

Dispute Settlement in the UN Convention on the Law of the Sea

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mechanism can be used.²⁵⁹ While the Convention anticipates a possible overlap in jurisdiction between courts and tribunals constituted under the Convention and the Security Council, no such allowance is made when a matter is before a different political body. A question of admissibility as to the proper forum may be raised in this context if one of the warring parties attempted to bring a matter that constituted one aspect of a wider conflict under the UNCLOS system as part of its overall political campaign. Such a tactic may be viewed as an abuse of process. Also in this situation, the relevant court or tribunal could properly determine under the circumstances that the dispute did not actually relate to the interpretation or application of the Convention and it thus lacked jurisdiction to resolve the dispute.

If any of the States involved in the armed conflict had opted for the military activities exception, it is clear that a dispute arising out of the context of an armed conflict will fall under this exception. Such a characterization would only be avoided if, for example, States pointed to failures to cooperate in respect of fishing conservation, denying passage, or unlawfully suspending marine scientific research as violations of the Convention without citing the conflict as possible reason for this alleged transgression. Again, a court or tribunal would have to decide if the dispute was truly one relating to the interpretation or application of the Convention. Furthermore, a question of admissibility might be raised in this instance to challenge the political character of the dispute. The political nature of the dispute could well be reaffirmed if the entirety of the conflict was being addressed by a regional organization or in another political forum. A court or tribunal may reason that it is dealing with the legal dimensions of the dispute and that its holding might contribute to the overall resolution of the conflict. The political question may not create too much pause, particularly in light of the tendency of the ICJ to exercise jurisdiction in these cases.²⁶⁰ The risk is that the misuse of the compulsory dispute settlement mechanism in this manner could undermine the authority of the tribunal or court and diminish the likelihood of compliance with the decision.

Military Activities on the High Seas and in the EEZ

A range of military activities can be undertaken on the high seas or in EEZ areas that do not amount to armed conflict. As O'Connell notes:

²⁵⁹ UNCLOS, art. 298(1)(c).

²⁶⁰ See, e.g., *Military and Paramilitary Activities (Nicaragua v. United States)*, 1984 ICJ 392, 434–35 (November 26); *Teheran Hostages*, at 19.

the occasion for navies to be employed to influence events will be multiplied because the increasing complexities of the law of the sea, with its proliferation of claims and texts and regimes covering resources, pollution, security and navigation, are multiplying the opportunities for disputes and the circumstances for the resolution of disputes by the exertion of naval power.²⁶¹

In these cases, the laws of war would not govern an “exertion of naval power” and so the focus then becomes how UNCLOS might govern these sorts of uses of the oceans. Naval activities on the high seas and in the EEZ are generally not regulated specifically under the terms of the Convention. States deliberately minimized debate on military uses to avoid controversy and to incorporate sufficient ambiguity within the Convention to allow for differing interpretations.²⁶² The tactical reason for this approach was to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives.

States with considerable naval fleets were particularly anxious to preserve their rights on the high seas. The freedoms of the high seas listed under Article 87 are not exclusive and may be interpreted as including implicitly a variety of military activities. The inclusive listing of categories (signaled by the phrase “*inter alia*”) was also used in the High Seas Convention.²⁶³ In neither convention is any express reference made to military activities, although the freedom of navigation has traditionally encompassed the free movement of warships across the high seas.²⁶⁴

²⁶¹ D. P. O’Connell, *The Influence of Law on Sea Power* (1975), p. 10. See also Scott C. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 *La. L. Rev.* 1221 (1985). (“Sea power will be a fundamental tool of coercive and supportive diplomacy employed by coastal and maritime states alike to safeguard all their interests in the oceans, particularly in light of the potential for international tension and crisis to arise over ocean rights and obligations.”)

