

CONCEPT PAPER – GUIDELINES FOR PREVENTING AND MANAGING INCIDENTS BETWEEN MARITIME LAW ENFORCEMENT UNITS

Background

Following numerous incidents at sea involving naval vessels, other patrol vessels, military aircraft, fishing vessels and research vessels of ARF members, a working group of ARF Eminent and Expert Persons (EEPs) was established in February 2016 to conduct a study of lessons learnt and best practice with regard to preventing and managing incidents at sea. The working group's report completed in February 2017 documented the numerous instruments (listed in Annex A) in place to help prevent and manage incidents. Noting that none of these instruments applied to non-naval vessels and aircraft, particularly those employed on maritime law enforcement, the report recommended that non-binding 'guidelines' or 'principles' for maritime law enforcement in the region should be developed for use between ships and aircraft engaged in maritime law enforcement.

Vietnam, Australia and the European Union convened the first ARF Workshop on Enhancing Cooperation among Regional Maritime Law Enforcement Agencies in Nha Trang, Vietnam on 18-19 January 2018. The workshop was a practical step toward implementing the 2016 ARF Ministerial Statement on Enhancing Cooperation among Maritime Law Enforcement Agencies (MLEA). The workshop found that MLEA cooperation among ARF participants remained under-developed. The meeting also noted some of the challenges to MLEA cooperation, such as differing institutional arrangements, lack of effective communication and consultation mechanisms, poor inter-agency coordination, and existing maritime and territorial disputes.

The 10th ARF Inter-Sessional Meeting on Maritime Security held in Brisbane, Australia, on 27-28 March 2018 was briefed on the report by the ARF EEPs and its recommendations. The meeting agreed that the next step in implementing the recommendations would be to develop a concept paper outlining possible Maritime Law Enforcement Agencies (MLEA) incident prevention/management guidelines for discussion at the second ARF Workshop on Enhancing Cooperation among Regional MLEAs. Implementation of the recommendations from the ARF EEP Working Group on Preventing and Managing Incidents at Sea was identified as a key focus of this workshop.

Objective

This paper:

- reviews recent developments with the prevention and management of maritime incidents;
- outlines issues that might be covered in possible incident prevention/management guidelines for MLEAs; and
- recommends the establishment of an online working group to develop these guidelines.

Recent Developments

Role and Activities of MLEAs

The activities of regional MLEAs and the size and capabilities of their vessels continue to grow. While they are a key contributor to the maintenance of maritime security across the region, data collected by the Center for Strategic & International Studies in Washington shows that MLEA vessels¹ have been involved in most major incidents in the South China Sea since 2010.

Annex B lists the regional maritime security forums where issues related to the role and activities of MLEAs are discussed.

Extension of CUES

In September 2016, China and ASEAN adopted the *Joint Statement on the Application of the Code for Unplanned Encounters at Sea (CUES) in the South China Sea*,² which had been agreed in 2014 by the Western Pacific Naval Symposium (WPNS). This statement refers only to the safety of naval ships³ and naval aircraft and not to maritime law enforcement vessels and aircraft other than naval vessels and aircraft employed on law enforcement tasks. CUES' safety and communications protocols now serve as a basis for incident responses across the region.

Both Singapore and the Philippines have proposed that CUES should be expanded to cover coast guards and other maritime forces. The WPNS has established a Working Group on CUES to have oversight of its continued utility and the possible need for updates, including its possible extension to coast guards to deal with situations when naval vessels have unplanned encounters with coast guard vessels at sea.

Several regional forums have cautioned against the application of CUES to coast guards due to the functional differences of naval and coast guard operations. CUES was written specifically with naval functions in mind, and coast guards have functions and responsibilities distinct from navies. In particular, navies and coast guards differ on policies related to the use of force. Unlike some navies, coast guard vessels may need to apply force in the normal course of their duties.

With regard to safety and communications procedures, there is value, however, in the guidelines for MLEA vessels conforming as far as possible with those in CUES. This would assist in facilitating standard safety and communication procedures between naval and MLEA vessels and assist in preventing and managing incidents involving naval vessels and MLEA vessels.

¹ 'MLEA vessels' are non-naval vessels employed on maritime law enforcement duties - primarily Coast Guard vessels, but may also include vessels of other maritime law enforcement agencies, such as marine police and fisheries protection services.

