy EP-3 involved in the incident off Hainan on 1 April 2001, which intercept the *proforma* data codes used in computer-to-computer data exchanges. The *proforma* include the dial tones of protocols and link-ups that determine the signalling method (such as data transfer multiplexers and private branch exchanges) and the paths and speeds of data transmission. The airborne cyber-warriors are reportedly able to ‘conduct intrusions of foreign computer systems’, and hence manipulate, deceive or disable them.

The United States continues to operate by far the largest and most active, as well as the most advanced, fleet of SIGINT aircraft in the Asia Pacific region. More than 30 U.S. aircraft are engaged, several of them on a daily basis, in collecting SIGINT of some sort or another around East Asia and the western Pacific. The U.S. now flies more than 400 reconnaissance missions a year along the periphery of China, or an average of more than one per day, mostly for SIGINT purposes, and mostly with flights originating from bases in Japan.

### **Unmanned aerial vehicles (UAVs)**

In recent years the defence forces in many Asian countries have become interested in the acquisition of some type of unmanned aerial vehicle (UAV), primarily for surveillance and reconnaissance, but also for EW activities and fire support. Not only are UAVs much cheaper to operate and maintain than manned aircraft, but they have improved enormously in terms of reliability, endurance, payload capacity, and operational versatility. They are also relatively expendable, and can be used on technical intelligence collection missions that would be too dangerous for manned systems to undertake. The regional interest was palpably quickened by the capabilities demonstrated in the UAV operations in Operation Enduring Freedom in Afghanistan.

## Intelligence Collection Ships

China now has the largest and most active fleet of SIGINT ships in Asia. In addition to equipping some of its frigates for SIGINT operations, in the mid-1980s the PLA Navy built a series of new vessels for dedicated SIGINT missions. The first of these new SIGINT ships became operational in 1987–88, and there are now more than a dozen of them. They include the *Xiangyang Hong 09* (V 350) ‘oceanographic research’ ship; the *Xiangyang Hong 10*, which is equipped with several large log-periodic antennas usable for COMINT purposes; the *Xiangyang Hong 14*; the *Xing Fenghan* (V 856); the Dadie-class No. 841, which displaces some 2,300 tons, and which has been used to monitor U.S.–South Korean Team Spirit exercises; the *Yanbing* (pennant number 723); and the three armed *Yanha* (pennant numbers 519, 721 and 722) which were completed in the late 1980s and which operate in the North China Sea. Several trawlers have also been configured for SIGINT operations (e.g., AGI 201). In addition, the four *Yuan Wang* and the *Shiyan* space event support ships are capable of collecting missile and satellite telemetry and monitoring satellite communications.

One especially noteworthy naval SIGINT operation was the use of the *Xiangyang Hong 09* (V 350) and an accompanying ‘environmental research ship’, *Xiangyang Hong 05*, in preparations for the Chinese actions in the Vietnamese-occupied area of the Spratly Islands in the South China Sea in March 1988. In October 1987, the two vessels began a careful survey of the Yongshu (Fiery Cross) Reef, and by the end of the year had obtained all the data needed for the pre-emptive seizure of the reef in March 1988 before Vietnamese forces could react.

Since 1999, Chinese spy ships have increasingly been probing the waters off Japan. There have been numerous deployments of ‘oceanographic research’ ships to the area around the disputed Tiao Yu Tai Islands, as well as the waters around Okinawa. In May 2000, the *Yanbing AGI (No. 723)*, in an unprecedented move, passed through Japan's two most important straits, the Tsugaru Strait between Honshu and Hokkaido and the Tsushima Strait off Kyushu. (The vessel did not violate Japanese territorial waters in passing through the Straits.) In August 2000, a Chinese spy ship ‘equipped with sophisticated electronic monitoring devices’ penetrated inside the 12-mile limit during a Chinese Navy war game.

There are almost continuous SIGINT collection operations around Taiwan. For example, the *Ziangyang Hong 14*, which ‘operates in the Taiwan Strait all year around’, was found in Taiwanese waters and driven away by Taiwanese warships on three occasions in 2002. In May, during Taiwan's Hankuang (Han Glory) 18 military exercise, it was spotted off Chinpeng naval base. On 9–10 October and 3 November, it was chased away from Lanyu (Orchard Island), 60 km southeast of Taiwan proper. The vessel is believed to ‘intercept Taiwan's communications’.

Japan has also recently modernised its limited AGI capability, replacing the *Akashi* (AGS 5101) with the *Nichinan* (AGI 5105) in 1999. The *Akashi*, which had a

displacement of 1,420 tons and a crew of 65 plus ten ‘scientists’, and which was equipped with a large number of electronic intercept antenna (including a NEC NOLR–6 ESM system for radar intercepts), was commissioned in 1969, and a replacement had been expected since the mid–1990s.

North Korea has the largest fleet of intelligence collection ships in Asia, although they are small (around 100 tons), old converted fishing trawlers, with little technical intelligence collection equipment. They regularly operate along the South Korean coastline, where ‘several have been sunk over the years’. During the 1990s, they ventured further into the Sea of Japan and, in 1999, into Japanese territorial waters. They were chased and fired at by Japanese MSA vessels. This was followed by the sinking of a North Korean spy ship on 22 December 2001.

In January 2002, the Japan Defense Agency compiled a list of 27 ‘suspicious’ ships which had been sighted operating in waters around Japan. Some of them belonged to China and Russia, but the majority were classified as North Korean ships. The North Korean ships feature ‘multiple antennas, double doors in the stern to launch and retrieve smaller craft, and an engine mounted forward rather than aft, as is usually the case’.

### **Naval EW developments**

The rapidly developing EW capabilities in the Asia Pacific region reflect the widespread efforts to achieve national self-reliance, the general recognition of the value of EW as a force multiplier, the defence modernisation programs (which necessarily include significant electronic components), and the ability of many countries in the region to indigenously produce advanced electronic systems (or the desire to promote the development of indigenous electronic sectors through local design and production). ELINT is an essential ingredient in both the design and operation of EW capabilities.

Sophisticated SIGINT and EW capabilities are in fact integral to the operation of the modern weapons systems which are currently being acquired throughout the Asia Pacific region. Modern missile systems, for example, simply cannot be effectively utilized without real-time intelligence and surveillance information, supported by a thorough and comprehensive catalogue of the electromagnetic environment in the area of operations.

