Available online at www.sciencedirect.com
SCIENCE DIRECT®
Marine Policy 28 (2004) 25–27
MARINE POLICY
www.elsevier.com/locate/marpol

A Chinese perspective on 'Operational Modalities'

Cheng Xizhong*

China Institute for International Strategic Studies, P.O. Box 9812, Beijing 100029, China

Abstract

There are three concepts in 'operational modalities' in the EEZ: peaceful use of the EEZ, due regard, and rules for encounters between domestic and foreign military vessels and aircraft. China's position is that the use of the EEZ for non-peaceful purposes without its consent is illegal. This includes foreign military and electronic intelligence gathering activities in the EEZ as well as marine scientific research for non-peaceful purposes. China maintains that the obligation of due regard by the foreign state for coastal states' rights is superior to that of the coastal state for the rights of the foreign state, including encounters between foreign and domestic aircraft and vessels. However, China recognizes that there are no uniform regulations for such interactions and believes that while difficult due to differences in interpretation of international law and other complexities, they should be established.

Keywords: China; Navy; EEZ; Peaceful use; Due regard

1. 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 1960's and 1970's when the United Nations Seabed Committee discussed the issue of peaceful use of seabed, there were two basic viewpoints regarding 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 Conference of the United Nations Convention on the Law of the Sea, there were similar disputes regarding the peaceful use of the sea. Ecuador and the United States could be taken as representing opposing viewpoints. At the 1976 New York session, 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 "The term 'peaceful purpose' certainly does not rule out military

*Corresponding author.

0308-597X/$ - see front matter © 2003 Elsevier Ltd. All rights reserved.
doi:10.1016/j.marpol.2003.10.008

activities in a general way. The United States has persistently held that carrying out military activities for peaceful purposes is entirely in line with the United Nations Charter and principles of international laws''.

Also, at this Conference, some countries proposed that specific actions should be prohibited to satisfy the ''peaceful purpose'' provisions. These included prohibiting: 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 former 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. I hold 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.

In sum, I believe the following actions have hostile intent:

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

2. 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''. I believe 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 their 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. I believe 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.

3. The problem of the two "due regards" when activities are 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 stated 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, i.e., 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.

4. 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 Preventing Collision at Sea (1972), the Chicago Convention on 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. However, there are some useful bilateral examples such as the Agreement of the United States and Russia on Preventing Dangerous Military Actions and some agreed 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.