Policy Forum 11-28: Intelligence Gathering, the South China Sea, and the Law of the Sea

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Intelligence Gathering, the South China Sea, and the Law of the Sea

By Mark Valencia

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Nautilus invites your contributions to this forum, including any responses to this report.

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I. Introduction



USS Nimitz, USS Chosin, USS Sampson, and USS Pinkney in South China Sea (Photo: US Navy)

Mark Valencia, Nautilus Institute Associate and NARP Research Associate, examines the implications of new intelligence gathering equipment on maritime conflicts and the Law of the Sea. He writes, “The scale and scope of maritime and airborne intelligence collection activities are likely to continue to expand rapidly in many countries … The Law of the Sea does not adequately deal with these dimensions of freedom of navigation… Unless the issues are addressed and resolved, more incidents and possible conflict lie ahead.”

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II. Article by Mark Valencia

-"Intelligence Gathering, the South China Sea, and the Law of the Sea"
By Mark Valencia
Rapid advances in technology – in space, in the air and on and under the sea – are changing both the art of intelligence gathering and its manifestations. This in turn is creating confusion, uncertainty and disputes regarding “appropriate” behavior in others’ maritime jurisdictional zones. There are already calls –which eventually may become shouts - for a review and revision of the rules of engagement and relevant laws, including the Law of Sea. Indeed Pakistan’s very public but futile angst over what it says are violations of its sovereignty by US aerial drones may be only a forerunner of coastal countries’ similar protests regarding violations of their ocean security and marine scientific research regimes.
The South China Sea in particular has become the cockpit of frequent but largely sub-rosa confrontations between China and US surveillance platforms such as U2s, EP-3s, the ocean

surveillance vessels Impeccable and Victorious and the oceanographic survey ship Bowditch. But these incidents are but the tip of a dark iceberg of possibilities and a harbinger of more to come. Drones are generally considered relatively cheap weapons and highly effective reconnaissance tools. In a world of increasing use of spy planes including UAVs (unmanned aerial vehicles) such as the ever improving Global Hawk, and spy ships including unmanned surface vessels (USVs) and now unmanned underwater vessels UUVs, their missions are rapidly outstripping relevant laws and regulations. For example remote sensing from satellites and high-flying surveillance aircraft have for decades undertaken maritime scientific research and surveys in others EEZs without the permission – or even the advance knowledge - required by the 1982 UNCLOS.

Now the race is on among the world's navies to develop fleets of crewless vessels capable of missions on and under the water. The U.S. in particular is developing maritime drones for missions that will include intelligence gathering, reconnaissance and surveillance. U.S. Chief of Naval Operations Admiral Gary Roughhead believes that "unmanned underwater systems will become extensions to the submarines, can become extensions to aviation, manned or unmanned, as far as sensing the battlespace". "But its [the pursuit of unmanned systems] also going to be important politically, because I believe the future will be one where the sensitivities of sovereignty, a nation's claim to control its own land, to be able to focus on that which is there, that the idea of large footprints ashore, improved facilities ashore, may not always be guaranteed as we have become used to over these past years". Under development are Large Diameter Unmanned Underwater Vehicles and the Persistent Littoral Undersea Surveillance System which includes deep and shallow water "gliders" to increase "our awareness of the underwater battle space". The use of these devices is not necessarily confined to waters under U. S. jurisdiction. On the horizon are modular floating 'bases' that can be carried on commercial container ships and assembled in foreign EEZs.

As if is this is not enough to concern military and foreign affairs planners and legal officers, the new US naval emphasis is on the littoral. Indeed, a new US littoral combat ship will soon be deployed to Singapore. This new focus seems destined to violate the prior notification/authorization regime for military vessels that some countries like China, India, Indonesia and Vietnam have for their 12nm territorial seas.

