Coastal State Use of Force in the EEZ under the Law of The Sea Convention 1982

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Recent enforcement operations against illegal fishing activities in the Southern Ocean have served to highlight how unsettled Law of the Sea Convention 1982[1] (LOSC) jurisprudence remains on the issue of coastal State use of force in the Exclusive Economic Zone (EEZ). In many ways this is a curious paradox, for the issue is by no means simply theoretical, nor of infrequent practical import. Australia, for example, conducts in excess of 300 boarding's each year in support of its' LOSC EEZ rights, jurisdictions and responsibilities.[2] Donald Rothwell, analysing the French response to the presence of *Rainbow Warrior II* near Mururoa in July 1995, noted that the issue of the use and levels of force under the LOSC is a central problem confronting its implementation.[3] Rothwell argued that this is exacerbated by the fact that it is the Convention itself that has generally sponsored these new 'pressures to create law and order at sea'.[4] Given, as Edward Miles has observed, that the LOSC is 'the best balance the world is likely to achieve between extending coastal State jurisdiction and preserving the navigation and other rights of the international community', the future relevance and preservation of the LOSC regime depends heavily upon 'facilitating implementation [and] compliance'.[5]

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1 United Nations Convention on the Law of the Sea, Montego Bay (1982) 21 ILM 1261. Adopted by the Third United Nations Conference on the Law of the Sea (UNCLOS III) on 10 December 1982, it entered into force on 16 November 1994.

2 P Briggs, 'The ADF's Role in Policing the Offshore Zones' Paper presented at Policing Australia's Offshore Zones: Problems and Prospects (Canberra, 8-9 April, 1997) p 12.

3 D Rothwell, 'The Mururoa Exclusion Zone' (July-August 1995) 83 *Maritime Studies* pp 12-14 at 12.

4 K Booth, 'The New World Order and the Future of Naval Power' (November 1991) 17(4) *Journal of the Australian Naval Institute* 17.

5 E L Miles, 'The New Ocean Regime: Facilitating Implementation, Compliance, and Evolution' Keynote Presentation at the Conference on Oceans Governance and Maritime Strategy (Canberra, 18-19 May 1998) p 4.

The issue of enforcement is central to the entire LOSC project and its' success.

For all the importance of 'force' to the new LOS regime, the Convention itself is obscure - even 'markedly silent' - on specifics regarding 'the degree of force that may be used against vessels'.[6] There was little discussion of the issue at the UNCLOS III negotiations,[7] a fact explicable not by oversight, but rather as one aspect of the conscious 'super trade off' which allowed the construction of the Conference's delicately balanced 'package deal'.[8] Yet while such 'constructive ambiguities'[9] have allowed the LOSC to become a reality, they have also created significant interpretive problems, and the issue of force remains one of the most unsettled of these grey areas.

One result of this consciously drafted ambiguity is that guidance in the interpretation of the LOSC is often sought outside of the Convention itself. Most frequently this will be found in customary international law, conventions and legislation which purport to give further effect to rights and responsibilities enshrined in the LOSC. This procedure is acknowledged in both the Convention itself[10] and in state practice generally.[11] Internationally, conventions such as: MARPOL 73/78 and the Intervention Convention 1969;[12] the Suppression Conventions on Terrorist Bombings and Illicit Drug Trafficking;[13] and proposed conventions on the Transport of Migrants by Sea and Combating People-Trafficking,[14] operate to elaborate upon rights and duties flagged in the LOSC while providing detail as to

6 I Shearer, 'Enforcement of Laws Against Delinquent Vessels in Australia's Maritime Zones'. Paper presented at Policing Australia's Offshore Zones: Problems and Prospects (Canberra, 8-9 April, 1997) p 14.

7 I Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35 *International Comparative Law Quarterly* 320 at 322.

8 Miles, note 4 above, at p 8.

9 As described by R Grunawalt, The Australian Naval Institute 1997 Vernon Parker Oration (10 April 1997).

10 See for example M C Stelakatos-Loverdos, 'The Contribution of Channels to the Definition of Straits Used for International Navigation' [1998] 13(1) *The International Journal of Marine and Coastal Law* 71 at 87, regarding Article 42.