Most of the countries in the Asia Pacific region have recently acquired long-range anti-ship missiles, such as Harpoon or Exocet, which are designed for use at beyond-line-of-sight or over-the-horizon ranges. SIGINT is invaluable to the effective operation of these systems. HF and VHF DF systems provide the principal means of detecting and locating enemy ships; analysis of the communications and radar emissions is a primary means of determining the nationality, class, and even the identity of particular ships and together with other electro-optical techniques, a means of precision-guidance of the missiles to the targeted ships. Modern air defence systems utilize ELINT together with active radar for threat warning and location.

A whole class of anti-radiation missiles exists for attacking radars on the basis of their signal emissions (frequency, power, pulse rates, and characteristics, and so forth). It has been widely recognized that defence operations on the modern electronic battlefield simply cannot be effectively conducted without full and real-time intelligence concerning the adversary's electronic order of battle (EOB), i.e., catalogues of the plethora of communications systems, radars, and other electromagnetic emitters which might be expected in area of operations.

Moreover, countries in the region attempting to achieve greater defence self-reliance generally recognize the value of capitalising on 'force multipliers', of which electronic warfare is one of the most potent. The acquisition of EW systems can be traded off against that of expensive platforms to achieve greater defence capabilities within given budgetary and other resource constraints.

In the Asia Pacific region, Japan is clearly the leader with respect to the acquisition of advanced EW equipment. All of the major platforms of the Japan Air Self-Defense Force (JASDF) and Japan Maritime Self-Defense Force (JMSDF) have advanced ESM systems for detecting, identifying and informing countermeasures against electronic threats—such as the J/APR-4A and J/APR-6 radar warning receivers installed on the F-15J and F-4EJ fighters, the NOLR-6C and NOLR-9 ESM systems on the JMSDF's new destroyers, and the ZLR-7 system on the new *Oyashio*-class submarines.

### **Network-Centric Warfare Activities**

Many countries have established cyber-warfare agencies whose tasks include destroying or incapacitating the critical information infrastructure of notional adversaries (including their defence C<sup>3</sup>I systems).

Two aspects of cyber-warfare activities are particularly noteworthy here. The first is that EEZs are just as attractive for monitoring (and intruding into) microwave telecommunications, including computer-to-computer traffic, as for more conventional radio and radar signals interception and DF activities. Ports, offshore berths, and the air and maritime environs more generally frequently provide good line-of-sight to terrestrial microwave relay systems—allowing both interception of cyber traffic and insertion by wireless of viruses and trojan horses into the targeted computer systems.

Second, cyberspace is also the domain of non-state actors, including political dissidents, human rights activists, and apolitical computer hackers as well as transnational criminal groups and terrorist organisations. Individual hackers in mainland China, Taiwan, Japan, and South Korea have become especially proficient at malicious hackings into websites and computer networks associated with vital national infrastructure facilities. Since June 2002, Falun Gong practitioners in China have been hacking into the state-owned Sinosat-1 communications satellite and broadcasting Falun Gong messages and scenes of Falun Gong followers exercising. The use of sea-based hacking platforms would greatly complicate detection and apprehension of the hackers.

Pirates in East Asia are already using VHF radios to monitor the international maritime emergency frequencies, frequency scanners to detect and intercept other radio transmissions, satellite telephones and laptop computers.

### **SIGINT and Crises**

The recent developments with respect to SIGINT, EW and cyber-warfare capabilities and activities in maritime areas are likely, on balance, to be destabilising in crisis situations and detrimental to regional security in general. SIGINT, ELINT and network-related collection activities are not only increasing, they are also likely to become more intrusive—and thus more important for the infringed party to take defensive measures against. Peripheral aircraft flights can inflame tensions. They are provocative, being visible signs of efforts being made to penetrate the electronic secrets of the targeted country. Some involve intentional violations of foreign airspace in order to provoke and monitor electronic responses—the changes in radar operating modes and communications frequencies, and in the chains of command and reportage, at higher alert levels.

The intensity of intelligence collection flights in the region will increase, but so too will the risks of neighborly disputes about them (as occurred between Singapore and Australia because of Singapore Airforce technical intelligence collection activities in Australia in 1993–94), as well as more serious crises, such as the confrontation between the United States and China occasioned by downing of the U.S. EP-3 SIGINT aircraft near Hainan Island on 1 April 2001. (U.S. SIGINT flights along the Chinese coast were resumed in early May 2001, using RC-135 *Rivet Joint* SIGINT aircraft flying from Okinawa, which fly at higher altitude and greater speed than the EP-3s, and also carry a more sophisticated array of SIGINT equipment).

The intensity of intelligence collection flights in the region could increase by as much as three-fold over the next decade. Instead of about 40 SIGINT aircraft operating in East Asia, there could well be more than a hundred, including dozens of UAVs. These are likely to cause substantial air traffic control problems, and to be involved in accidents of various sorts, ranging from navigation failures and crash landings in the countries under surveillance to collisions with other aircraft. Countries subject to several SIGINT flights around their borders each day, or continuous surveillance by high-altitude UAVs such as the *Global Hawk*, will inevitably take counteractions, shooting them down, in extreme cases, but more commonly developing electronic countermeasures, generating competitive moves regarding EW capabilities.

Asian defence forces, now having modern weapons systems with significant EW elements, require more comprehensive and up-to-date intelligence about the EOBs in their neighbourhoods and potential areas of operation to use them effectively. During the Cold War, when the United States needed similar information about the Communist bloc, it risked both diplomatic relations and airmen's lives to collect it. From 1950 to 1969,

there were some 28 incidents in which U.S. reconnaissance aircraft were shot down or forced to land by Communist air forces, with some 130 airmen killed and another 100 missing. Most of these incidents involved SIGINT flights and most of them occurred in East Asia. In November 1951, for example, a U.S. Navy P-2V *Neptune* electronic reconnaissance aircraft was shot down by Soviet fighters over the Sea of Japan, with the loss of its 10-man crew. In January 1953, another P-2V ELINT aircraft was shot down by Chinese fighters over the Formosa (Taiwan) Strait, killing 11 airmen. In July 1953, 15 airmen were killed when a U.S. Air Force RB-50G 'ferret' aircraft operating out of Yokota was shot down over the Sea of Japan, about 100 miles southeast of Vladivostok. In August 1956, a U.S. Navy P4M-IQ Mercator SIGINT aircraft from VQ-1 Squadron, with 16 crew, was shot down off the PRC coast.