The situation is presently beyond international control. Thus continued intrusive probes are likely to generate frustration and resentment that may translate into the forcible halting of such 'intrusions' when and if detected. The scale and scope of maritime and airborne intelligence collection activities are likely to continue to expand rapidly in many countries, involving levels and sorts of activities quite unprecedented in peacetime. They will not only become more intensive; they will generally be more intrusive. Indeed stepped up drone missions may even be considered a prelude to impending warfare. They will generate tensions and more frequent crises; they will produce defensive reactions and escalatory dynamics; and they will lead to less stability in the most affected regions, especially in Asia.

No other country can match the U.S.'s array of robotic aircraft and seacraft, particularly their range and advanced weapons and sensors, coupled with the necessary satellite and telecommunications support systems. But others like Russia and China are engaging in crash programs to catch up. Little is known of their actual capabilities, but China reportedly has more than two dozen UAV models. Drone acquisition has become a world-wide phenomenon. More than 50 countries have purchased aerial surveillance drones, and many have started in-country development programs to weaponize them.

The rapid expansion of the drone fleets – and the drive to weaponize them raise profound questions of agreed rules, international law and expected behavior. The Law of the Sea does not adequately deal with these dimensions of freedom of navigation. Unfortunately it also uses key terms that are left undefined – and are now the subject of disagreement.

Critical questions include the following:

Is a country legally correct to assert "freedom of navigation and overflight of the high

seas" to justify the operations of its military aircraft and vessels in foreign EEZs?
The answer depends in part on what exactly the aircraft and vessels were/are doing - - - which is classified. However in the case of the EP-3 incident it has been speculated that the SIGINT plane was not just passively 'listening,' but was actively "tickling" China's onshore defense communications in order to elicit and observe a response, and even interfering with shore to submarine communications.
The US position is that such activities are allowed under Article 58 of UNCLOS which provides that in the EEZ "*all states enjoy subject to the relevant provisions of this Convention, the freedoms _ _ _ of navigation and overflight _ _ _ and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft _ _ _.*"

But does the U.S. as a non-party to the Convention have the legitimacy to cite and interpret its provisions in its favor?
The U.S. argues that it participated in the framing of these provisions and that their negotiating history supports its position. Moreover, it says, the Convention's provisions are now customary international law. Others however argue that the Convention is a series of package deals and that non-ratifiers are not entitled to the 'benefits' of particular tradeoffs while eschewing their part of the bargain. Moreover, they say, the EEZ and its regime were created by the Convention, not customary law.
China argues that the activities of the EP-3 and the Impeccable are an "abuse of rights" prohibited by UNCLOS Article 300, i.e., the unnecessary or arbitrary exercise of rights, or interference with the exercise of rights by another state. This in turn goes back to exactly what these platforms were doing and to the issue of 'due regard to the rights and duties' of *each* other. Although such due regard in the EEZ is required by the Convention, it is undefined.
China also alleges that these activities constituted a non-peaceful threat of use of force, that the U.S. was 'preparing the battle field,' and that the activity thus endangered China's security. But what constitutes a threat of use of force inconsistent with the UN Charter and UNCLOS?
It is generally understood that the Charter prohibition includes the use of indirect armed force. Moreover the Charter and subsequent legal developments in the UN system have not taken into account highly advanced technologies, in particular the latest intensive and intrusive electronic warfare capabilities. A crucial question is whether some of the electronic warfare activities conducted in or above the EEZ can be considered to be inconsistent with the Charter and thus the peaceful purposes clauses of the Convention. Particularly relevant are active SIGINT activities conducted from aircraft and ships, some of which are deliberately provocative, intending to generate programmed responses. Other SIGINT activities intercept naval radar and emitters, enabling them to locate, identify and track (and thus plan electronic or missile attacks against) surface ships and submarines. Still others may interfere with communication and computer systems. These activities appear to involve far greater interference with the communication and defense systems of the targeted coastal state then any traditionally passive intelligence gathering activities conducted from outside national territory. Is this a threat of use of force and a violation of sovereignty as some contend?