11 See for example Appendix 2 to the Straits of Dover Agreement 1988, which refers to the power to undertake 'any measures necessary' in pollution control as arise from either international agreements or 'generally accepted rules and practices'.

12 See P W Birnie and A Boyle (eds), *Basic Documents on International Law and the Environment* (Clarendon Press, 1995) pp 189-210.

13 *Oceans and the Law of the Sea, Report of the United Nations Secretary-General*, UN General Assembly, 53rd Sess., UN Doc. A/53/456, para. 132, 143 (5 October 1998).

14 Id at para. 138.

their enforcement. Domestically, Australia no less than 13 Commonwealth Acts which deal substantially with LOSC issues while purporting to give effect to its' provisions.[15] It should be noted however, that this practice of defining LOSC detail by reference to complementary customary and conventional law is not without complications. Indeed, these instruments can create even greater inconsistencies. Consider for example, The Torres Strait region. It is subject to no less than six separate regimes of control and management each with its own, occasionally inconsistent enforcement provisions.[16]

Outline

The focus of this article is upon the issue of the use of force in the EEZ beyond the territorial sea and contiguous zone. My aim is to examine selected LOSC provisions relating to the use of force within this zone, in order to establish whether or not they can be said to provide a framework of sufficient clarity and cohesion to serve as a guide for the enforcement of EEZ jurisdictional rights. To achieve this aim, I have outlined the terms and regimes that contain an element of force, as they are incorporated into the EEZ regime by the Convention. In the process of this examination, I have considered customary and conventional amplifications on force, which are relevant to LOSC interpretation. Finally, and on the basis of this examination, I have provided my conclusions as to the nature and character of 'force' as contemplated by the LOSC EEZ provisions.

Defining Force as Applicable to the EEZ Regime

The EEZ regime created by the LOSC is in many ways *sui generis*.[17] Its' uniqueness is evinced by the manner in which the Convention deals with the issue of force within this zone. Many commentators believe that Part V of the LOSC is set apart from the remainder of the convention by its' more detailed 'specification of enforcement powers'.[18] As Ivan Shearer notes:

15 J Levingston and N Egan, 'Oil Pollution Claims in Australia' (July-August 1995) 83 *Maritime Studies* 1 at 2-3.

16 Briggs, note 1 above, at p 2.

17 Shearer, note 6 above, at p 333.

18 See D Rothwell, 'Australia and the Law of the Sea: Recent Developments and Post-UNCED Challenges' in Lorne K Kriwoken et al (eds) *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law

> The very fact that enforcement powers are spelled out in this Part of the Convention, whereas they are merely assumed or implied in relation to the territorial sea and the contiguous zone, indicates that they are regarded as more sensitive matters and are to be construed strictly. [19]

Under the LOSC there are two major sources of enforcement rights which apply and operate within the EEZ: thematic cross-zonal provisions, such as dumping and Hot Pursuit, which apply as equally to the EEZ as to other zones; and EEZ-specific provisions. Let us begin with the issue of thematic cross-zonal provisions on use of force.

Thematic Cross-zonal Provisions Relating to Force which Apply in the EEZ

There are three major LOSC wide thematic sources of enforcement, which apply as equally in the EEZ as they do in other sea zones. The first of these relates to oil pollution. Article 221 reaffirms the customary and conventional right of coastal States to 'take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage' resultant from a maritime casualty. The aim of such coastal State action is 'to protect their coastline or related interests, including fishing, from pollution.' The provision quite explicitly contemplates the use of force by the coastal State in its EEZ in order to prevent or mitigate the impact of such pollution.[20] When the *Torrey Canyon* broke-up off the French coast in 1967, it caused massive environmental damage,[21] a danger which has increased in frequency and proportion over the last 30 years. For instance, when the *Amoco Cadiz* became a maritime casualty in 1978, the vessel released in excess of 221,000 tonnes of oil into the sea off Brittany.[22] In the case of *Kirki*, it was only luck and the Intervention Convention, which saved Western Australia from more than the 17,700 tonnes being lost when

International, 1996) pp 59-69 at 67; R R Churchill and A V Lowe, *The Law of the Sea* (2nd ed, Manchester University Press, 1988) p 143.

