

Legal Study on Military Activities in the EEZ

- With a Focus on Foreign Military Activities in the EEZ of P. R. China -

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ABSTRACT

Military activity in the EEZ is a very complicated issue. In view of the fact that the USA has engaged many kinds of military activity in the EEZ of the P. R. China and that these activities has led to conflicts between the two countries, this article deals with the legal issues of military activities of one country in the EEZ of another country with focus on the foreign especially USA military activities in the EEZ of the P. R. China. This article, on the basis of legal documents such as the UN Charter, the UN Convention on the Law of the Sea, and on the basis of laws and practice of related countries, analyzes the following issues: the legal status of the EEZ under international law and its impact on military activity of one country in the EEZ of another country, the relation between peace principle and military activity of one country in the EEZ of another country, the navigation of military vessels of one country in the EEZ of another country, the flight of military aircrafts of one country over the EEZ of another country, the marine scientific research conducted by military vessels of one country in the EEZ of another country, the military survey conducted by military vessels or military aircrafts in the EEZ of another country, the military exercises or arms trials held by one country in EEZ of another country, and the use of force by military vessels or aircrafts of one country in the EEZ of another country. At the end, the article summarizes the main points discussed and analyzed.

Key words: The UN Convention on the Law of the Sea, EEZ, military activity

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Preface

One main achievement of the UN Convention on the Law of the Sea 1982 is the establishment of legal regime on the exclusive economic zone (EEZ). The EEZ legal regime is a result of struggle by developing countries for marine rights of 200 nautical miles¹, and it also reflects the compromise between developing countries and big marine powers. The developing countries try to extend their jurisdiction and marine rights to the EEZ and big marine powers try to maintain their traditional freedoms and interests in this marine area. The UN Convention on the Law of the Sea makes a balanced legal arrangement for the EEZ conferring rights on one party and at the same time imposing obligations on it. The flexible or sometimes conflicting provisions in respect to the EEZ thus lead to new disputes among the interested parties.

One of the new disputes concerning the EEZ is about the military activity of one country in the EEZ of another country. This dispute can be divided into many sub-issues such as whether a country can conduct military activity in the EEZ of another country, whether such military activity should be limited, whether such military activity should be noticed to the coastal country in advance, whether such military activity should be ratified by the coastal country etc. The dispute becomes worse with some big marine powers conducting more and more military activity in the EEZ of other countries. Take the relation between P. R. China and the USA as an example, during the past one or two decades, the USA warships, military aircrafts, spying ships or planes have conducted various military activities in the EEZ of the P. R. China, and some of these activities result in serious consequences². On 1 April 2001, an EP-3, which is a spy plane belonging to USA navy, flew over the EEZ of P. R. China in the South China Sea, 70 nautical miles south-east of the Chinese Hainan Island, and continuously conducted intelligence collecting activity. Two Chinese interceptors took off to trace the EP-3. The EP-3 refused to leave, and at the end clashed with one of the two Chinese interceptors. The collision resulted in the falling down of one of the Chinese interceptors and the death of its pilot. The damaged EP-3 flew into Chinese territorial airspace and landed on Chinese Lingshui Airport. After rounds of negotiation, the USA said sorry to Chinese people and government three times and the EP-3 together with its crew was finally released³. On 22 December 2001, 25 Japanese military or public service vessels and 14 Japanese aircrafts chased an unidentified vessel to the EEZ of P. R. China and fired the vessel down to the seabed of the EEZ⁴.

1 Qu, G.-Q. (2005) *The Law of the Sea*, the Chinese People's University Press, pp.121-124.

2 Fu, K.-C. (2006) Military Survey and Liquid Cargo Transfer in the EEZ: Some Undefined Rights of the Coastal States, *China Oceans Law Review* (2nd Issue), Xiamen University Centre for Oceans Policy and Law, p.4.

3 The People's Web: Today in History—American EP-3 Clashed with Chinese Military Aircraft over the South China Sea on 1 April 2001, <http://www.people.com.cn/GB/historic/0401/6024.html>, last visit on 4 May 2010.

4 Lu, R.-D. (2002) Special Focus—How can Japan Do whatever it Likes in the Chinese EEZ, *China Oceans Newspaper*, 8 February 2002.

On 8 March 2009, the *Impeccable*, a military survey ship owned and operated by USA navy, conducted military survey in the EEZ of P. R. China about 120 km south of Chinese Hainan Island without permission of P. R. China. The *Impeccable* conflicted with 5 Chinese vessels including one navy vessel and one public-service vessel, and its military survey was interrupted⁵. It has been reported that the USA has conducted over 200 times of military survey in the EEZ of P. R. China. At the same time, the USA has held many military exercises in Yellow Sea, East China Sea and South China Sea with neighbouring countries of P. R. China. During the past years, due to the dispute with P. R. China in respect of the title of Diaoyu Islands and the delimitation of EEZ and continental shelf in the East China Sea, Japanese military vessels or aircrafts often visit the EEZ of P. R. China and intervene in the normal operation of Chinese oil and natural gas exploration. In 2010, the USA together with its allies held several military exercises in marine areas surrounding coast of P. R. China.