² <https://asean.org/storage/2016/09/Joint-Statement-on-the-Application-of-CUES-in-the-SCS-Final.pdf>

³ Defined in CUES at paragraph 1.3.3 to include 'warships' (as defined at Article 29 UNCLOS), naval auxiliaries and submarines.

Air Incidents

Singapore has proposed extending a similar set of guidelines to those in CUES to avoid unintended incidents in the air that could escalate into a conflict. The resulting multilateral code, the Guidelines on Air Military Encounters, was endorsed by the ASEAN defence ministers at their ASEAN-only meeting preceding the ASEAN Defence Ministers' Meeting-Plus (ADMM-Plus) held in October 2018. Although Singapore had hoped to get the United States and China to sign on to the guidelines, which are nonbinding and voluntary, the ADMM-Plus countries agreed to endorse them in principle and study them further for potential future adoption.

Hot Lines

Several hot lines or Direct Communications Links (DCL) have been set up across the region, most recently a defence hot line between ASEAN member countries, to provide a crisis management mechanism and reduce the risks of incidents at sea. As well as hot lines between military headquarters, hot lines between coast guards are also important. The coast guards of China, Japan and South Korea have informally exchanged contact addresses in order to keep close cooperation.

At the 19th China-ASEAN Summit held in Vientiane in September 2016, the parties jointly reviewed and approved the *Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of China and ASEAN Member States in Response to Maritime Emergencies*.⁴ The term “maritime emergency” was defined in that document as “an incident in the South China Sea that requires immediate policy-level intervention in relation to the full and effective implementation of the DOC”, referring to the Declaration of Conduct of Parties in the South China Sea which was signed in November 2002.

South China Sea Code of Conduct

On August 3, 2018, the Foreign Ministers from ASEAN members and China adopted the Single Draft South China Sea Code of Conduct Negotiating Text (Single Draft Negotiating Text) (SDNT) based on the Framework for the Code of Conduct. The SDNT includes proposals for cooperation among MLEAs, including the humane treatment of persons in danger or distress at sea, safety of navigation, communication at sea, search and rescue, fisheries cooperation, capacity building, joint exercises, hotlines, exchange of information, and the extension of CUES to Coast Guard-type agencies.⁵

Centre for Humanitarian Dialogue Project

The Centre for Humanitarian Dialogue (CHD) has been hosting a series of meetings and workshops in the region in recent years directed towards developing a set of “common

⁴ https://www.fmprc.gov.cn/nanhai/eng/zcfg_1/P020170413337343995888.pdf

⁵ Carlyle A. Thayer, 'From Confidence Building, Preventive Diplomacy and Dispute Resolution to the ASEAN-China South China Sea Code of Conduct', Presentation to Session 6 - Confidence Building, Preventive Diplomacy and Dispute Resolution Tenth South China Sea International Conference sponsored by the Diplomatic Academy of Vietnam and the Vietnam Lawyers' Association Da Nang, Viet Nam, November 7-9, 2018, p.18.

operating principles” (COPS) for maritime law enforcement and fishing vessel encounters in the Spratly islands. The aim is to prevent incidents, reduce tensions and promote good humanitarian practices during encounters at sea.

Recent meetings sponsored by CHD have identified a possible need for separate guidelines for the different types of interactions (MLEA to Fishing Vessel and MLEA to MLEA). Other conclusions have been that cooperation between MLEAs is more difficult due to significant differences in the operational procedures between MLEAs, and that unlike navies, these forces are not accustomed to interacting with each other with appreciable differences, for example in their communications procedures.

Possible ARF guidelines for preventing and managing incidents between maritime law enforcement units will differ from COPs in that the latter principles are primarily concerned with encounters at sea involving MLEA and fishing vessels and are directed towards a particular area of the South China Sea i.e. the Spratly islands. Conversely, the ARF guidelines will have general application and not be directed toward any particular area.