²⁶² Majula R. Shyam, “The UN Convention on the Law of the Sea and Military Interests in the Indian Ocean,” 15 *Ocean Dev. & Int’l L.* 147, 149 (1985). Booth considers that the drafters of the Convention deliberately followed the tactic of silence, and that a number of rights for navies are hidden within that silence. Booth, at 340. See also Rauch, at 231 (noting that all substantive discussion of questions with security policy or military implications was off the record and that assorted euphemisms are used to refer to military uses).

²⁶³ High Seas Convention, art. 2.

²⁶⁴ O’Connell writes:

So, battle fleets in past ages steamed in formations, conducted manoeuvres, and engaged in gunnery practice extending over hundreds of square miles. Provided that the rules of the road were observed and the range was kept clear, this was a lawful use of the high seas because other ships in the area continued to navigate without being diverted.

One of the few requirements in UNCLOS that may impact on the conduct of high seas military maneuvers is that the freedoms of the high seas are to be exercised with due regard for the interests of other States in their exercise of high seas freedoms.²⁶⁵ How this obligation of due regard is likely to influence State conduct on the high seas is unclear. A due regard requirement had not been included in the High Seas Convention. Instead, Article 2 of that treaty had set out a test of reasonableness whereby the freedoms of the high seas were to be exercised “with reasonable regard to the interests of other states.”²⁶⁶ Therefore, in the past, the high seas have been used by naval powers for extended military exercises as well as weapons tests and these States have claimed these acts to be lawful uses of the oceans as they meet a standard of reasonableness.²⁶⁷ This previous standard could arguably be read into a standard of “due regard” under UNCLOS. However, the change in terminology and the use of the due regard standard in respect of activities in the EEZ indicate that a balancing test of subjective interests may be undertaken in the event of a dispute, rather than an objective assessment of reasonableness *writ large*. The shift in emphasis should not be over-emphasized, however.

A further limitation on military activities on the high seas could be Article 88 of the Convention, which reserves the high seas for peaceful purposes. Larson, however, considers that the reservation of the high seas for peaceful purposes is virtually redundant. He argues:

Exactly what this means in practice is rather difficult to define, since the super-powers in particular use the [high seas] to deploy sub-surface submarines and surface vessels and use the air space above for naval and other military purposes. As a result, the practical effect of reserving the [high seas] for peaceful purposes is almost non-existent.²⁶⁸

From this perspective, it would seem that little clarity on the authorization of military activities is provided through the reference to peaceful

O’Connell, *2 International Law of the Sea*, p. 809. See also P. Sreenivasa Rao, “Legal Regulation of Maritime Military Uses,” 13 *Indian J. Int’l L.* 425, 435 (1973).

²⁶⁵ UNCLOS, art. 87(2).

²⁶⁶ High Seas Convention, art. 2.

²⁶⁷ At the time of the First Conference, States were unable to agree on legal rules for these military activities, beyond a reasonable regard test.

²⁶⁸ David L Larson, “Security Issues and the Law of the Sea: A General Framework,” 15 *Ocean Dev. & Int’l L.* 99, 116 (1985). See also Truver, at 1242 (stating that Article 88 “seems to have very little substance”); Booth, at 341 (describing Article 88 as, “a familiar piece of pious rhetoric, calculated to degrade respect for the document rather than legitimize new patterns of behavior”).

purposes. The reservation of areas for “peaceful purposes” has been used in other multilateral treaties to refer to complete demilitarization or to excluding certain types of military activities – either as conventional obligations or as goals for States parties.²⁶⁹ In the UNCLOS context, the proscription is limited to threats or use of force as set forth in the UN Charter.²⁷⁰ No further curtailment can be drawn from the peaceful purposes provisions of the Convention.²⁷¹ As noted above, the States with the superior military strength will presumably conduct military exercises or weapons tests and rely on their rights under the freedoms of the high seas for such acts. These States would expect to protect these rights by excluding the possibility of review by international courts or tribunals.