All above events and incidents indicate that military activity of one country in the EEZ of another country is a very sensible, serious issue. In current situation, disputes and controversies in regard to this issue has posed great challenge for the international society. It is necessary and meaningful to review the EEZ legal regime and find solutions to these disputes for the benefit of regional and global peace and security.

1. Legal status of EEZ and its impact on military activity of one country in the EEZ of another country

Military activity of one country in the EEZ of another country is heavily affected by the legal status of the EEZ under international law.

According to the UN Convention on the Law of the Sea, the sovereignty of a coastal country extends beyond its land territory and internal waters and, in the case of an archipelagic country, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea of the this country⁶. The sovereignty of this country also extends to the air space over the territorial sea and to its seabed and subsoil. Every coastal country has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention⁷. Every coastal country can exercise exclusive, absolute sovereignty over its territorial sea, which is only limited by the innocent passage right of a foreign vessel⁸.

5 Yang Y.-L. (2009) Pentagon says Chinese vessels harassed U.S. ship, CNN, 10th March, 2009, available at: <http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/> last visited: 01/10/09.

6 Refer to Article 2 of the UN Convention on the Law of the Sea.

7 Refer to Article 3 of the UN Convention on the Law of the Sea.

According to the above Convention, the EEZ of a coastal country is a marine zone beyond and adjacent to its territorial sea, but not extend beyond 200 nautical miles from the baselines, subject to the specific legal regime established by the Part V of the Convention, under which the rights and jurisdictions of the coastal country and the rights and freedoms of other countries are governed⁹.

For the coastal country, its rights and jurisdiction includes: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters over the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; jurisdiction over the establishment and use of artificial islands, installations and structures, over the marine scientific research, and over the protection and preservation of the marine environment; other rights as provided for in the Convention¹⁰.

For other countries, their rights and freedoms in the EEZ of the coastal country include: the freedoms referred to in Article 87 on freedom of the high seas for navigation, over-flight, laying submarine cables and pipelines; rights of other internationally lawful uses of the sea related to the above mentioned freedoms, such as those associated with the operation of ships, aircrafts and submarine cables and pipelines, and compatible with the other provisions of the Convention. The Convention further stipulates that Articles 88 to 115 on the high seas and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Part V on EEZ of the Convention¹¹.

Realizing the subtle balance between the interests of a coastal country and other countries and trying to avoid potential disputes, the UN Convention on the Law of the Sea continues to urge the interested countries to mutually respect the rights of each other. While the Convention requires the coastal country to pay due regard to the rights and freedoms of other countries in exercising its own rights and jurisdiction in its EEZ in a manner compatible with the provisions of the Convention, the Convention also requires that other countries should have due regard to the rights and jurisdiction of the coastal country and should comply with the laws and regulations adopted by the coastal country not incompatible with the Convention¹². Because this requirement of mutual respect is vague and difficult to enforce, it can not resolve all the conflicts in this regard. Therefore, the Convention tries to lay down some principles in settlement of potential disputes regarding EEZ. It provides that in cases where the Convention does not attribute rights or jurisdiction to the coastal country or other countries within the EEZ, and a conflict arises between

8 Refer to Article 17 of the UN Convention on the Law of the Sea.

9 Refer to Articles 55 and 57 of the UN Convention on the Law of the Sea.

10 Refer to Article 56 of the UN Convention on the Law of the Sea.

11 Refer to Article 58 of the UN Convention on the Law of the Sea.

12 Refer to Articles 56 and 58 of the UN Convention on the Law of the Sea.

a coastal country and any other country, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole. The principle of equity is also very abstract, and thus difficult to interpret, but together with considering all related elements and weighing the relative importance of involved interests, it can provide a useful route to conflict resolution.

According to the Convention, the high seas cover all parts of the sea that are not included in any EEZ, territorial sea, international waters or archipelagic waters of any country¹³. The high seas are open to each and every country, and the principle of freedom applies to the high seas as a whole¹⁴.

From above analysis, it can be concluded that EEZ is a special marine zone, standing between the territorial sea and high seas. The EEZ legal regime makes about 30% of the sea under sovereign rights or jurisdiction of coastal countries¹⁵. In EEZ, a coastal country can not enjoy all the rights and jurisdiction it can enjoy in territorial sea and other countries can not enjoy all the rights and freedoms they can enjoy in high seas. There exists a subtle balance between the coastal countries and other countries in EEZ. Many resources such as 90% of global commercial fishing, 87% of global marine crude oil and natural gas, and large quantity of mineral exist in EEZ. The main part of marine scientific research is held in EEZ. Most of world marine passages are also located in EEZ¹⁶. Consequently the chance of conflict among countries in EEZ increases sharply.

The analysis of the legal issues concerning the military activity of one country in the EEZ of another country can only rest on the legal regimes of EEZ. In other words, the legal status of EEZ under the international law can exert a great influence on the discussing and resolving of the issues concerning the military activity of one country in the EEZ of another country.