The most politically traumatic incident was the shoot-down by North Korea of a U.S. Navy EC-121M *Warning Star* SIGINT aircraft operating out of Atsugi, with 31 crew (including nine COMINT and ELINT personnel from Kamiseya) over the Sea of Japan on 15 April 1969. U.S. aerial reconnaissance flights in the region were temporarily halted, but after a few weeks they were resumed under new guidelines—in particular, the closest point of approach (CPA) for flights near North Korea and China was changed from 20 miles to 50 miles. (The EP-3E involved in the April 2001 incident was 62 miles off the coast of Hainan.)

### **Peacetime EW Engagements Will Become More Common**

U.S. and Chinese naval and air forces have been involved in electronic warfare on at least two occasions, both of which led to Chinese communications being paralysed. In July 1995, during the controversial visit to the United States by former Taiwanese President Lee Tung-hui, U.S. fighter aircraft monitoring a large-scale Chinese military exercise in the coastal regions opposite Taiwan had their communications jammed by Chinese aircraft, and 'retaliated by using advanced equipment to counter the [jamming] signals'. The second occasion was in May 2002, when the *USS Kitty Hawk* was on 'routine exercises' off the northwest of Okinawa, and the communications between the carrier and one of its jet fighters as well as with an EP-3 SIGINT aircraft over the East China Sea were jammed by signals transmitted from a nearby Chinese warship. The American aircraft then reportedly 'succeeded in jamming the electronic warfare equipment on board the Chinese vessel as well as [bringing] communications at the Peoples' Liberation Army naval and army bases in the north of Fujian province to a standstill'.

In crisis situations, SIGINT and EW activities can be inflammatory and escalatory. On the one hand, adversaries will be particularly concerned to protect their electronic secrets—the locations of emergency transmitters, the new communications frequencies and circuits, the alerted air defence system, and the backup e-networks. And on the other hand, important aspects of the regional SIGINT and EW capabilities invite

attack, encouraging pre-emption. At the operational level, destruction or degradation of adversary EW capabilities—by destroying, incapacitating, or deceiving the supporting ELINT systems, or by directly jamming the EW systems, or by severing the communications and data links between the ELINT collection systems, EW processing and analysis centres, and operational EW systems—is imperative to achieve control of the electromagnetic spectrum and remove the ‘force multiplication’ capabilities otherwise available to the adversary. Many new long-range missile systems, including land-attack cruise missiles, anti-ship missiles, anti-radiation air-to-surface missiles, and some air-to-air missiles require over-the-horizon or beyond-visual-range targeting information, frequently provided by ELINT (as well as radar and electro-optical imaging) systems, the denial of which can greatly degrade the utility of the missiles—although increasing the likelihood of accidents and mistaken target identification. At the strategic level, the collection systems which provide strategic intelligence to decisionmakers as well as operational intelligence to defence commanders, and which are typically vulnerable to both physical and electromagnetic attacks, become high-priority targets in counter-command and control strategies. And, of course, anticipating this, the adversary is pressed to take pre-emptive actions. In effect, the vulnerability but vital characteristics of the SIGINT and EW capabilities and cyber-networks combine to produce a reciprocal dynamics which compels pre-emption.

## **Discussion**

We now have a better understanding of what exactly is going on in and over EEZs and what activities are causing objections and concerns. We now know that some intelligence collection activities in the EEZ are active, not passive, and can be deliberately provocative. And we know that no country has a monopoly on these techniques. This complicates our discussion and definition of ‘due regard’, ‘peaceful uses’ and ‘hostile context’.

Some would prefer to consider this issue as purely a military intelligence or ROE issue rather than an EEZ issue. They argue that one does not have to be in an EEZ to undertake intelligence collection and if we consider it an EEZ issue, progress will be difficult. In this view, these are problems for another forum, such as that dealing with arms control, not for one on the rights and obligation in the EEZ. But others argue that it is indeed an EEZ and UNCLOS issue because these activities are taking place in or over the EEZ and some may be violating the ‘due regard’ and ‘peaceful use’ provisions of UNCLOS. They also point out that marine scientific research in foreign EEZs is also undertaken from satellites, but no one argues that the EEZ regime should not deal with marine scientific research. They argue further that advancing technology has dramatically changed the nature of the game and that intelligence activities are no longer restricted to collection but extend to interference and manipulation of communications and must be addressed under the Law of the Sea.

It was also pointed out that while it is true that the activities described can be undertaken in all domains and dimensions, most space-based systems are incredibly expensive and only the United States maintains geospatial systems. Further, there are going to be more and more such activities in the maritime area, and in EEZs especially. SIGINT ships and aircraft are going to have to come in closer to shore to intercept increasingly sophisticated communications. In one sense perhaps we should be thankful for the territorial sea, which theoretically keeps these activities 12m from shore.

This raises several key questions. Is 'jamming' part of the peaceful uses of the sea? Is the existing law of the sea and territorial sea irrelevant regarding this issue? Is there any bilateral, regional or multilateral organization that can prevent this electronic warfare from abusing the rights of states? Should the issue just be left alone or is there anything we could and should do?

There is no organization or rules concerned with these capabilities. In fact this is the reason there has been great resistance to any arms control or even transparency measures regarding these developments. And there is nothing to limit the explosive growth and expansion of these activities. Indeed, in cyberspace there is no sovereignty and jurisdiction. And there is no system that can be created to provide sovereignty in cyberspace. In this context we must follow closely the explosive increase of intelligence collection activities, so that we may properly understand them. Without a good understanding of these developments, we cannot understand the rights of states. For example, AGIs and reconnaissance have a great deal to do with the EEZ and they should not be carried out without limits. Indeed these activities will become more intrusive and the terms we have discussed will need to be deliberated and better understood. But increased intrusiveness does not necessarily mean hostile intent; otherwise we would be seeing greater conflict than we have already. Hostile intent is highly contextual and we have to take these increased capabilities into account in determining hostile intent. So there is work to be done here as developments are moving faster than military doctrines. Perhaps regional ROE's are required.

These multiple intelligence collection activities also present great opportunity to the countries in the region for information sharing to address transnational crime. Since 9/11 most of the threats in the world are perceived as coming not from other countries but from non-state actors. So we should promote the sharing of information that could be used for this purpose. Otherwise, it is a waste of assets.