The lack of normative guidelines on military activities on the high seas then carries over to the EEZ. Through the cross-reference in Article 58, paragraph 2, the reservation of the high seas for peaceful purposes is extended to the EEZ, to the extent that this obligation is not incompatible with the provisions of the Convention governing the EEZ. As with the high seas, a due regard requirement is incorporated into Article 58 whereby:

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 the Convention and other rules of international law in so far as they are not incompatible with this Part [dealing with the EEZ].

The rights and duties of the coastal State are those set out in Article 56 and relate to issues such as the conservation and management of the natural resources, artificial islands, marine scientific research, and the marine environment. The Convention does not specifically authorize coastal States to control conduct relating to military activities in the EEZ.

²⁶⁹ See Bozcek, “Peaceful Purposes Provisions,” at 361–63 (discussing the use of “peaceful purposes” provisions for the regimes governing Antarctica, the moon and other celestial bodies and the seabed). See also James C. F. Wang, *Handbook on Ocean Politics and Law* (1992), pp. 367–88; Wolfrum, at 201–02.

²⁷⁰ UNCLOS, art. 301.

²⁷¹ The Convention designates both maritime zones and activities as subject to the peaceful purposes requirement. See *ibid.*, art. 88 (reservation of high seas for peaceful purposes); *ibid.*, art. 141 (Area is only to be used for peaceful purpose); *ibid.*, art. 143 (marine scientific research in the Area is only to be for peaceful purposes); *ibid.*, art. 147 (installations in the Area only for peaceful purposes); *ibid.*, art. 240 (marine scientific research is to be conducted for peaceful purposes). These activities must similarly fall short of threats or use of force under the UN Charter to be for “peaceful purposes” under the Convention.

The fulfillment of the requirement of due regard will ultimately depend on what activities are being undertaken by the respective States. A number of commentators have taken the view that Article 58 was intended to ensure for third States that the rights enjoyed in the EEZ were quantitatively and qualitatively the same as the traditional freedoms of the high seas.²⁷² Rauch has argued that the freedom of navigation associated with the “operation of ships” allows for a range of internationally lawful military activities, including maneuvers, deployment of forces, exercises, weapons tests, intelligence gathering, and surveillance.²⁷³ Some governments argue, however, that various military activities, such as weapons exercises and testing, may not be conducted without coastal State consent.²⁷⁴ This view is based on an interpretation of Article 58 that focuses on the listing of the specific freedoms and that not all military activities are related to the specified freedoms.²⁷⁵ Furthermore, it is quite likely that a naval presence mission or military exercises in the EEZ of another State could well interfere with coastal State economic rights.²⁷⁶ An attempt to introduce a requirement of coastal State consent for naval operations other than navigation in the EEZ during the drafting of the Convention did not succeed.²⁷⁷ Francioni instead remarks, “[f]rom the text and legislative history of article 58, it seems difficult to infer that the establishment of the EEZ has involved a limitation on military operations of foreign navies other than pure navigation

²⁷² Richardson, “Navigation and National Security,” at 573. See also Walter F. Doran, “An Operational Commander’s Perspective on the 1982 LOS Convention,” 10 *Int’l J. Marine & Coastal L.* 335 (1995) (“The Convention does not permit the coastal state to limit traditional non-resources related high seas activities in this EEZ, such as task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, military marine data collection, and weapons’ testing and firing.”); Oxman, “Regime of Warships,” at 838 (“It is essentially a futile exercise to engage in speculation as to whether naval maneuvers and exercises within the economic zone are permissible. In principle, they are.”); Francesco Francioni, “Peacetime Use of Force, Military Activities, and the New Law of the Sea,” 18 *Cornell Int’l L.J.* 203, 214 (1985) (noting that the majority of authors believe that military uses of the seas remain unaffected by the establishment of the EEZ).

²⁷³ Rauch, at 252.

²⁷⁴ Brazil, Cape Verde, and Uruguay have taken this view. United Nations, Office of the Special Representative of the Secretary-General for the Law of the Sea, *Law of the Sea Bulletin*, No. 5 (1985), at 6–7, 8, 24. Singh has argued that military activities in the EEZ are subject to the national jurisdiction of the relevant coastal States. See Singh, p. 148. However, this interpretation cannot be correct because it would attribute to coastal States jurisdiction over non-economic activities.