2. Relation between military activity in EEZ and peace principle

Peace principle is one of fundamental principles of the UN Charter¹⁷. Peace principle has also been adopted by the UN Convention on the Law of the Sea. Peace principle is concretely embodied by Articles of 88, 141, 246 and 301 of the UN Convention on the Law of the Sea as leading principle of marine activities. Through the provision of Article 58 of this Convention, peace principle also applies to activities in EEZ.

13 Refer to Article 86 of the UN Convention on the Law of the Sea.

14 Refer to Article 87 of the UN Convention on the Law of the Sea.

15 Song, Y.-X. (2009) *Theories and Practice of State Marine Jurisdiction*, the Oceans Publishing House, p.61.

16 Qu, G.-Q. (2005) *Law of the Sea*, the Chinese People's University Press, p.120.

17 Refer to Article 2 of the Charter of the UN.

However, as the Convention is the outcome of compromises between coastal states and big maritime powers, the issue of military activities of one state in the EEZ of another state is in some degree a grey area¹⁸. As a result, there arise questions such as how to determine an activity of one state in the EEZ of another state is in conformity with the peace principle, whether all military activities of one state in the EEZ of another state are against the peace principle or only some of them are against the peace principle, and who shall have the final judgment of the nature of such activity.

There are three viewpoints in regard to above questions. One viewpoint holds that peace principle prohibits any military activities of one state in the EEZ of another state. The second viewpoint holds that military activities can be divided into two categories---those for peaceful purpose and those not for peaceful purpose, and that the peace principle only prohibits those activities not for peaceful purpose. The third viewpoint holds that the coastal state that is heavily affected by such military activities should be given the right to judge the nature of the military activities and prohibit those that might threaten its security.

The UN Convention on the Law of the Sea has not generally prohibit all military activities of one state in the EEZ of another state, and in practice it is difficult for a coastal state to prohibit all military activities of other states in its EEZ. The general practice of coastal states is to tolerate those military activities of other states in their EEZ if they do not pose a threat to the coastal states. So the first viewpoint can not stand either from international law perspective or from practice perspective. The second viewpoint reflects the attitude and practice of the majority of states, but problem lies in that they have inconsistent practice in regard to the judgment of the nature and consequences of such activities. As to the third viewpoint, because it considers more the feelings and interests of developing states and submits the military activities to the decision of coastal states,, it is welcomed by them, but strongly opposed by the big marine powers.

In view of above different viewpoints and inconsistent practice of states, it is necessary for the international society to reconsider the relationship between the peace principle and the military activity of one state in the EEZ of another state, to codify the practice of states and to make universally acceptable norms in this regard. The author suggests that the legislating pattern of the innocent passage of ships of one state through the territorial sea of another state can be used to draft the military activities of one state in the EEZ of another state¹⁹. On the one hand, it is necessary to lay down a general principle for the military activities of one state in the EEZ of another state, and on the

18 Ji, G.-X. (2009) The Legality of US Conduct in the South China Sea, *China Security* (14th Issue), at http://www.chinasecurity.us/index.php?option=com_content&view=article&id=266 last visit on 20/04/2011.

19 Refer to Articles of 18 and 19 of the UN Convention on the Law of the Sea. The Article 18 gives a definition to innocent passage of ships of one state through the territorial sea of another state, and the Article 19 first describes the detailed contents of such innocent passage and then gives a list of 12 activities which do not belong to the exercise of right of innocent passage.

other hand, it is helpful to make a list of permitted military activities and/or prohibited military activities. The list can be further adjusted according to the development of international law and state practice.

3. Whether the USA should be bound by the UN Convention on the Law of the Sea?

The UN Convention on the Law of the Sea was enacted in 1982 at the third UN Conference on the Law of the Sea, and became effective in 1994 and as at 14 April 2011 among the 192 UN member states 155 states have ratified this Convention²⁰.

This Convention has been called the ocean charter and it stands in the centre for the rule of law in the field of the sea. But the USA as a super power has not ratified the Convention. As a result of this, there arises the question whether the USA should be bound by this Convention. If the answer to this question is yes, the other states can base on the Convention to restrict the USA military activities in their EEZ, otherwise they can not.

From the perspective of the law of treaties, the UN Convention on the Law of the Sea, as an international treaty, has no abiding ability on a non-contracting country. The USA has not ratified the Convention, so the USA as a non-contracting party to the Convention is not bound by the Convention. However, if this Convention has codified the international customary rules, then the USA shall be bound by these international customary rules which have been codified by the Convention. Then whether the UN Convention on the Law of the Sea has codified the related international customary rules becomes a key question.