Is the U.S. legally correct that the Bowditch is undertaking hydrographic surveys and is therefore not subject to the EEZ consent regime for marine scientific research?
Again the answer is neither simple nor straight forward and again we need know what type of data was being collected in China's EEZ. The U.S. argues that hydrographic and military surveys – although undefined – are differentiated from marine scientific research in the language of the Convention. But some argue that in principle they are the same. They say the very reason that the Convention's consent regime was established for marine scientific research is that information collected thereby may have economic value or may be used to undermine the security of the state. Some of the scientific information and data obtained by military surveys may be of great value for

commercial exploitation as well as to achieve military objectives. For example, detailed US naval side-scan sonar charts of its EEZ, when released, proved invaluable to geologists searching for volcanically active rift zones potentially rich in metallic sulfides. If such information regarding the seabed of a foreign coastal state's EEZ should be released to the private sector, its collection could have been a violation of Article 300 requiring good faith and non-abuse of rights. By then, of course, it would probably be too late to contain the information. Thus in terms of use there seems to be overlap with data collected in marine scientific research and coastal states who perceive the issue this way may try to prevent such data collection.

Similarly, trends in technology and the need for broader 'hydrographic' data have conflated hydrographic surveying with marine scientific research. Indeed, hydrographic data now have much wider application than safety of navigation and some of its uses are associated with the rights and duties of a coastal state in its EEZ. It is becoming increasingly difficult to argue that hydrographic data collected today will not have some economic or security value in future. Thus similar considerations would now seem to apply to the conduct of hydrographic surveying in the EEZ as apply to the conduct of marine scientific research there. In sum, the distinction between different categories of surveying and marine scientific research hinges on more than intent and the initial purpose of collecting the data. Indeed, it seems that the potential economic and security value and utility of the data to the coastal state should also be considered.

However, a simple reading of UNCLOS Article 258 should put the U.S. arguments to rest. It provides that "*the deployment and use of any type of scientific research* installation or *equipment* in any area of the marine environment shall be subject to the same conditions as are prescribed in this Convention for the conduct of marine scientific research in any such area." It seems difficult to avoid the conclusion that this applies to the Bowditch – and the Impeccable - and that their deployment of such equipment requires consent.

Are military exercises allowed in the EEZ?

Traditionally the freedom of the high seas included the use of the high seas for military maneuvers or exercises, including the use of weapons. This freedom has been incorporated in the 1982 UNCLOS, and it has been generally asserted, particularly by maritime states, that it applies also to the EEZ. However, upon signing ratifying or acceding to the Convention, several states, including Bangladesh, Brazil, Cape Verde, Pakistan, Malaysia, Uruguay, - and most recently, Thailand - declared that such military activities are not permitted in their EEZ without the consent of the coastal state. The U.S. has taken the position that "military activities, such as - - - launching and landing of aircraft, - - - exercises, operations - - - [in the EEZ] are recognized historic high seas uses that are preserved by Article 58."

Some analysts have concluded that state practice and authoritative commentators are divided on whether military maneuvers, and particularly those involving the use of weapons, in the EEZ of a foreign state without its consent are internationally lawful uses of the sea. They argue that simple naval transit and maneuvers are part of the freedom of navigation. But they find it more difficult to agree that an extended test of weapons, such as laying of depth charges, launching torpedoes, firing artillery or the covert laying of arms within an EEZ are included among the 'normal' uses associated with the operation of ships and aircraft and pay 'due regard' to the rights and duties of the coastal state, especially their duty to protect the environment including its fish and mammals. Moreover, the legality of military maneuvers and ballistic exercises that temporarily prevent other states from using an area of their EEZ remains unresolved.