19 Shearer note 5 above, at p 9. One implication, however, of this more detailed 'specification' of enforcement powers, is that when confronted with EEZ issues upon which the LOSC is deafeningly silent - such as regulation of artificial structures and marine scientific research - we are left in a state of even more acute uncertainty than is usual when dealing with the more ambiguous references to force found in the remainder of the Convention.

20 See J G Dalton, 'The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?' [1993] 8(3) *The International Journal of Marine and Coastal Law* 397 at 408.

21 Shearer, note 6 above, at p 337.

22 Levingston, note 14 above, at p 2.

the vessels' bow fell off in 1991.[23] A significant response to potential oil spill disasters is found in the 1969 Intervention Convention. It provides detail on levels of force, which are legitimately permitted in dealing with such incidents and clearly informs the LOSC. Indeed, Article 221 is arguably incomprehensible without it. Article 1 of the Intervention Convention empowers the coastal State to take such measures '*as may be necessary*' [authors' emphasis added] to prevent or mitigate a situation of 'grave and imminent' pollution.[24] 'Necessary measures' in this context are universally held to include, inter alia, the use of force to destroy both the vessel and its cargo, and this interpretation enjoys the support of significant state practice.[25] Again, when interpreted with the assistance of influential and complementary customary and conventional international law, it seems clear that use of the term 'necessary' imports a well established conceptualisation of force into the EEZ regime.

The second thematic cross-zonal provision which impacts upon the use of force in the EEZ relates to 'dumping' at sea. Article 210 confers upon the coastal State the power to adopt laws and regulations, and to '*take other measures as may be necessary to prevent, reduce and control such pollution*' [authors' emphasis added]. Further, under Article 210(3) these 'measures' are to be such that they '*shall ensure* [authors' emphasis added] that dumping is not carried out', except as is in accordance with coastal State regulations. In this Article, the term 'necessary' is combined with a list of purposes that assist in defining the aim or *direction* of the force, that is, the prevention, reduction and control of dumping. These purposes however, do not inherently define the *level* of force permissible in their pursuit. This detail, it is argued, is to be found in the combination of the term 'necessary' with the absolutist nature of the phrase 'shall ensure', and it is this which gives teeth to these purposes.

The third thematic cross-sectoral provision which imports the issue of force into the EEZ, is the regime of Hot Pursuit codified in Article 111. The *I'm Alone* and *Red Crusader* cases are generally recognised as templates for Hot Pursuit. In the *I'm Alone* case, the Arbitration Commissioners agreed that 'necessary and reasonable force might be used for the purpose of boarding, searching, seizing, and the bringing

23 J Chapman, 'The KIRKI Incident' (July-August 1992) 65 *Maritime Studies* 1 at p 5.

24 Birnie and Boyle (eds), note 11 above, at p 204.

25 See, for example, I Shearer, 'Current Law of the Sea Issues' in R Babbage and S Bateman (eds), *Maritime Change: Issues for Asia* (Allen & Unwin, 1993) pp 47-68 at 61-62; Shearer, note 5 above, at pp 8-9.

into port of a suspected vessel'.[26] Further, a sinking which is an *incidental* result of the force used might actually be acceptable. However, intentional sinking, in this scenario, would constitute an excessive use of force. Shearer believes that this case is authority for an interpretation of 'force' that asserts:

> Deliberate sinking will in no circumstances be warranted if the offence involved is a customs (ie. a purely regulatory) offence. In other words, the proportionality principle requires the enforcing State to weigh the gravity of the offence against the value of human life. [27]