Article 38 of the Statute of the International Court of Justice is deemed universally to have authoritatively explained what international rules are composed of. It says that international customary rule is a general practice which has been accepted as law. General practice and acceptance as law are two requirements for establishing the existence of an international customary rule²¹. As far as the UN Convention on the Law of the Sea is concerned, almost all of the states then had taken part in the negotiations, nowadays 155 states of the 192 UN member states have accepted the Convention, a small number of states have not yet ratified the Convention but have signed the Convention, and the USA has participated the negotiation from the beginning to the end and played a leading role in the process and agreed to almost all parts of the Convention except the Part XI concerning

²⁰ <http://www.un.org/zh/law/sea/statesparties.shtml>, last visit on 14 April 2011.

²¹ Lee, M. L. (2006) The Interrelation between the Law of the Sea Convention and Customary International Law, *San Diego International Law Journal*, p.405 and pp.408-409.

the deep seabed. In addition, the USA has taken part in the negotiation for the amendment to the Convention in regard to the enforcement of the Part XI in 1994, and the federal government of the USA has repeatedly declared that it is considering ratifying the Convention. Furthermore, the USA courts have cited related provisions of the Convention with a view that they have reflected the international customary rules. Therefore it can be inferred from above evidence that this Convention has been accepted as a codification of existing international customary rules. Following the same reasoning, the EEZ legal regime established by the Convention can also be seen as reflecting the international customary rules. What deserves special attention is that it is the USA that first introduced through Truman Proclamation the regime of controlling marine resources beyond the territorial sea²². In 1983 President Reagan of the USA established an EEZ for the USA by proclamation, asserting rights over living and nonliving resources in accordance with the Convention²³. Thus it is obvious that the USA has recognized the EEZ legal regime established by the Convention. It naturally and logically follows that the USA should be bound by the Convention as a treaty codifying related international customary rules.

Now the problem is not whether the USA should be bound by the Convention, the problem is how to interpret the provisions of the Convention when applying to the USA activities in the EEZ of other states. In practice, the USA emphasizes the aspects of EEZ which are similar to those of high seas. It singles out the provisions of the Convention which confer freedoms to other countries in the EEZ of a coastal country²⁴, and it especially points out that all rules of high seas shall apply to EEZ if only the application does not violate the sovereign rights to natural resources and related jurisdiction of the coastal country. In interpreting the Convention, the USA uses a special term *international waters* to refer to the EEZ and a special term *international airspace* to refer to the airspace over the EEZ. Through use of these terms, the USA aims to indicate that it enjoys freedom of navigation and over-flight in EEZ of other countries including the related freedom of military activity. In December 1988, the USA issued the USA Free Navigation Program, declaring that the USA shall oppose the excessive claims on the sea and shall insist the global marine navigation freedom and over-flight freedom through diplomatic and military activities²⁵. Italy as an ally of USA also declared when signing the UN Convention on the Law of Sea in July 1994 that the jurisdiction of a coastal state should not extend to military exercises of other states, and a foreign state need not inform in advance or get permission of the coastal state for military activities in the EEZ of latter state²⁶. In recent years, the USA has been conducting various military activities in the

22 Liang, S.-Y. (2011) *International Law*, China University of Political Science and Law Press, p.219.

23 Damrosch, L. F. et al (2001) *International Law—Cases and Materials (fourth edition)*, West Group, p.1438.

24 Xiao, F.-C. and Xia Wang (2007) Three Issues of the Law of the Sea Concerning the Maritime Military Activities, *Research on Trends of International Law of the Sea*, Oceans Publishing House, p.99.

25 Sohn, L. B. and John E. Noyes (2004) *Cases and Materials on Law of the Sea*, Trans-national Publishers Inc., pp.579-580.

EEZ of the P. R. China particularly in the East China Sea and the South China Sea. When the P. R. China protested against such activities, the USA answered by saying that its activities were in conformity with international law and that it had conducted similar activities in EEZ of over 85 countries including India, Republic of Korea, Australia without any prior notice or permission.

The use of the terms *international waters* and *international airspace* by the USA and its following activities is to make legal basis for its activities and to confuse the legal status of the EEZ and high seas²⁷. This attempt is certainly opposed by most of the countries. They insist that the USA should be bound by the UN Convention on the Law of the Sea and that there is no legal basis to see the EEZ as international waters and that the USA should pay due respect on the sovereign rights and jurisdiction enjoyed by a coastal country under the Convention. P. R. China repeatedly declares without its consent any USA military survey in its EEZ is unlawful. Brazil also declared in December 1982 when signing the UN Convention on the Law of the Sea that the Convention never authorized other states to have military exercises or use of force in the EEZ of a coastal state without the consent of this coastal state, and it further declared in December 1988 when ratifying the Convention that without its consent no other states could have military exercises in its EEZ²⁸.

4. Legal analysis of some military activities of one state in the EEZ of another state

The military activities a state conducts in the EEZ of another state can be of various kinds. Though it is useful to study these military activities as a whole, it is more useful and meaningful to classify these activities and analyze some typical activities of them in details.

4.1 Navigation of warships in EEZ

According to the UN Convention of the Law of the Sea²⁹, ships of any state are entitled to freedom of navigation in the EEZ of another state subject to the provisions

26 Tian, S.-C. (2007) Military Activities in EEZ—A Commentary on Guidelines on Navigation and Over-flight in EEZ Drafted by EEZ Team of 21st Century, *Research on the Trends of International Law of the Sea*, Oceans Publishing House, p.152.