But some see 'terrorism' as the single challenge to security, while others see it as only one of several. We are already seeing a vast expansion of military expansion and weapons in Asia. We are seeing some increase in sharing and cooperation, but that coexists with a great deal of concern about what is happening with our neighbors and elsewhere. While it is not a competitive 'arms race,' nevertheless the buildup is a cause for concern and will be a permanent feature of our security environment. Indeed, there is not likely to be much sharing beyond allies in part because intelligence operations and

military operations are going to be more closely combined. They are a conjoined activity and countries will be reluctant to share with countries that could become adversaries in future.

The fundamental question is whether it is constructive to prepare some kind of international arrangement or guidelines regarding these activities and to share information. It appears that we are at a very critical stage. It is important to continue this dialogue which may produce beneficial results for people in the region and humanity as a whole. It is hoped that we all will continue talking and building confidence in this region.

## Session VIII: Options for Resolving Disagreements\*

There is considerable disagreement among the participants regarding issues under discussion. Some of the disagreements relate to different interpretations of the relevant UNCLOS provisions, some relate to the means of attempting to resolve the disagreements, and some even relate to whether or not there is a need to resolve such disagreements.

The disagreements relating to the interpretations of UNCLOS provisions generally relate to the exact presumed meaning of the terms as well as the meaning of specific Articles. Some of the provisions of UNCLOS were allowed to be vague in order to achieve consensus. It was hoped that differences in interpretation or application of these provisions could be dealt with through the dispute settlement mechanisms of UNCLOS.

There are specific differences with regard to the meaning of ‘freedom’ of navigation and overflight in and above the EEZ, i.e., whether such freedoms can be limited by certain regulations—national, regional or international—or whether such freedoms are absolute. The notion of ‘freedom’ of navigation and overflight has always been associated with the high seas regime. However, some consider that regulations may be necessary, because freedom without regulations would produce chaos. This was one of the reasons why under ‘archipelagic sea’ lanes, the words ‘freedom of navigation and over flight’, as they appear in Article 38 paragraph 2 on ‘straits used for international navigation’, were not used. Instead the words ‘rights of navigation and overflight’ were used in Article 53 paragraph 3 in order to emphasize that ‘archipelagic sea lanes’ are not high seas or EEZ. Rights exist, yet the exercise of those rights should and must be subjected to certain “codes of behavior” and regulations. Similarly, in this view, some limitation should also be applied to the freedom of navigation and overflight in the EEZ in accordance with Article 58 paragraph 1 and Article 87, not only because the EEZ is not exactly high seas, but also because other ‘freedoms’ of the high seas are already being subjected to various regulations.

In fact there is already agreement that the exercise of the freedom of navigation and overflight in and above EEZs should not interfere with or endanger the rights of the coastal state to protect and manage its own resources and its environment and should not include marine scientific research. Equally, the exercise of such freedoms of navigation and overflight should not interfere with the rights of the coastal states with regard to the establishment and use of artificial islands, installations and structures in the EEZ.

There are also different interpretations regarding the precise meaning of “other internationally lawful uses” of the sea. It is not clear what other lawful uses of the sea these terms include other than the right to navigate and overfly the EEZ. For example it

---

\* Excerpts from and discussion of a paper presented by Hasjim Djalal.

clearly it does not include warfare in the EEZ of other countries. The interpretation of this phrase will be affected by the interpretation of “due regard”, non-abuse of rights, peaceful activities, and the obligation not to threaten or use force against other countries. In this context, different interpretations arise as to whether particular military and intelligence gathering activities are a lawful exercise of the freedom of navigation and overflight, whether they are non-abuse of rights, whether they pay “due regard” to the interests of the coastal countries, and whether some such activities are a threat to peace and security as well as the interests of the coastal countries.

If the answers to any of the above questions are positive, then the coastal state has the right to protect itself and to request the foreign ship or aircraft not to carry out the questionable activities. There would be a problem, however, if the foreign ship or aircraft disregarded the request and whether in such a situation the use of force or “board and inspect” might be justified. If such action is motivated by the need to protect marine resources and the environment, the request is legitimate. But it is not clear whether such rules can be applied to foreign vessels conducting military and intelligence gathering activities in and above the EEZ.

There is also disagreement on how to deal with these uncertainties. One opinion is that there is no need to be concerned, because there is no general pattern of such behavior or incidents. According to this view, each case should be dealt with separately by the parties concerned either through direct bilateral discussions or through direct bilateral agreements or arrangements. This option may work in some cases but not in others, particularly if the relations between the parties are poor or if there is no bilateral arrangement or agreement between them. Leaving the problem to chance could be dangerous in the long run. Moreover, the solution will be influenced by the comparative power of the parties in the sense that those who have the means to force their will would in the end prevail.

Something has to be done to prevent maritime incidents resulting from such uncertainty. In this context, the following could be attempted.

A legal opinion on a particular matter could be sought either through the International Court of Justice (ICJ) as an ‘advisory opinion’ or through the Law of the Sea Tribunal. The Court may have jurisdiction to interpret this language on the basis of UNCLOS Article 288, particularly 288 para 1. This may not be easy as the request for an advisory opinion would have to be submitted by a body that was authorized to do so in accordance with Article 65 paragraph 1 of the Statute of the Court. Asking the opinion of the Tribunal may also be difficult, particularly if the issue involves states which are not parties to UNCLOS.

The issues could also be dealt with through national legislation. Although this is not the ideal, national governments may be forced to deal with these matters unilaterally in order to protect their security and other interests. The practices regarding the application of “straight baselines” for the determination of “internal waters” serve as

examples. While there are various provisions regarding the drawing of straight baselines for purposes of defining internal waters, there was no provision stipulated in UNCLOS regarding the length of those straight baselines or their permissible distance from the coastline, unlike the very precise limitation of length of “straight archipelagic baselines” used to define archipelagic waters. As a consequence more and more coastal countries, including those in the Asia Pacific, are drawing extravagant straight baselines enclosing large amounts of maritime space as “internal waters”. The point is that if those practices become common, then one could argue that it has become part of customary international law through state practice, despite protests by opposing states. Thus if more and more coastal countries enact unilateral national legislation prohibiting the exercise of military and intelligence gathering activities in and above their EEZ, then the prohibition against conducting such exercises could also become part of customary international law through state practice, despite the opposition of some countries, particularly if those countries are not parties to UNCLOS.