²⁷⁵ See Lowe, “Commander’s Handbook,” at 113.

²⁷⁶ See Mark Janis, *Sea Power and the Law of the Sea* (1976), p. 84.

²⁷⁷ Francioni, at 215.

and communication.”²⁷⁸ Sufficient ambiguity in the text means that interpretations can be made both in favor of and against the right of warships to conduct military maneuvers in a foreign EEZ.²⁷⁹ A similar vagueness is evident with regard to the legality of military installations and devices.²⁸⁰ In light of the deliberate ambiguity in relation to this issue and the specific grant of sovereign rights and jurisdiction in the EEZ, the better interpretation does seem to be in favor of the legality of military activities in the EEZ, subject to due regard requirements only.

The want of precision as to what military activities are permissible on the high seas and in the EEZ may constitute good reason to allow for third-party dispute resolution. A court or tribunal could set out the appropriate legal standards based on UNCLOS provisions and specify what conduct is or is not acceptable under the Convention. In addition, the inclusion of military activities within the scope of mandatory jurisdiction is also necessary as a consequence of the doctrine of sovereign immunity of warships.²⁸¹ Articles 95 and 96 provide for the complete immunity of warships as well as ships owned or operated by a State and used only on government non-commercial service on the high seas. Immunity is also accorded to these vessels in the territorial sea of a State, subject to certain rules relating to innocent passage.²⁸² Any claims brought before the national courts of States, other than the relevant flag State, can be excluded from national jurisdiction on the basis of sovereign immunity. Reference to sovereign immunity was not

²⁷⁸ *Ibid.*, at 216.

²⁷⁹ Bozcek, “Peaceful Purposes Provisions,” at 372. Robertson argues that the right to conduct naval manoeuvres is seemingly incompatible with coastal State interests in the EEZ. He believes the only possible restriction is found in Article 88, which is applicable to the EEZ by virtue of Article 58(2), providing that the high seas are reserved for peaceful purposes. However, if these manoeuvres are restricted in the zone, then it would also follow that such manoeuvres are similarly restricted on the high seas and this latter interpretation is contrary to the established position permitting such naval activities on the high seas. See Robertson, at 885–87. By contrast, Shyam has noted that none of the littoral States on the Indian Ocean have enacted legislation prohibiting naval exercises by other States. Shyam, *Military Interests*, at 164. The negative implication to be drawn from this practice is that naval exercises are not viewed as activities that can be regulated under the EEZ regime.

²⁸⁰ Bozcek, “Peaceful Purposes Provisions,” at 373. ²⁸¹ See Janis, at 56.

²⁸² See UNCLOS, art. 32. See also notes 296–334 and accompanying text. Moore argues that warships transiting straits are also subject to immunity through a reading of Articles 31, 32, 42(4) and (5), 233, and 236. John Norton Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” 74 *Am. J. Int’l L.* 77, 99 (1980) (“coastal states shall not interfere with or take enforcement action against warships or other vessels entitled to sovereign immunity”). See also *ibid.*, at 106.

included in Article 298, as it was considered inappropriate – and would be anomalous – for international courts and tribunals that hear disputes between sovereign States.²⁸³ The continued exemption of military vessels or aircraft from national jurisdiction was a strong reason not to exclude their activities entirely from the scope of international jurisdiction.²⁸⁴