Fisheries, pollution and immigration offences most probably fall within this category of regulatory offences. This interpretation is further illustrated in the *Red Crusader* case, where it was found that fire directed *at* a trawler in response to a fisheries violation, was force used 'without proved necessity'. This decision also offers guidance on the concept of 'proportionality'. It implies that the response must not only be proportionate in terms of the offence committed, but also proportionate in terms of procedure. Thus, the firing of warning shots as an initial response to a fisheries offence would be construed as disproportionate, whereas the firing of warning shots *after* repeated and clear orders to heave-to have been ignored would be considered a proportionate response. Overall however, jurisprudence on the issue of Hot Pursuit indicates that 'force endangering human life in not justified... where purely regulatory, or less serious, offences are concerned'.[28]

However, not all breaches of LOSC provisions are to be characterised as merely regulatory. It is arguable that the deliberate use of sinking and even lethal force can be a legitimate response in an Article 111 situation. Grunawalt argues that it is accepted state practice to employ 'disabling fire' when exercising authority to stop, board, search and arrest vessels involved in smuggling significant quantities of illegal drugs. In this instance, the provisions of a second, complementary convention define the force inherent in the LOSC: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[29] Similarly, Shearer concludes that the use of sinking or lethal force might be legitimate where a vessel 'car-

[26] See also Shearer, note 5 above, at p 15.

[27] Ibid.

[28] Id at p 16.

[29] R J Grunawalt, 'Maritime Law Enforcement: US Navy/US Coast Guard Cooperation in the War on Drugs at Sea' presentation at the Conference on Oceans Governance and Maritime Strategy (Canberra, 18-19 May 1998) pp 5-7.

rying arms to dissidents in the enforcing state' has resisted approach.[30] Thus, force as contemplated by Article 111 and as applicable in the EEZ by virtue of the cross-zonal nature of this provision, can make permissible the use of 'ultimate' that is, sinking or lethal, force where the original offence is characterised as 'serious' rather than merely regulatory in nature.[31] Similarly, the concept of proportionality, which this interpretation seems to evince, is a more complex issue than one of a simple correlation between the nature of the offence and the force permissible. As noted above, the concept of proportionality under Article 111 also includes an element of 'procedural' proportionality and a requirement for a graduated response.

EEZ-specific Provisions Regarding Force

The Coastal State enjoys several seemingly distinct categories of enforcement powers relating to the EEZ. The first of these, detailed in Article 73 (1), relates to coastal State rights to 'explore, exploit, conserve and manage the living resources' of its EEZ. The coastal State may in respect of this jurisdiction 'take such measures, including boarding, inspection, [and] arrest... *as may be necessary to ensure compliance*' [authors' emphasis added] with valid coastal State laws. This reference to 'necessity' however, is not unique in the Convention. An examination of the opinions as to the meaning attributed to this phrase elsewhere in the LOSC is therefore appropriate. The most important non-EEZ reference to this phrase is found in the regime of Innocent Passage, specifically in Article 25(1). This provision authorises coastal States to 'take the *necessary steps*' [authors' emphasis added] required to prevent non-innocent passage. Rothwell argues that such 'steps' include arrest and escort out of the territorial sea, so long as such responses are 'proportionate' to the infringement.[32] This approach clearly places the issue of 'proportionality' at the centre of interpretation. Similarly, Shearer believes that the two-limbed test of necessity and proportionality permeates this reference to force.[33] Therefore, when interpreting the word 'necessary' it is arguably the

30 Shearer, note 5 above, at pp 15-16.

31 The phrase 'terminology 'original offence' has been used purposely here. If, for example, a vessel which has committed a merely regulatory offence turns to ram the apprehending vessel in the course of the pursuit, it is the right of self-defence arising in that situation rather than the original offence, which confers upon the apprehending vessel the right to use a higher level of force.