Another option is bilateral or regional arrangements between maritime powers and coastal countries as well as between adjacent and opposite neighboring countries. But it should be understood that the rules may differ between various bilateral or regional arrangements. While this may not be the ideal situation, this would not necessarily be contrary to international law, because recent developments in international law indicate that bilateral and regional arrangements can contribute to the development of international law. The benefit of such an arrangement would be practical, in the sense that the countries involved would avoid regional tension by seeking solutions that could be acceptable to the countries in the region.

A fourth option would be to increase dialogue, CBMs, and cooperative efforts among the states involved. In this regard the practice and experience with regard to the management of potential conflicts in the South China Sea could be instructive. The South China Sea Workshop process started in the early 1990s after a major incident in the area in 1988 and after the conflicts in Indochina were approaching a resolution. At that time it was thought that the potential conflicts in the area must be managed to avoid a new confrontation that could endanger peace and stability in the region. To manage such potential conflicts, three mechanisms were developed, namely (1) promotion of dialogue, (2) development of confidence building measures or a CBM process, and (3) the design of cooperative programs in which every entity in the area could participate. The process has lasted for more than ten years. As a result, better understanding has been created between the parties and major conflicts have been avoided, while every state in the area is beginning to cooperate in certain agreed projects. A similar mechanism could also be attempted with regard to the issues of military and intelligence gathering activities in the EEZ.

A similar dialogue could be promoted on military and intelligence gathering between the regional or global maritime powers and the relevant coastal states,

particularly those that are sensitive to such activities in their EEZ. This dialogue should include countries in East, Southeast, and South Asia as well as in the Middle East in view of the current maritime significance of those countries to the maritime powers.

With regard to CBM processes, from the very beginning, the South China Sea Workshop issued statements regarding the need for: peaceful settlement of disputes; restraint in policy and practice so that matters do not become complicated; promotion of cooperation; and the implementation of other basic principles of potential conflict management. Also discussed was the need to conclude a “code of conduct” between the parties which would hopefully lead to the creation of a “regional code of conduct” for the South China Sea. China and the Philippines, as well as the Philippines and Vietnam concluded bilateral “codes of conduct”. These efforts led to the conclusion of the Declaration on the Conduct of Parties between ASEAN and China regarding the South China Sea, signed in Phnom Penh on November 4, 2002.

Confidence building could be advanced by increasing the transparency of the activities of the military powers in the EEZ of other countries. Suspicion and misjudgment must be avoided or reduced. Port visits could be helpful, at least to indicate that there is no negative intent. In certain circumstances, joint exercises and exchange of information with the coastal state by foreign military vessels operating in its EEZ could also be useful. Inviting relevant officials and personalities aboard the ships that happen to be in the EEZ of the coastal states would also enhance transparency. For example, once a number of Indonesian top naval officers were invited and flown on board the U.S. aircraft carrier *Nimitz* when the American Fleet was navigating through the South China Sea from the Pacific to the Indian Ocean. Similar invitations might be extended to relevant personalities of other coastal countries, in order to increase transparency and confidence.

Another example of a positive process is the Indonesian experience in designating archipelagic sea lanes. In implementing Article 53 of UNCLOS on ‘archipelagic sea lanes’, Indonesia consulted first its neighbor countries regarding the rules to be applied in the sea lanes, and then the relevant international organization and the maritime powers, and then submitted the proposal to the IMO which, after lengthy deliberation, adopted the proposal, which Indonesia then formalized in its national legislation.

The management of potential conflicts is more effective if the parties to the potential conflict have experience cooperating rather than confronting each other. Therefore it is essential to devise cooperative efforts in which every interested party can participate. This mechanism has been used in the South China Sea Workshop process and has been extremely helpful in promoting confidence among the parties. It may be difficult to agree on a project regarding military and intelligence gathering, but it would be worth attempting. For instance, the relevant military and intelligence officers could meet from time to time to exchange their concerns and expectations so that whenever possible those concerns and expectations could become complimentary rather than contradictory. In view of the secretive nature of military and intelligence activities, this mechanism would

have to be approached very carefully and would have to start from the least intrusive activities, perhaps through enhancing mutual understanding of scientific and technological progress in information gathering, in weaponry, in ROE, and in general training. With regard to devising cooperative efforts, it is better to concentrate on technical matters because they are relatively straight forward and devoid of major political constraints.

There are lessons learned from the South China Sea process that might also be applied to managing conflict emanating from military and intelligence gathering activities in the EEZ. However, certain conditions would have to be met to undertake such activities.

Realization by the parties that the outbreak of conflict, especially armed conflict, will not settle the dispute and will not bring benefit to either party. This condition exists in the matter under discussion.

The existence of the political will to settle the matter peacefully and to take measures so that the continuation of the dispute does not escalate into armed conflict. It is hoped such political will exists.

The parties should not legislate their position beforehand and should not exacerbate public opinion, because these actions tend to solidify the position of all sides and make it more difficult to seek solutions. Not many countries have regulated these activities yet and the discussion of the issues is still within official and academic groups like this one. Thus, the timing of an initiative in managing these potential conflicts is opportune.

There is a need to increase transparency in national policy and to have frequent meetings among the various relevant officers to exchange information and enhance mutual understanding of their professional needs, particularly to avoid unnecessary confrontation. This point is particularly relevant in the case of military and intelligence gathering activities in foreign EEZs.

Preventive diplomacy should be undertaken by all parties who have an interest in solutions or possible solutions to the problem, either regionally or internationally. Solutions that take into account national and regional interests but ignore the interests of others would not necessarily be effective in the long run. We are beginning a dialogue toward this objective.

The success of the South China Sea Workshop is due to specific approaches. Those approaches could also be relevant in the case under discussion.

Use an all-inclusive approach and do not exclude any directly interested parties in the process.

Keep the process as flexible as possible and avoid institutionalizing it unless it is absolutely necessary. An informal approach is essential, at least in the beginning.

Start with less sensitive issues which participants feel comfortable discussing without encouraging the animosity of their respective governments or authorities.

The participants should be senior or important personalities in their governments, although they should participate in the process in their private capacities.

Differences should not be magnified and cooperative efforts should be emphasized.

Take a cost effective, step-by-step approach.

It should be understood that the process of managing potential conflicts is long term, and requires continuity; lack of immediate concrete results should not be cause for despair and frustration.