Military activities in the EEZ were a controversial issue during the negotiation of the text of the 1982 UNCLOS and continue to be so in state practice. Some coastal states contended that other states cannot carry out military exercises or maneuvers in or over their EEZ without their consent. Their concern was that such uninvited military activities could threaten their national security or undermine their resource sovereignty. Other states specifically argued the opposite. Indeed, maritime powers such as the U.S. insisted 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. The debate has continued and morphed into a dispute over freedom of intrusive intelligence gathering.
Such disputes imply that certain UNCLOS provisions formulated in a very different political and technological era may be interpreted in the light of these new circumstances – or renegotiated. But such negotiations - with a weakened U.S, non-existent Soviet Union and a rising China - may have very different results from before when the U.S. and the Soviet Union strongly influenced the freedom of navigation provisions in favor of maritime powers.

The Way Forward
Despite the bravado, bluster and propaganda, the answers to these questions are not a 'slam dunk' for any 'side'. Unless the issues are addressed and resolved, more incidents and possible conflict lie ahead. It is therefore particularly important that mechanisms be instituted to address these particular 'hot button' issues dotting the broad new geopolitical canvas.
There are several possible ways forward, each with its own complexities.

China/US Bilateral Agreement
China and the U.S. do have a Military Maritime Consultative Agreement that provides a forum to discuss such issues at the operator level. But there has been no progress. The U.S. simply repeats its navigational freedom arguments and China proposes that the U.S. refrain from intelligence gathering in China's EEZ. It likens the EP-3flights to "flies at a picnic."
It was hoped that such discussions might eventually lead to an INCSEA agreement similar to that between the U.S. and the Soviet Union at the height of the Cold War. But even that would only be a basic agreement on the "rules of the road." It would not address the source of the problem nor resolve the issues for the broader Asian community.
Given that China undertakes surveillance in Japan's EEZ perhaps it could tolerate *passive* SIGINT data collection and it is the active "tickling" and interference with communications that is the real problem. If so perhaps both the U.S. and China could agree to refrain from the latter activities. However, the U.S. would have to forego its current advantages in active SIGINT.
Clearly China and the U.S. have quietly reached some sort of interim understanding regarding US military activities in its EEZ. Otherwise, we would be reading about more incidents. US Admiral Willard, Commander Pacific Command, told the US Senate that the Chinese navy has not exhibited the same level of assertiveness in 2011 that it did in 2010. Willard attributed this change in China's behavior to the strong American response regarding such actions and the resumption of US-China military talks. Perhaps. Maybe China can tolerate passive ELINT data collection but active 'tickling' and interference with communications is the real problem. If so, perhaps the two sides could agree that each should refrain from (1) provocative acts, such as stimulating, exciting, or probing the defensive systems of the coastal state, and (2) collecting information to support the use of force against the coastal state. Perhaps they could work toward a formal agreement on the following points:

1. The activities of another state in the EEZ of coastal state should not interfere with the communications, computer, and electronic systems of the coastal state or make broadcasts that adversely affect the defense or security of the coastal state.
2. The coastal state should not interfere with the communications, computer, and electronic over the coastal state's EEZ.
3. In order to make the first two points effective, states should conclude agreements guaranteeing mutual noninterference with communications, computer, and electronic systems.

The International Tribunal for the Law of the Sea
In the best of worlds, the U.S. would ratify the Convention and agree to have the Tribunal decide

these issues. This is probably a non-starter. The difficult US domestic political environment precludes ratification any time soon and even if it did ratify, the U.S. would probably exercise its right to decline application of compulsory dispute settlement procedures to those disputes concerning military activities. Defining “military activities” would be up to the judges of the Tribunal, a possible problem for the U.S. position.

A Regional Approach

This leaves the region to take the initiative, initially perhaps ASEAN, regarding what constitutes hostile and non-hostile acts in the EEZ. This could take the form of a joint declaration, a formal code of conduct, or voluntary guidelines regarding military activities in foreign EEZs. For China to join would be proof of its benign intent towards the region and would leave the U.S. isolated on this issue. If the U.S. prefers an alternative outcome it needs to stop stonewalling and spouting the same stale rhetoric, and focus, engage, acknowledge and adjust. Otherwise such incidents are likely to continue, hardening hearts and minds in China and beyond.

III. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: bscott@nautilus.org. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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