Centre for Strategic and International Studies (CSIS) Expert Working Group on the South China Sea

The CSIS Expert Working Group on the South China Sea has produced *A Blueprint for a South China Sea Code of Conduct*.⁶ This recommended negotiations on a code governing protocols for communication between naval and law enforcement vessels that encounter each other at sea to reduce the chance of incidents and help de-escalate those that occur. This could involve either the negotiation of a wholly new agreement based on international best practices, or the extension of CUES to cover encounters among law enforcement ships and between law enforcement and naval vessels. It also encouraged joint training and exercise activities among regional MLEAs to promote best practices and minimize the risk of incidents at sea, and work with the Heads of the Asian Coast Guard Agencies Meeting (HACGAM) to develop a set of principles governing the operation of MLEAs in the South China Sea.

Issues for Consideration

Possible issues for consideration in the guidelines include: arrangements for joint regular training, workshops and exercises; mechanisms for joint consultations after an incident; arrangements for MLEA hotlines; information-sharing; bilateral arrangements in areas where maritime boundaries have not been agreed; adherence to the COPs; legal considerations; safety issues; and communications procedures.

Applicability of Guidelines

As a first step, the guidelines to be developed might apply only to interactions between MLEA vessels and not to interactions between naval vessels and MLEA vessels, or to interactions between MLEA aircraft. Guidelines for these other types of interaction may follow later.

⁶ <https://amti.csis.org/blueprint-for-south-china-sea-code-of-conduct/>

Definition of an MLEA vessel

It may be appropriate to include a definition of an MLEA vessel possibly based on UNCLOS Articles 96 and 110(5).

Geographic Scope of Guidelines

Like CUES, and rather than specifying the geographical scope of the guidelines, they might apply to all MLEA vessels of ARF members regardless of where an incident takes place. Acknowledging the several sovereignty disputes in the region, the guidelines might include the disclaimer that their adoption is without prejudice to the sovereignty claims, or to the different views of ARF members with regard to their rights and duties in the different maritime zones.

Nature of Existing Instruments

The existing agreements are mostly voluntary and non-binding. No enforcement mechanism is available and there is no apparent follow-up on lessons learned after an incident has occurred. Bilateral instruments appear more achievable than multilateral ones. While the Guidelines are intended for implementation at a regional level, countries might be encouraged to adopt them bilaterally, pending regional agreement.

Focal Points

ARF participants should exchange information and contact details for all their agencies conducting maritime law enforcement operations, including the identification of the primary focal point for information exchange. Inter-agency coordination between national MLEAs is of fundamental importance.

Hot Lines

Hot lines are essential for preventing and managing incidents at sea. MLEA focal points should be identified by each ARF member to facilitate hot line communications.

Joint Training, Workshops and Exercises

Joint training, workshops and exercises involving regional MLEAs should be encouraged. These might be organised through the HACGAM.

Common Communications Procedures and Language

Common communications procedures and language are essential elements of any effective agreement. While English is the internationally recognised language of the sea, MLEA officers may be less competent in the English language than naval officers. Cooperative training programs might include short courses in Maritime English.⁷

⁷ Maritime English refers to a simplified form of English to be used by seafarers. It includes Standard Marine Communication Phrases (SMCP), a set of key phrases in the English language developed by the IMO to facilitate ship to ship & ship to shore communication, as well as communication onboard ship. Short courses in Maritime English are taught around the world.

The Communications Procedures in the Guidelines might conform as far as possible to those set out in CUES.

Automatic Identification Systems

The guidelines might prescribe that MLEA vessels when in proximity to each other should not de-activate automatic identification systems.

Regular consultative arrangements

Regular consultative arrangements are important to discuss the state of play with agreements and to follow up on any incidents that have occurred. The guidelines should mandate these consultations.

Safety Procedures

The Safety Procedures in the Guidelines might conform as far as possible to those set out in CUES.

Live Fire

Live fire or other actions endangering human life should be avoided as far as possible in maritime law enforcement operations. In undertaking maritime law enforcement actions, MLEA vessels should employ the use of force in a manner that is necessary and responsible in the circumstances.

Areas without Maritime Boundaries

Bilateral agreement should be sought for maritime law enforcement cooperation in areas where maritime boundaries have not been agreed and in areas of overlapping maritime jurisdiction.

Managing Incidents

Given the large number of agencies involved in undertaking maritime law enforcement activities, the guidelines might consider guidance to stress the importance of a 'whole of government' approach to incidents at sea, involving maritime law enforcement, fisheries, marine environmental protection and other relevant agencies.