27 Mandsager, D. (1998) U.S. Free Navigation Program: Policy, Procedure and Future, *The Law of Military Operations*, International Law Studies, Vol. 72, Naval War College Press, p.114 and p.117.

28 Tian, S.-C. (2007) Military Activities in EEZ—A Commentary on Guidelines on Navigation and Over-flight in EEZ Drafted by EEZ Team of 21st Century, *Research on the Trends of International Law of the Sea*, Oceans Publishing House, p.151.

29 Refer to Article 58 of the UN Convention on the Law of the Sea.

and conditions of the Convention. Here the Convention does not exclude the warships from the ships. State practice shows that no state requires the prior notice or consent for a foreign warship to navigate in its EEZ though most states denies the right of navigation of warships in their territorial sea. This means that warships of a state enjoy the freedom of navigation in the EEZ of another state subject to the provisions of the Convention.

But problem is that some marine superpowers insist the absolute freedom of their warships in EEZ of other states to guarantee the global movement of their warships. For example, in order to justify the conduct of the USA naval vessel *Impeccable* in the EEZ of P. R. China, Admiral Michael Mullen, the Chairman of the Joint Chiefs of Staff of the USA, once said that though the *Impeccable* was in the EEZ of P. R. China, the USA has the right to enter this area because this area is not territorial water. The USA insists that EEZ is international water and its warships can enjoy the same freedom as they enjoy in high seas. This saying is obviously due to a misunderstanding of the provisions of the Convention. The marine area of EEZ used to be high seas until the UN Convention on the Law of the Sea entered into force in 1994. Since then the EEZ area is no longer high seas, and the freedom of navigation once enjoyed by other states in this area has been greatly derogated³⁰. The term international waters can not find its place in the provisions of EEZ under the UN Convention on the Law of the Sea. In other words, the EEZ is not international water, and the exercise of such freedom must meet the requirements and conditions of the Convention. For example, the exercise of such freedom of navigation should pay due regard to the sovereign rights, safety and security of the coastal state and must abide by the laws and regulations made by the coastal state according to the Convention and other international law.

Accordingly, the freedom of navigation enjoyed by warships of a state in EEZ of another state has been submitted to significant restrictions nowadays. On the one hand, in exercising such freedom, the warships should abide by the restrictions imposed by the Convention and other international law. On the other hand, they have to abide by the laws and regulations of the coastal state made in accordance with the Convention and other international law, such as laws and regulations of protection and management of living or non-living resources, of preservation of environment and measures against marine pollution, of management of artificial island and manmade structures etc.

In practice, most states are greatly concerned with the navigation of warships of other states in their EEZ. This is determined by the military nature of the navigation. They usually take different measures in this regard. They either trace or watch or intervene in such navigation, or pay no special attention to it, taking into consideration all the concrete situation and circumstances.

30 Fu, K.-C. (2006) Military Survey and Liquid Cargo Transfer in the EEZ: Some Undefined Rights of the Coastal States, *China Oceans Law Review* (2nd Issue), Xiamen University Centre for Oceans Policy and Law, pp.8-9.

4.2 Flight of military aircrafts over the EEZ

According to international law, the airspace over land and territorial sea of a state is the territorial airspace over which the coastal state exercises exclusive and absolute sovereignty and the coastal state can prohibit any entry to or flight over its territorial airspace by foreign aircrafts. The airspace over the high seas is open to aircrafts of all states regardless of their military or civil nature. But according to the UN Convention on the Law of the Sea³¹, the airspace over the EEZ is a special airspace standing between the territorial airspace over the territorial sea and the international airspace over the high seas. Therefore, the airspace over the EEZ is not an international airspace as called by the USA³².

According to the UN Convention on the Law of the Sea, when exercising the rights and freedoms conferred by the Convention, a contracting state should not threaten the sovereignty, territorial integrity and political independence of another contracting state and should not use force or threaten the use of force against another contracting state not in conformity with the Charter of the UN³³. This means that when military aircrafts of one state fly over the EEZ of another state, they should not abuse the freedom of over-flight to threaten or damage the sovereignty, territorial integrity, security and safety of the coastal state. For example, the military aircrafts of the USA usually fly over the EEZ of the P. R. China to collect national security information about the P. R. China, this activity of the USA poses potential threat to the security and safety of P. R. China, the information so collected may be used against P. R. China in any war or armed conflict with P. R. China, therefore this activity is not for peaceful purpose and constitutes a threat to sovereignty and security of P. R. China, and this activity is in deed an abuse of the freedom of flight over the EEZ.