Keep the objective simple, in this case to avoid misunderstanding, dispute and conflict.

The roles of widely recognized impartial and dedicated interlocutors are essential.

Finally, it should be realized that the efforts to manage potential conflict will not only be long and tedious but also require resources, both financial and human. For that purpose it would be essential to secure financial resources for a specific period as well as the commitment of professionals who would devote sufficient time and energy to organizing the dialogue, building the network, and undertaking the background research. While the process could start informally without institutions, the end result would hopefully be channeled to government agencies that would be able to adopt government policies, either through national mechanisms or regional arrangements, or even through an international understanding. To accomplish this, it may be necessary to create an Ad Hoc Working Group, consisting of relevant personalities from the various parties or countries, supported by the availability of sufficient funding.

## **Discussion**

While the foregoing is very helpful, some participants had reservations. Some felt that the issues of UNCLOS and the rules of warfare are completely separate and that it is not helpful to try to address these issues through UNCLOS. Second, the Tribunal may not have the mandate to provide advisory opinions like the International Center of Justice (ICJ). Moreover, the baseline analogy may not be relevant because states that are party to the Geneva Convention on the Territorial Sea and consistently object to certain state practices cannot be bound by those practices. Furthermore the ICJ has recently ruled in the Qatar–Bahrain case that baselines must be applied in strict conformity with the Convention. Moreover, informal dialogue must lead to formal dialogue between states and that is the only way these matters can be settled without conflict. Finally some governments have already passed legislation on these issues.

Other participants felt that some regulations have to be applied to military and intelligence gathering activities in the EEZ, that we need to find new ways to resolve these issues, and that the time to do so is now. The problem is where and how to start. Letting state practice decide the matter is inappropriate because states all act in their self interest. Perhaps states could ask a UN body to assemble a commission to define these

troublesome terms. The long-term objective might be a code of conduct regarding military and intelligence gathering activities in foreign EEZs. Also possible might be INCSEA agreements between many countries, e.g., Indonesia and China, or Japan and China, eventually leading to a regional INCSEA agreement. Anti-piracy agreements could be developed in a similar process.

All this brings us back to terminology. What do ‘due regard’, ‘hostile intent’, ‘peaceful use’, ‘hydrographic survey’, ‘normal mode’ and ‘rules of engagement’ mean to the naval officer and to the lawyers. For example, ‘due regard’ may mean one thing on the high seas and another in a foreign EEZ. In the foreign EEZ, the duty of ‘due regard’ is to the coastal state but on the high seas the duty is to humankind.

## **Session IX: The Way Forward**

This dialogue has set out many views on the way to forward. There was disagreement regarding specific proposed follow up measures. Some participants felt we need first an agreed glossary of terms. Others felt we have to start with certain premises, e.g., that the limitations on military activities in the EEZ are greater than they are for civilian activities on the high seas. For example, there seemed to be agreement that there are limitations regarding threats to resources and the environment. But there seemed to be a need to define the range of possible impacts of military activities on resources and the environment, including, for instance, live fire exercises and active sonar. There are also clearly 'due regard' issues and some felt that it is dangerous to leave the interpretation of 'due regard' solely to the operator on the spot. Indeed, some participants felt that the guidelines for the operator must be clear.

A second suggested premise advocated by some is that the activities of a foreign state should not interfere with the duties of the coastal state to monitor and manage its resources, particularly including coastal state surveillance and patrol. There was some agreement that the coastal state has the right to protect, manage, and exploit the living and non-living resources of its EEZ; the duty to protect and preserve the marine environment of its EEZ; the right to conduct (and to give permission for) marine scientific research in its EEZ; and the exclusive right to construct, operate, and use artificial islands, installations, and structures in its EEZ. A third area of some concurrence is that if the activity constitutes a threat of use of force against the state, it is not allowed.

One view was that the military is an extension of the state and thus it was suggested that we need to involve policy planners in our next meeting and to examine political as well as military views. In this scenario the next meeting should have at least two papers that look at contrasting political views and another paper on the 'way forward'. It was suggested that prior to a future meeting the organizers establish a working group to develop a range of understanding of key terms. This could lead to better understanding of these terms and it could be distributed widely for feedback. This would help future meetings and be a first step in a confidence building process. This working group could also produce a plan of action and next steps. And it could suggest cooperative programs that could eliminate misunderstandings on this topic.

However, we were advised to avoid stale legal debates which are often unproductive. Instead, it was suggested that we need to focus on common understandings or even a range of understandings and guidelines. Also it must be understood by all participants that what we intend to produce is not a legal document. Whether or not it becomes soft law is in the eye of the beholder. If we produce guidelines, we can say we agree and give it to our governments. They may not agree, but this is our role as an

informal epistemic community. We were reminded that we are not trying to settle the disputes—only to manage them.

The organizers envision two to three more meetings to determine the way to accomplish our objective. Small working groups may assist the process by conducting studies on the following:

- fact-finding regarding previous incidents;
- production of a glossary of definitions or range thereof;
- categorization of activities in the EEZ as to what should or should not be allowed or restricted, and what should be discussed;
- the manner of implementation of coastal states' rights;
- the means and manner of enforcement of the agreed rules; and
- suggestions for policy, possibly including analogous elements of INCSEA policies.

One possible model objective is the South China Sea Declaration. However, in pursuing a similar product we would have to be particularly mindful of the interests of the maritime powers for without their involvement, the effort would be moot, at least for them. Nevertheless, such efforts could still be focused on building understanding and arrangements within the region. The organizers will have to approach these tasks step by step and to perhaps begin with the commissioning of papers on selected topics.

It was recognized that it is important in the ongoing process to include all those who wish to participate. It is also important to keep the planning group balanced and independent of specific national interests. This requires independent funds. The specific issues that we dealt with in the different sessions are interrelated and intertwined. We have covered the key points. Now we need locomotives as the leaders, to move the process forward.

We may need to approach this task as a consultant would. In this view, we are at the strategic stage. The next stage is the mission which requires the choice of technology, resources and process. There are some things that can be done right away and some that can be addressed in the longer term. Perhaps a steering group is needed to make the decisions regarding the creation and composition of the working groups and their agendas. If so, this should include the representatives of the sponsoring organizations and one or two other people. There could also be reiteration and feedback from a wider network via email. It is important that the organizers keep their focus and not bite off more than they can chew. That is where the guidance of the steering group could be important. We must also define the specific problems. Is it the perceived threat of military activities in the EEZ to coastal state security? Is it the fear that hydrographic surveys are really intelligence gathering? Is it the effect of military activities on resources or the environment? We need to deal with one problem at a time and to seek solutions.