Recommendations

The recommendations of this paper are that:

- an online working group of representatives of the MLEAs of ARF members and other experts should be established to develop guidelines for preventing and managing incidents between maritime law enforcement units;
- the working group should be co-chaired by representatives of the Co-Chairs of the Workshop on Enhancing Cooperation among Regional Maritime Law Enforcement Agencies who would develop successive drafts of the guidelines for circulation among working group members for comments and input;
- the issues for consideration identified in this concept paper should provide the basis of the guidelines; and
- the final version of the guidelines should be ready for consideration by the Third Workshop on Enhancing Cooperation among Regional Maritime Law Enforcement Agencies to be held in 2020.

ANNEXES:

- A. List of Current Regional Agreements and Arrangements**
- B. Regional Forums**

ANNEX A - CURRENT REGIONAL AGREEMENTS AND ARRANGEMENTS

Conventions

- United Nations Convention on the Law of the Sea (UNCLOS) 1982
- International Convention on Maritime Search and Rescue (SAR), 1979
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), 1988 (and the 2005 Protocol)
- International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended
- Convention on the International Regulations for Preventing Collisions at Sea (COLREGs), 1972

Regional Arrangements

(1) Legally Binding Agreements

- 2011 Agreement between China and Vietnam on basic principles guiding settlement of sea-related issues;
- 2015 Agreement between Russia and North Korea to prevent dangerous military activities;

- Bilateral ‘Cold War’ type INCSEA agreements between Russia and the US (originally 1972)⁸, South Korea (1994) and Japan (1993) (as well as these agreements within the region, there are also INCSEA agreement elsewhere in the world); and
- 1989 US-USSR Agreement on the Prevention of Dangerous Military Activities.

(2) Non-binding Codes

- 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC), especially articles 4, 5 and 6.
- Western Pacific Naval Symposium (WPNS) Code for Unplanned Encounters at Sea (CUES) agreed in 2014 (the Indian Ocean Naval Symposium (IONS) has also agreed to adopt CUES).

(3) Non-binding Memorandums of Understanding

- 2014 Memorandum of Understanding (MOU) between US Department of Defense and China’s Ministry of National Defense on Notification of Major Military Activities Confidence-Building Measures Mechanism (MOU-CBMM); and
- 2014 U.S.-China Memorandum of Understanding on the Rules of Behavior for the Safety of Air and Maritime Encounters (MOU-Rules). This has three annexes:
Annex I: Terms of Reference for Safety of Air and Maritime Encounters
Annex II: Rules of Behavior for Safety of Surface-to-Surface Encounters⁹
Annex III: Rules of Behavior for Safety of Air-to-Air Encounters

(4) Other Instruments

- The 2001 Malaysian-Indonesian MALINDO Prevention of Sea Incidents Cooperative Guidelines; and
- 1988 US-USSR Joint Statement on Uniform Acceptance of Rules of International Law Governing Innocent Passage.

(5) Other Bilateral Arrangements

Other bilateral arrangements exist in the region that potentially contribute to preventing and managing incidents at sea, including joint development zones and joint or coordinated patrols in border areas.

- The Jakarta Treaty of 1982 between Indonesia and Malaysia provides Malaysia with a right of access and communication through Indonesian archipelagic waters between East and West Malaysia.
- The [Joint Coast Guard Committee on Maritime Cooperation by Philippines and China](#) was established in November 2017 to promote partnership and cooperation between these two countries in the South China Sea. It includes a Hotline Communication Mechanism.

⁸ The INCSEA Agreement between the US and the Russian Federation originated in 1972 but was updated in 1997 and 1998.