In practice, due to the fast speed of aircrafts and the potential threat they might pose to the coastal states, in order to strengthen the national defence against any such threat, some coastal states declare and establish air defence identification zone³⁴. The air defence identification zone usually extends to the airspace over the EEZ and the coastal state declaring and establishing this zone requires that any aircraft entering into this zone

31 Refer to Article 58 of the UN Convention on the Law of the Sea. The flight of foreign aircraft over the EEZ of a coastal state should be in conformity with the provisions of the Convention and must show due respect to the related laws and regulations made by the coastal state in accordance with the Convention and other international law.

32 According to some marine experts of the USA, the airspace over the EEZ should not be deemed as international airspace. Some authors deliberately use the "EEZ airspace" to replace the "international airspace" when referring to the airspace over the EEZ. Please refer to: Morris, M. A. (1982) *Military Aspects of the Exclusive Economic Zone*, *Ocean Yearbook* 3, University of Chicago Press.

33 Refer to the Article 301 of the Charter of the UN.

34 Nowadays tens of coastal states have declared and established the air defence identification zone. With the threat of international terrorism spreading widely, in order to protect national security, more and more coastal states shall follow this practice to declare and establish their air defence identification zone.

should notice in advance the coastal state its nationality, category, route, purpose of the flight etc. When necessary, the coastal state shall intervene in the flight and may warn, intercept, or forcefully land the aircraft. The USA has declared and established such an air defence identification zone extending to the airspace over its EEZ, and take strong measures to intervene in the flight over its EEZ after the event of 9/11. The very practice of the USA itself shows that the airspace over the EEZ is not an international airspace in which a foreign aircraft can enjoy absolute freedom of over-flight.

Taking into consideration of the nature of military aircrafts and the more serious threat they can pose to the coastal states, it is natural that the flight of military aircrafts of one state over the airspace of the EEZ of another state shall draw special attention of the coastal state and may attract more intervention by the coastal state whenever the flight is conducted not in conformity with the Convention and other international law.

4.3 Military scientific research and military survey in EEZ

According to the UN Convention on the Law of the Sea, a coastal state has the jurisdiction over any marine scientific research conducted in its EEZ. The Convention requires that marine scientific research to be conducted by a state in the EEZ of another state should get the permission or consent of the latter state. In order to protect the marine interests of the coastal states and at the same time to facilitate marine scientific research, the Convention divides the marine scientific research into two categories—theoretical scientific research and applied scientific research—and treat them differently. The former mainly refers to purely scientific research which is done for peaceful purpose and for the benefits of all mankind. The latter mainly refers to the scientific research for the exploration and exploitation of the resources of the EEZ. For the former, the Convention stipulates that without particular reason the coastal state should not refuse to give permission or wilfully delay the permission; for the latter, the Convention lays down stricter conditions and stipulates that the coastal state can exercise absolute discretion in regard to the permission³⁵. Accordingly, military scientific research conducted by a state in the EEZ of another state also needs the permission or consent of the coastal state. If an application for marine scientific research is refused by the coastal state, the refused party can resort to the proceedings of the Convention for the settlement of dispute.

In practice, there appears a new situation where military vessels of a state conduct marine survey in the EEZ of another state without applying for consent or permission of the latter state. For example, military vessels of the USA, such as the *Bowditch* and the *Impeccable*, frequently enter into the EEZ of the P. R. China and conduct marine survey without the permission or consent of the P. R. China. When protested by the P. R. China,

35 Zhou, Z.-H. (2008) *International Law*, China University of Political Science and Law Press, p.349.

the USA claims that it is not conducting marine scientific research but is surveying the marine passage and that the survey of marine passage is to guarantee the exercise of freedom of navigation stipulated by the Convention and therefore is a lawful use of the EEZ. Then whether marine survey is one kind of marine scientific research and is subject to the permission of the coastal state? Are there any differences between them? If marine survey is not subject to the permission of the coastal state, what will happen to the marine scientific research regime of the Convention? It is true that the Convention deals with the marine survey and marine scientific research in different sectors of the Convention³⁶, but is this sufficient to say that they are different and should be treated differently in regard to the permission of the coastal state? In practice, due to the development of science and technology and application of advanced equipment, it is very difficult to distinguish marine survey from marine scientific research³⁷, and marine survey also concerns the search and investigation of marine currents, marine environment, marine geology etc. In addition, practice shows that marine survey in EEZ can affect the sovereign rights and jurisdiction of the coastal state in regard to the EEZ natural resources and the exploration, exploitation, preservation and management of these resources³⁸. Furthermore, “marine survey” conducted by the USA military vessels in the EEZ of the P. R. China actually aims to collect national security information of P. R. China, therefore it is for military purpose and constitutes security problem for the P. R. China. For this reason, such survey often leads to confrontation with the P. R. China. Taking above into consideration as a whole, it can be inferred that it is not proper to exclude from the jurisdiction of a coastal state the military marine survey of another state in the EEZ of the former state. If such exclusion is permitted, what will happen? It will happen that this exclusion can be abused by a state whenever it wants to circumvent the permission of the coastal state regarding its marine scientific research in the EEZ of the coastal state. For example, it might happen that even though the USA military vessels are actually conducting marine scientific research in the EEZ of the P. R. China, they can inform the P. R. China that they are conducting marine survey so that it is not the Chinese business to step in. When the P. R. China intervened in the military survey conducted in its EEZ by the USA navy vessel *Impeccable*, what the *Impeccable* said was just that it was conducting military survey and the Chinese vessels should stop harassing its activity³⁹. If this is the case, the jurisdiction of a coastal state

36 Refer to the Article 19 (2) (j) and the Article 54 of the UN Convention on the Law of the Sea. The arrangement of marine scientific research and marine survey in different sectors of the Convention seems to indicate there is slight difference between them.