However, the highly political nature of naval activities on the high seas has typically meant that the role of courts and tribunals has been marginal in the legal regulation of military uses of the oceans.²⁸⁵ The minimal substantive regulations along with an optional exclusion covering military activities on the high seas and in the EEZ are indicative of a preference on the part of States not to use compulsory third-party procedures for resolving disputes about military activities. The optional exclusion is beneficial to naval powers not wishing to have their military activities questioned through an international process. The exclusion satisfies “the preoccupation of the naval advisors . . . that activities by naval vessels should not be subject to judicial proceedings in which some military secrets might have to be disclosed.”²⁸⁶ An optional exclusion is also beneficial to coastal States that could use the exception to prevent review of any of their interference with naval exercises in their EEZ. The deliberate obfuscation of rights and duties in different maritime areas provides States with considerable leeway in deciding what actions to take and how certain disputes should be resolved. The intention of the States parties is respected through Article 298 in this regard. Permitting “military activities” to be excluded from compulsory dispute settlement reinforces the versatility allowed for this issue: “It is obvious that states can define military matters as broadly as they wish.”²⁸⁷ Such

²⁸³ “Doubts were raised . . . as to whether any vessels are entitled to sovereign immunity in a case brought before an international tribunal, as that doctrine applies only to domestic courts which are not allowed to bring before them a foreign sovereign, and as the very purpose of international tribunals is to deal with disputes between sovereign States.” 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 135. The question should be raised, however, as to whether the same considerations should automatically apply to disputes involving non-State entities before international tribunals.

²⁸⁴ Singh, p. 168, n. 21; and 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 136 (referring to the views of the New Zealand delegate).

²⁸⁵ The constrained judgments in the *Nuclear Tests* cases are exemplary in this regard. See *Nuclear Tests (Australia v. France; New Zealand v. France)*, 1974 ICJ 253, 457 (December 20).

²⁸⁶ 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, at 135. See also Noyes, “Compulsory Adjudication,” at 685 (noting that an exception was required for military activities because naval advisers were concerned about exposing military secrets in the course of judicial proceedings).

²⁸⁷ Gamble, “Dispute Settlement in Perspective,” at 331.

choices can be made in accordance with strategic policies and protects States from formal international review through legal processes if they so elect.

Passage through Territorial Seas, Straits, and Archipelagic Waters

The military activities exception could encompass the acts of military and government vessels as they traverse maritime areas subject to coastal State sovereignty. Unlike military activities on the high seas, the Convention contains detailed provision for the passage of different types of foreign ships through territorial seas, straits, and archipelagic waters. The law of the sea has addressed the question of rights and duties relating to the passage of foreign vessels through territorial seas because of the rights of the coastal State over this body of water as well as third States' interests in ensuring the passage of all vessels through the safest and most expeditious route. In addition, navigation through territorial seas and straits has always had considerable military importance.²⁸⁸ Straits, particularly narrow bodies of water between coasts, are essential for passage between larger bodies of water and are typically high-traffic areas for commercial, military, and government vessels alike.²⁸⁹ These coastal States then have interests in protecting their security as well as their economic and environmental interests in the areas directly adjacent to their land. Such interests have been balanced through the recognition of a right of innocent passage through waters subject to coastal State sovereignty.

A threat to the mobility of vessels, especially military vessels, arose when coastal States advocated for a territorial sea wider than the traditionally accepted three-mile limit. The States with large naval fleets particularly faced this challenge during the First and Second Conferences. An increase in breadth would have reduced the high seas area available for the exercise of the freedom of navigation. A broader territorial sea

²⁸⁸ Naval vessels need to be able to traverse all areas of the oceans in order to fulfill their strategic objectives. As Richardson writes: "To fulfill their deterrent and protective missions these forces must have the manifest capacity either to maintain a continuing presence in farflung areas of the globe or to bring such a presence to bear rapidly. An essential component of this capacity is true global mobility - mobility that is genuinely credible and impossible to contain." Richardson, "Power," at 907.

²⁸⁹ Straits of strategic importance for United States' commercial and military interests include Gibraltar, Dover, Malacca (in the Indonesian archipelago), Hormuz (the gateway to the Persian Gulf), Bab al Mandab (in the south of the Red Sea), and Bonifacio (between Corsica and Sardinia). Mark E. Rosen, "Military Mobility and the 1982 UN Law of the Sea Convention," 7 *Geo. Int'l Env. L. Rev.* 717, 720 (1995).