

# Designing with due regard

## Uncrewed maritime surveillance in the Exclusive Economic Zone

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Keeping watch over the vast expanse of the ocean is expensive and difficult. The strategic value in having a better picture of what is happening in the maritime domain has led States to invest in a diverse range of surveillance assets, including uncrewed maritime vehicles (UMVs). As the use of these devices becomes more widespread, major maritime powers will know an unprecedented amount of real-time information about what is happening on and under the surface of the ocean. But can the law of the sea resolve disputes between coastal States and other States regarding the use of surveillance UMVs?

### Uncrewed devices increasing feature in maritime surveillance

UMVs encompass a broad range of technology. They can operate on or below the surface; and they can be remotely controlled, pre-programmed, or have the capacity for at least some autonomous operation. The nature and capacities of each device will depend on their mission and purpose. These devices are already being used for military maritime surveillance, including hydrographic surveys, acoustic monitoring, environmental monitoring, and real-time surveillance feeds to military planners.

This paper considers how the United Nations Convention on the Law of the Sea (UNCLOS) regulates surveillance by UMVs in the



Exclusive Economic Zone (EEZ) of foreign states, and if and how this law will constrain UMV design. It also identifies uncertainties and gaps in the legal regime that may lead to conflict.

## The legality of military surveillance in the EEZ is contested

The development of UMVs has the potential to dramatically increase the possible scale of intelligence gathering operations in foreign EEZs. Intelligence gathering of this scale was not possible when UNCLOS was negotiated, and the strategic and legal implications were not accounted for in the compromise struck by the States party to the agreement.

UNCLOS sets out the basic rules governing the use by States of the ocean, including where ships (including UMVs) are permitted to go, what they are allowed to do when they are there, and how other States may respond to them. It does this by dividing the ocean into different zones with different balances of rights and obligations between coastal States and other States. Consequently, the relevant rules depend on the jurisdictional zone where a UMV is deployed.

Other than internal waters, the zone of ocean closest to the coast – the territorial sea – is the area of maximum coastal State control. The coastal State has territorial sovereignty over this area and its use by other States is tightly constrained. Beyond the territorial sea is the EEZ, an area that extends up to 200 nautical miles from the coastal baseline. In the EEZ, the coastal State has specific sovereign rights enumerated in UNCLOS, but not absolute territorial sovereignty.

Military activities in the EEZ have been controversial since the zone was first formalised in international law. It was a compromise between maritime powers and coastal States, and part of the ‘package deal’ of UNCLOS that recognised the rights of coastal States to economic resources within the EEZ, while still protecting the access of other States to the area for non-economic purposes. The negotiated solution found in UNCLOS does not deal explicitly with military activities, leaving room for different interpretations. It has resulted in several diplomatic and military confrontations between some of the world’s leading powers and has been the subject of much academic debate.

The central point of contention is the extent to which UNCLOS permits other States to carry out military activities, including surveillance, within the EEZ of a coastal State. The stakes are high: while some see military activities as being an unacceptable threat to the sovereignty of a coastal State, others see them as ensuring and protecting maritime trade and undersea cables, and crucially important to the global economy and security.

## Key UMV design choices will reduce the risk of international conflict

Along with arguing that military surveillance is permitted in the EEZ of foreign States, the paper identifies some capabilities that UMVs should be equipped with to minimise the risk of legal conflict. In particular, because the legality of the surveillance is dependent on the military purpose of the surveillance (rather than the specific information collected), ensuring surveillance UMVs can communicate that they are a naval vessel belonging to a State, and the military purpose of their information collection, will help demonstrate that their use is lawful.

UNCLOS also requires other States to have ‘due regard’ to the interests of coastal States in the EEZ. This means if States intend to deploy UMVs for military maritime surveillance they are obliged to assess whether it could affect the economic and environmental interests of the coastal State in the EEZ. In addition, UMVs that are being deployed for long periods should have some capacity to avoid causing disruption to the protected interests of the coastal State.

## Conclusion

While it should be accepted that the deal struck by UNCLOS allows for military surveillance in the EEZ of coastal States, legal arguments are unlikely to convince those States that hold to the more restrictive view. The legal conflict reflects other geopolitical calculations that made a chance in position hard to imagine.

In addition, the secret nature of surveillance leads to an impasse: while in other settings international tribunals have held that consultation is required to satisfy the requirement of due regard, letting the coastal State know that the surveillance is going to occur could compromise its effectiveness. States should explore ways to build confidence that when carrying out surveillance in the EEZ, they are respecting the interests of the coastal State. This could include sharing information about how the potential environmental and economic impact of surveillance was assessed, or confirming that the information gathered from the surveillance is only used for military purposes and not for economic gains. Such activities may go towards mitigating the risk of legal conflict and the potential for a miscalculation leading to a serious confrontation with tragic consequences. ●



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