And we need to look at existing arrangements and previous studies that we can use to move forward. To be efficient we should have timelines and deliverables.

The organizers feel they have the participants support to proceed. IOP/SOF will think through the suggestions and work with the EWC to determine what should be done taking all these opinions into consideration. Continuity in the process is of utmost importance and in this context the participants greatly appreciated the support of IOP/SOF. It is also important to keep these meetings informal and uninstitutionalized. We should act in our individual capacities—but we should act.

This issue and the region are particularly distinctive. The world's two largest economies and four most populous nations are involved—the United States, Japan, China, India and Indonesia—as are Australia and other Asian Nations. And there is in this region the greatest number of islands in the world, and some of the largest EEZs with many overlapping claims. Here there are many ocean problems and difficulties and thus many opportunities for deriving new solutions. That is why this dialogue has acquired such maturity in one year and it could have a very significant impact on foreign policy all over the world.

Moreover, the participants are not like-minded persons in similar professions. The active participation of the naval personnel is particularly important. Indeed naval personnel understand 'we have a common enemy—the sea'. And as operators they have the most immediate need of guidance for 'due regard'. In this sense, this conference reminds one of the best days of the law of the sea negotiations. There the navy captains were called the custodians of the oceans. So this is a great club and a great agenda, with a diverse composition and the effort should be sustained. The EWC and the IOP/SOF have done a remarkable job of doing so to this point, including the preparatory work. The EWC and the IOP/SOF and the next host country should prepare the next round and the next step. The next agenda should be based on the summary of this meeting. Progress has been achieved and we must keep up the momentum.

## **Appendix 1**

### **SOF Chairman Masahiro Akiyama's Intentions for the Project**

We will need two or three more meetings of this type and the results of our discussions will be integrated into a report which will include the areas of consensus. To assist the functioning of the project, we can set up a small Working Group. We will decide later on the number of people. Perhaps the Working Group could use the Internet for much of its work and then report its findings to future international meetings. The Working Group would have five functions.

#### **1. Fact-Finding**

There have been quite a few incidents and the media coverage alone is not sufficient to fully understand them. We should investigate and share the precise facts. Moreover, a variety of terms and their definitions or range of definitions should also be included in fact-finding.

#### **2. Formulation of Basic Policies**

This could be very controversial. The current theme will be maintained, i.e., "The Regime of the Exclusive Economic Zone: Issues and Responses." Specifically, the focus shall be state activities and the EEZ, and the relationship between military activities and sovereign rights/jurisdiction.

#### **3. Categorization of Activities**

State activities in the EEZ could be categorized as those that should be restricted, those that should be unrestricted, and those that occupy an ambiguous 'grey zone'.

#### **4. Definition of the Sovereign Rights of Coastal States and their Implementation**

These rights take various forms such as the right of consent, the right to require notification, and other customary rights. The procedures used in the exercise of these rights can be further classified according to whether consent is explicit or implicit, whether prior consent/notification is required, and whether some conditions shall be attached or not.

#### **5. Foremost Function of the Working Group**

Rules without implementation are worthless. If we are to have rules, we must decide the best ways that they can be enforced or how we can develop a system to implement them. With regard to implementation, two things should be kept in mind. First, the issue of state activities in the EEZ is global and, even though our discussions are focused on the Asia Pacific region, it should be recognized that this issue is deeply

linked to the strategic interests of the United States, Russia and NATO members. For that reason, the continued involvement of U.S. and Russian participants should be secured.

Finally, we cannot do everything at once. We have to narrow our focus and approach the tasks one by one. Since the participants are attending the discussions in their personal capacities and are not representing their countries, I hope that they will do their utmost to reach a consensus. Issues that cannot be mutually agreed upon should be excluded.

## Appendix 2

### Agenda

#### The Regime of the Exclusive Economic Zone: Issues and Responses

#### The Tokyo Meeting 19–20 February 2003

SESSION	WEDNESDAY 19 <sup>th</sup>	
<b>I</b>	0900	<b>Welcome and Opening:</b> Hiroshi Terashima, Executive Director, Institute for Ocean Policy, Ship and Ocean Foundation Mark J. Valencia, Senior Fellow, East-West Center
	0915	<b>Keynote Speech:</b> Masahiro Akiyama, Chairman, Ship and Ocean Foundation
	0945	<b>Coffee</b>
<b>II</b>	1010	<b>Summary of the Bali Dialogue</b> Chair: Tsutomu Fuse, Professor, Yokohama City University Paper: Mark J. Valencia
	1040	<b>(5 Minute Technical Break)</b>

<b>III</b>	1045	<p><b>Perspectives on Critical Questions</b></p> <p>Chair: Hasjim Djalal, Special Adviser to the Minister, Department of Ocean Exploration and Fisheries</p> <p>Panel: Ram Anand, Professor Emeritus, Jawaharlal Nehru University; Susumu Takai, Director, Archives and Library, National Institute for Defense Studies; Colonel Sunaryo, Director of Studies, Indonesian Naval Training Command; Ji Guoxing, Deputy Director, Shanghai Center for RIMPAC Strategic and International Studies</p>
	1145	<b>Open Discussion</b>
	1215	<b>Lunch</b>
<b>IV</b>	1315	<p><b>Operational Modalities and ‘Rules of Engagement’ of Navies Operating in the Region</b></p> <p>Chair: Sam Bateman, Principal Research Fellow, Centre for Maritime Policy, University of Wollongong</p> <p>Panel: Kim Duk-ki, Policy Planning Bureau, Ministry of National Defense; Jayant Abhyankar, Deputy Director, International Maritime Bureau; Alexander Skaridov, President, St. Petersburg Association of the Law of the Sea; David Grimord, Director, International and Operational Law, Office of the Navy Judge Advocate General; Cheng Xizhong, Research Fellow, China Institute for International Strategic Studies</p>
	1430	<b>Open Discussion</b>
	1500	<b>Coffee</b>