32 Rothwell, note 2 above, at p 13.

33 Shearer, note 6 above, at pp 325-329; Shearer note 5 above, at pp 7-9.

question of 'proportionality' that must actually be addressed. There is a significant practical consequence that flows from this conclusion. The power to arrest as a legitimate response to violations (which is inherent in Article 25 and explicit in Article 73) necessarily assumes the enabling actions of stopping and boarding the delinquent vessel. This assertion may seem innocuous in and of itself, but when confronted with a belligerent, unaccommodating vessel that has refused to meekly heave-to and be boarded, the implications become quite stark. Considering jurisprudence on Hot Pursuit as a further interpretive guide, it is clearly arguable that 'necessary' does anticipate, and ultimately condone, firing *at* a vessel. At this point the distinction between 'regulatory' and 'serious' offences again becomes operative, and would govern the issue of sinking or lethal force. Thus, the recent Australian practice in cases of illegal fishing of choosing to give up an attempt to force a halt, rather than to fire upon a vessel which is delinquent, is entirely appropriate in terms of proportionality. Similarly, Swedish depth-charging of Soviet submarines clearly engaged in non-innocent passage during the Cold War[34] (an action which clearly anticipates the possibility that the force used may result in sinking and/or death) can also be construed as necessary and proportional where the offence, such as threatening national security, can be characterised as 'serious' in nature.

The second major reference to force in an EEZ-specific context is found within Article 220(3). A coastal State with 'clear grounds for believing' that a vessel has breached pollution regulations in the EEZ, is permitted to '*require* the vessel to give' [authors' emphasis' added] certain relevant information. The LOSC also uses this term in the context of the territorial sea. For example, Article 22(1) anticipates the 'requiring' of vessels to use sea lanes and traffic separation schemes where these are necessary for navigational safety; and further at Article 30 where a State may require delinquent warships to exit the territorial sea. However, this apparent correlation is deceptive. On the one hand, the ability to 'require' vessels to provide information or to use certain sea lanes, does not necessarily assume a concomitant jurisdiction to stop and board the vessel. Rather, the term 'require' in this sense seems to evince a merely hortatory purpose; the logical and correlative 'flip-side' of the various provisions asserting that vessels 'shall comply' with valid coastal State regulations. With respect to warships however, the term 'require' has different implica-

[34] See D J Harris (ed), *Cases and Materials on International Law* (4th ed, Sweet & Maxwell, 1991) p 385; Churchill and Lowe, note 17 above, at p 76.

tions. Whilst coastal States may not use force to stop and board a warship due to its sovereign immunity, some writers believe that the coastal State can nevertheless, use 'any force necessary' to 'compel' the warship to leave the territorial sea.[35] This interpretation is consistent with, and sits more comfortably within, the issue of the use of force to stop non-innocent passage, which applies as equally to warships as to other vessels. The only difference is that the warship cannot be forced to heave-to and be boarded, whereas a non-warship can be subject to this particular expression of force. Thus 'require' with respect to warships is clearly the corollary of 'necessary steps' which applies to vessels generally. As such, it is clearly not the equivalent of 'requiring' as is applicable to non-warships, for this particular usage of the term implies a category of force which clearly excludes the right to stop and board the vessel. It is submitted that this view is confirmed, when one examines the further provisions of Article 220. It is only where for example, the alleged pollution violation in the EEZ has resulted in 'a substantial discharge causing or threatening significant pollution of the marine environment', as per Article 220(5), that the coastal State gains the *additional* power to '*undertake physical inspection* of the vessel'[authors' emphasis' added]. Thus, it is only when this extra criterion of 'seriousness' is met that the coastal State gains the power to inspect, a power which implies the precedent power to stop and board. Similarly, by virtue of Article 220(6), it is only at a higher level of seriousness that the coastal State acquires the further power to 'institute proceedings including the detention of the vessel'. That is, when the coastal State has 'clear objective evidence' that a violation committed in its EEZ has resulted in 'a discharge causing major damage or the threat of major damage' to its coastline, related interests or its EEZ/territorial sea resources. Detention as with inspection, assumes not only the permissibility of the use of force to stop and board, but also the further power to arrest. Therefore at this level, the type of force acceptable is arguably the same as that prefigured by the phrase 'necessary measures'. This provides further support for the argument that the differing levels of permissible force anticipated by the terms 'necessary' and 'require' are recognisably distinct.