⁹ US Coast Guard and the China Coast Guard are understood to be pursuing an arrangement equivalent to Annex II of the MOU-Rules

ANNEX B - REGIONAL FORUMS

The following regional forums consider issues concerning the prevention and management of incidents at sea:

- *ARF Inter-Sessional Meeting on Maritime Security (ARF ISM on MS)*.¹⁰ The ISM on MS has developed successive ARF Work Plans for Maritime Security. These are focused on the priority areas of shared awareness and information-sharing, confidence-building measures (CBMs) based on international and regional legal frameworks, and capacity-building for maritime law enforcement.
- *ASEAN Defence Ministers Meeting Plus (ADMM-Plus) Expert Working Group on Maritime Security (EWG on MS)*. The EWG on MS is attended mainly by defence officials and naval officers but is seeking to bring in coast guard officers. It focusses on military cooperation, operational issues and confidence-building.
- *Expanded ASEAN Maritime Forum (EAMF)*. This includes all members of the East Asia Summit (EAS).¹¹ It brings into play national maritime administrations, as well as naval and coast guard officers and diplomats, to look at a full range of maritime issues. The EAS Statement on Enhancing Regional Maritime Cooperation agreed in Kuala Lumpur in November 2015 agreed to redouble its efforts to promote ‘cooperation and coordination between maritime law enforcement agencies such as among Coast Guards and other relevant agencies’.
- *Western Pacific Naval Symposium (WPNS)*. This is a major forum for naval dialogue and cooperation bringing together leaders from the navies of the Western Pacific to discuss issues of common concern.¹² The WPNS developed CUES and now has a working group considering how CUES might be extended to cover the risks of unplanned encounter between naval and coast guard vessels.
- *Indian Ocean Naval Symposium (IONS)*.¹³ IONS is a voluntary initiative that seeks to increase maritime co-operation among navies of the littoral states of the Indian Ocean Region by providing an open and inclusive forum for discussion of regionally relevant

¹⁰ Membership of the ARF comprises 27 members: the 10 ASEAN member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam), the 10 ASEAN dialogue partners (Australia, Canada, China, the European Union, India, Japan, New Zealand, the Republic of Korea, Russia and the United States), one ASEAN observer (Papua New Guinea), as well as the Democratic People’s Republic of Korea, Mongolia, Pakistan, Timor-Leste, Bangladesh and Sri Lanka.

¹¹ Membership of the EAS and EAMF comprises the ten Southeast Asian countries plus Australia, China, India, Japan, New Zealand, the Republic of Korea, Russia and the United States.

¹² Current WPNS members are: Australia, Brunei, Cambodia, Canada, Chile, China, France, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Tonga, Thailand, Singapore, the U.S. and Vietnam, as well as four observer countries — Bangladesh, India, Mexico and Pakistan.

¹³ IONS includes 23 nations that permanently hold territory that abuts or lies within the Indian Ocean, and 7 observer nations: The members are the **South Asian Littorals** (Bangladesh, India, Maldives, Pakistan, Seychelles, Sri Lanka and United Kingdom (British Indian Ocean Territory)); **West Asian Littorals** (Iran, Oman, Saudi Arabia and United Arab Emirates); **East African Littorals**: France (Reunion), Kenya, Mauritius, Mozambique, South Africa, and Tanzania; **South East Asian and Australian Littorals**: Australia, Indonesia, Myanmar, Singapore, Thailand and Timor-Leste with the following observers: China, Germany, Japan, Madagascar, Malaysia, Russia and Spain.

maritime issues. As some member countries do not have navies, its participants include some coast guards. IONS recently endorsed CUES for use between its members.

- *Heads of Asian Coast Guard Agencies Meetings (HACGAM)*.¹⁴ These meetings were established in 2004 to provide a combined regional response to piracy, but have since widened their scope to include other maritime security issues.
- *North Pacific Coast Guard Forum (NPCGF)*. This was initiated by the Japan Coast Guard in 2000 as a venue to share information on matters related to combined operations, illegal drug trafficking, maritime security, fisheries enforcement, illegal migration, and maritime domain awareness.
- *ASEAN Coast Guard Forum*. A meeting of this forum was held in the Philippines 21-22 November 2017. The Experts Group Meeting on the Establishment of the ASEAN Coast Guard Forum was held in Manila, Philippines, on 25-26 January 2018. The Forum was envisaged to provide a mechanism for dialogue and cooperation, exchanges of views and best practices, and to facilitate capacity building among regional coastguards and maritime law enforcement agencies.

¹⁴ Current HACGAM participants are: Australia, Bangladesh, Brunei, Cambodia, China, Hong Kong-China, India, Indonesia, Japan, Korea, Laos, Malaysia, Maldives, Myanmar, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Vietnam.