<b>V</b>	1530	<b>Specific Cases</b> Chair: Kim Dalchoong, President, International Political Science Association Paper: Jon Van Dyke, Professor of Law, William S. Richardson School of Law, University of Hawaii
	1600	Discussants: Richard T. Mehinick, Director, Sea Power Centre; Noor Aziz Yunan, First Admiral, Royal Malaysian Navy; Kazumine Akimoto, Representative, Akimoto Ocean Institute; Boris Korolev, Foreign Policy Advisor, Russian Federation Chamber of Commerce
	1700	<b>Open Discussion</b>
	1730	<b>End</b>
	1800	<b>Welcome Reception</b>
<b>VI</b>	<b>THURSDAY 20<sup>th</sup></b>	
	0900	<b>The Implications of September 11, 2001 and the “War on Terrorism”</b> Chair: B.A. Hamzah, President, Maritime Consultancy Enterprise Paper: Ashley Roach, Office of the Legal Adviser, U.S. Department of State
	0930	<b>Open Discussion</b>
	1015	<b>Coffee</b>
<b>VII</b>	1045	<b>The Implications of New Technology</b> Chair: Tsutomu Fuse Paper: Desmond Ball, Professor, Strategic and Defense Studies Center, Australian National University
	1115	<b>Open Discussion</b>
	1200	<b>Lunch</b>

<b>VIII</b>	1315	<b>Options for Resolving Disagreements</b> Chair: Alexander Yankov, Judge, International Tribunal for the Law of the Sea Paper: Hasjim Djalal
	1345	Discussants: Ashley Roach; Ji Guoxing; Sam Bateman
	1430	<b>Open Discussion</b>
	1515	<b>Coffee</b>
<b>IX</b>	1545	<b>The Way Forward</b> Chair: Masahiro Akiyama Panel: Hasjim Djalal; Masahiro Akiyama; Jon Van Dyke; Mark J. Valencia; Alexander Yankov
	1645	<b>Closing</b>  <b>Dinner on own</b>

## Appendix 3

### **The Regime of the Exclusive Economic Zone: Issues and Responses**

#### **The Tokyo Meeting List of Participants**

**Captain Dr. Jayant Abhyankar**

Deputy Director  
International Maritime Bureau  
London, England

**Rear Admiral (Ret.) Kazumine Akimoto**

Counselor  
Institute for Ocean Policy, SOF  
Tokyo, Japan

**Masahiro Akiyama**

Chairman  
Ship & Ocean Foundation  
Tokyo, Japan

**Dr. Ram Anand**

Professor Emeritus  
Jawaharlal Nehru University  
New Delhi, India

**Dr. Desmond Ball**

Professor  
Strategic and Defense Studies Center  
Research School of Pacific Studies  
Australian National University  
Canberra, Australia

**Dr. Sam Bateman**

Principal Research Fellow  
Centre for Maritime Policy  
University of Wollongong  
New South Wales, Australia

**Cheng Xizhong**  
Research Fellow  
China Institute for International Strategic Studies  
Beijing, China

**Dr. Hasjim Djalal**  
Special Adviser to the Minister  
Department of Ocean Exploration and Fisheries  
Jakarta, Indonesia

**Dr. Tsutomu Fuse**  
Professor  
Yokohama City University  
Yokohama, Japan

**Jenny Miller Garmendia**  
Degree Fellow  
East-West Center  
Honolulu, Hawaii, United States

**Captain David Grimord**  
Director  
International and Operational Law  
Office of the Navy Judge Advocate General  
Washington, D.C., United States

**Dr. B.A. Hamzah**  
President  
Maritime Consultancy Enterprise  
Kuala Lumpur, Malaysia

**Professor Ji Guoxing**  
Deputy Director  
Shanghai Center for RIMPAC Strategic and  
International Studies  
Shanghai, China

**Captain Masao Kawamura**  
Deputy Head  
Plans and Programs Division  
Operations and Plans Department  
Maritime Staff Office  
Japan Defense Agency  
Tokyo, Japan

**Dr. Kim Dalchoong**  
President  
International Political Science Association  
Seoul, Republic of Korea

**Commander Dr. Kim Duk-ki**  
Policy Planning Bureau  
Ministry of National Defense  
Seoul, Republic of Korea

**Captain Richard T. Menhinick**  
Director  
Sea Power Centre  
RAAF Base Fairbairn  
Canberra, Australia

**Captain (Ret.) Ashley Roach**  
Office of the Legal Adviser  
U.S. Department of State  
Washington, D.C., United States

**Captain (Ret.) Mark Rosen**  
International Law Analyst  
Center for Naval Analyses  
Washington, D.C., United States

**Dr. Alexander S. Skaridov**  
President  
St. Petersburg Association of the Law of the Sea  
St. Petersburg, Russian Federation

**Colonel Sunaryo**  
Director of Studies  
Indonesian Naval Training Command  
Surabaya, Indonesia

**Professor Susumu Takai**  
Director  
Archives and Library  
National Institute for Defense Studies  
Tokyo, Japan

**Hiroshi Terashima**  
Executive Director  
Institute for Ocean Policy, SOF  
Tokyo, Japan

**Dr. Martin Tsamenyi**  
Director  
Centre for Maritime Policy  
University of Wollongong  
New South Wales, Australia

**Dr. Mark J. Valencia**  
Senior Fellow  
East-West Center  
Honolulu, Hawaii, United States

**Professor Jon Van Dyke**  
William S. Richardson School of Law  
University of Hawaii  
Honolulu, Hawaii, United States

**Judge Alexander Yankov**  
International Tribunal for the Law of the Sea  
Hamburg, Germany

**First Admiral Noor Aziz bin Yunan**  
Maritime Enforcement Coordination Centre  
Royal Malaysian Navy  
Perak, Malaysia

## CONFERENCE COORDINATORS

**Koichi Takagi**  
Special Adviser  
Ship & Ocean Foundation  
Tokyo, Japan

**Dr. Mark J. Valencia**  
Senior Fellow  
East-West Center  
Honolulu, Hawaii, United States

## CONFERENCE SUPPORT STAFF

**Ralph Carvalho**

Senior Fiscal Officer  
East-West Center  
Honolulu, Hawaii, United States

**Penny Higa**

Program Officer  
East-West Center  
Honolulu, Hawaii, United States

**Ellery Racca**

Secretary  
East-West Center  
Honolulu, Hawaii, United States

**Kazumi Sugawara**

Researcher  
Institute for Ocean Policy  
Ship & Ocean Foundation

**Catherine Lee Vivar**

Researcher  
Institute for Ocean Policy  
Ship & Ocean Foundation