37 Zhang, H.-W. (2006) Conflict between Jurisdiction of Coastal States over Marine Scientific Research and Military Survey, *China Oceans Law Review* (2nd Issue), Xiamen University Centre for Oceans Policy and Law, p.31.

38 At least sufficient evidence has shown that the sonar system used in military marine survey can bring fatal damage to dolphins and whales and other marine living resources.

39 Actually, the *Impeccable*, as a marine surveillance ship, was detecting through the sonar system the information about the movement of the Chinese submarines deployed at the Sanya Submarine Base then. In an interview

over marine scientific research in its EEZ shall end up with nothing, and this will heavily damage the rights and national interests of coastal states which are conferred and protected by the Convention. According to the above analysis, it can be concluded that the marine survey especially the military survey of a state in the EEZ of another state should be subject to the permission of the latter state.

In order to guarantee its EEZ rights and jurisdiction under the UN Convention on the Law of the Sea, P. R. China has enacted the Regulations on the Management of Foreign-related Marine Scientific Research 1996 and the Law on EEZ and Continental Shelf 1998. According to these national laws and regulations of the P. R. China, any foreign related marine scientific research conducted in the EEZ of the P. R. China must be based on the consent or permission of relevant authority of the P. R. China. So it can be said that the above USA military survey in the EEZ of P. R. China not only violates the UN Convention on the Law of the Sea but also violates the national law of P. R. China.

4.4 Military exercises and arms trials

There is no direct provision in the UN Convention on the Law of the Sea in respect to the military exercises and arms trials of a state in the EEZ of another state. So in order to judge the legitimacy of these activities, general principles of the Convention and other sources of the international law should be considered.

According to the peace principle of marine activity as described in part 2 of this article, activity held by one state in the EEZ of another state should be for peaceful purpose. Military exercises or arms trials held by one state in the EEZ of another state are difficult to be classified as for peaceful purpose. Especially in the eyes of the coastal state in whose EEZ such activity is being held, this kind of activity is unfriendly or even hostile, and in some situations, it can be seen as a form of threat of use of force. It is easily understandable that when the USA held military exercises in the EEZ of the P. R. China, the P. R. China strongly protested such activity as a threat to the regional stability and security. So according to the peace principle of the UN Convention on the Law of the Sea and the UN Charter principle of no use of force in international relations, it is difficult to say it is lawful for a state to hold military exercises or arms trials in the EEZ of another state.

In practice, if a state is planning to hold military exercises or arms trials in the EEZ of another state, some area of the EEZ shall be covered and enclosed, and this shall impose adverse effects on the sovereign rights of the coastal state such as exploration,

with the Russian ITAR-TASS News Agency, an anonymous Pentagon official admitted that the ship was indeed engaged in collecting intelligence in the South China Sea. The activities of the Impeccable are obviously not for peaceful purposes and consequently violate the peace principle. Please refer to *the Global Times* of 11 March 2009 and <http://news.sohu.com/20090312/n262749905.shtml>

exploitation, preservation and management of these resources. In addition, the military exercises or arms trials shall inevitably have some adverse influence on the marine environment and marine living organisms. Just as what has been mentioned in the part 1 of this article, the Convention requires that other states should have due regard to the rights and jurisdiction of the coastal state and should comply with the laws and regulations adopted by the coastal state. Therefore, the military exercises and arms trials held by one state in the EEZ of another state can not be said to be proper and lawful.

It should be noticed that more and more states declare that other states are prohibited to hold military exercises or arms trials in their EEZ. For example, coastal states such as Brazil, India, Pakistan, Malaysia, Uruguay and Peru have expressly declared or enacted national law that military exercises or arms trials of other states are prohibited in their EEZ⁴⁰. More coastal states are following their examples.

In view of the above analysis, for the benefits of world peace and security and for the respect of the sovereign rights of the coastal states, if a state plans to hold military exercises or arms trial in EEZ of another state, it should inform in advance the latter state any such activity and get permission or understanding from the latter state.

4.5 Use of force by warships or military aircraft in the EEZ of another state

According to the provisions of the UN Convention on the Law of the Sea, warships or military aircrafts on behalf of the their states can exercise right of hot pursuit over vessels which have violated the laws or regulations of their internal waters, territorial sea, contiguous zone or EEZ, and can continue the pursuit in high seas or EEZ of other states⁴¹. The warships or military aircrafts of one state can also exercise universal jurisdiction over crimes committed at high seas such as piracy, terrorism, illegal broadcasting, slave trade etc., and they can exercise exclusive jurisdiction over vessels flying the flag of their own state⁴². If the vessels or their personnel flee into the EEZ of another state, the warships or military aircrafts can pursue them in the EEZ of another state.