35 Churchill and Lowe, note 17 above, at p 83.

Some Conclusions on the Nature of Force as Contemplated within the EEZ Regime

'The invocation of particular enforcement measures' in the EEZ, declares Shearer, 'is still governed to a significant degree by discretions vested in the coastal State according to its evaluation of the facts of a given incident'.[36] However, it is also possible to argue that use of force by the coastal State in support of its EEZ rights and jurisdictions, is afforded coherent conceptual guidance by the LOSC. This guidance is found in the specific terminology used in relation to Part V of the Convention, in the meanings attributed to this terminology in other Parts of the LOSC, and in the wider international law of the sea. Primarily, the terms 'require' and 'necessary' clearly imply significantly different scales of permissible force. 'Require' for example, is essentially hortatory, whereas 'necessary' prima facie contemplates force which will facilitate the stopping and boarding of a vessel. Secondly, within the concept of 'necessary', there is a fundamental distinction between merely 'regulatory' and more 'serious' offences. Some violations, such as fishing violations, may always be simply regulatory, whilst the characterisation of other offences (for example, customs (drugs) and pollution offences) is often more situational. This is where the concept of 'proportionality' becomes important not as a limb of the concept of necessity, but rather as an interpretive guide to it. Finally, 'proportionality' is itself a pluralistic requirement, existing at both the contextual level, which relates response to offence, and at the procedural level, which relates process to response.

In general, this interpretation of the Convention's provisions illustrates an important conceptual point about the relationship between the use of force, and the EEZ regime. Use of force in the territorial sea begins from a position of *sovereignty*, limiting it with respect to certain prescribed issues, such as the right of innocent passage. Use of force in the EEZ on the other hand, arguably starts from a position of non-sovereignty or freedom, but *confers upon* the coastal State prescribed *jurisdiction* over a select group of issues.[37] This is reflected in the observation that the use of force based upon jurisdiction is in-

[36] Shearer, note 6 above, at p 335.

[37] See S Scott, 'Maritime Surveillance off the Australian Antarctic Territory: The Political Context'. Paper presented at Policing Australia's Offshore Zones: Problems and Prospects (Canberra, 8-9 April, 1997) pp 3-4. I believe that this distinction is fundamental to the points which Scott makes regarding the Australian Antarctic Territory.

versely proportional to distance from shore,[38] whereas sovereignty, as a basis for force, is theoretically absolute wherever it is present. In conclusion, the use of force in the EEZ is probably best characterised in terms of 'freedom minus limited coastal State jurisdiction', rather than 'coastal State sovereignty minus significant LOSC limitations'.

Conclusion

Alfred Thayer Mahan, the most important modern theorist and publicist of maritime power, argued that law at sea was an artificial, dangerous fantasy.[39] Use of the sea, he asserted, required control of the sea, and control was a concept antithetical to notions of 'freedom of the seas'. For sea-control theorists, freedom of the seas meant the total absence of law - a legal vacuum - rather than a legal framework for ensuring rights. Over the course of the Twentieth Century however, it was generally realised that control of the seas was a myth. The only way in which freedom of the seas could be maintained was to establish a legal regime which could act to protect and regulate rights on the great common. The fact that the LOSC regime has achieved significant international coherence, respect and reliance despite the lack of 'a central and comprehensive organ of enforcement of that law,'[40] is testament to this aim. It also bears witness to the fact that coastal States have decided to use force in their EEZs regardless of the technicalities of LOSC interpretation are essentially acts of a political rather than legal reasoning.

38 Shearer, note 5 above, at p 1.

39 W E Livezey, *Mahan on Seapower* (University of Okalahoma Press, 1981) p 271.

40 Shearer, note 24 above, at p 47.