When exercising the right of hot pursuit in the EEZ of another state, the warships or military aircrafts may frequently find it necessary to use force against the fleeing vessels or personnel. In this situation, whether to use force and how to use force is not only an issue between the pursuing and pursued parties but also an issue between the pursuing party and the coastal state. According to development of relevant international customs, there is a trend to put more restrictions on the use of force against civil vessels. As an exception, the use of force may be permitted in extreme circumstances and in accordance

40 Kim, H.-S. (2003) Military Activities in the EEZ under the Law of the Sea, *Maritime Law Review* (Volume 15), the Korea Institute of Maritime Law, p.228.

41 Refer to the Article 111 of the UN Convention on the Law of the Sea.

42 Refer to the Articles of 92 and 110 of the UN Convention on the Law of the Sea.

with strict conditions and procedures. At least the following elements should be considered when warships or military aircrafts of one state decide to use force in the EEZ of another state: (1) whether the acts committed by the pursued vessel is a serious crime or not, as a general rule it is not proper to use force against minor misconduct; (2) Whether there are other choices except use of force, if there are other choices, then the use of force should be the last choice; (3) whether the warships or military aircrafts are encountered with armed attack, if the answer is yes, then they are entitled to use force; (4) Generally the use of force should follow an escalating procedure of warning, warning shooting, and shooting; (5) The use of force should be due to good reason and be proportional; (6) Impact on the coastal state should be considered, and when considering the impact on the coastal state, the distance from the coast, the function of the marine area, the situation of marine structures etc are relevant elements; (7) If the situation permits, warships or military aircrafts should contact the coastal state and inform in advance the use of force, if in emergency it is impossible to contact the coastal state, the use of force should be informed in due time thereafter. Existing cases of use of force by warships or military aircrafts of one state in the EEZ of another state show that such use of force often causes diplomatic dispute between the two states, therefore such use of force must be restrained, otherwise it may lead to serious conflicts between the two states.

5. Conclusions

Summarizing the main points of this article, the following conclusions can be drawn:

(1) The EEZ legal regime under the UN Convention on the Law of the Sea is a result of compromise between the developing coastal states and the big marine powers. EEZ is a marine zone between the territorial sea and high seas. In EEZ, the rights and interests of the coastal state and the rights and freedoms of other states coexist and interact with each other, and this fact makes the activities in EEZ sensitive and complicated.

(2) Military activity of one state in the EEZ of another state often leads to dispute and even armed conflicts between the two states, therefore it is extraordinary meaningful to study the related issues and search for acceptable norms.

(3) Peace principle does not prohibit all military activities of one state in the EEZ of another state, but imposes limitations on some kinds of military activities. Peace principle requires that such military activities should be conducted according to the conditions and limitations imposed by the UN Convention on the Law of the Sea and other international law, should not threat the sovereignty, the territory integrity and security of the coastal state, should not hinder the rights and jurisdiction enjoyed by the coastal state, and should

be in conformity with the laws and regulations made by the coastal state according to the UN Convention on the Law of the Sea.

(4) The UN Convention on the Law of the Sea has been the ocean charter and it stands in the centre for the rule of law in the field of the sea. State practice shows that the Convention has codified the international customary rules. The USA shall be bound by the Convention. There is no legal basis for the USA to call the waters of EEZ and airspace over EEZ as *international waters* and *international airspace*.

(5) Warships and military aircrafts of one state can enjoy freedom of navigation and freedom of over-flight in the EEZ of another state subject to the conditions and limitations contained in (3) above. Warships and military aircrafts should not abuse these freedoms.

(6) Military scientific research conducted by one state in the EEZ of another state should get permission of the latter state and should abide by the conditions thereof. There is no direct provision in the Convention as to whether military survey of one state in the EEZ of another state should get the permission of the latter state. Because nowadays marine survey can not be distinguished from the marine scientific research, because marine survey can also affect the sovereign rights and jurisdiction of the coastal state, it is proper to bring the military survey under the permission of the coastal state, otherwise the jurisdiction of the coastal state over marine scientific research in its EEZ might be circumvented.

(7) It is difficult to say military exercises or arms trials of one state in the EEZ of another state are lawful under the Convention. More and more states prohibit other states to hold military exercises or arms trials in their EEZ. For the benefits of world peace and for the respect of the sovereign rights of the coastal states, a state planning military exercises or arms trial in EEZ of another state should inform in advance the latter state and get permission or understanding from the latter state.

(8) The use of force by warships or military aircrafts in the EEZ of another state during the hot pursuit should be prohibited unless in extreme circumstances and in accordance with strict procedures. In any situation the coastal state should be informed the use of force. Existing cases show that such use of force often causes dispute between the two states, therefore such use of force should be restrained.

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