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AN IMPORTANT ASPECT OF CONFLICT PREVENTION, avoidance, and resolution in the international security area is illustrated by several military-to-military arrangements originally worked out between the United States and the Soviet Union (and now in force with Russia) to deal with disputes of an operational nature—those which, if not resolved, might lead to actual conflict.

During the late 1960s, a pattern of activities involving the U.S. and Soviet navies, including their associated aircraft, began to evolve that had a potential for the use of force. For example, maritime surveillance was often conducted by each side in a way that the other perceived as provocative harassment. There were instances of warships of one country maneuvering dangerously close to those of the other, pointing weapons at the other side's ships, and interfering with night vision or operations by shining searchlights upon bridges of vessels or shooting flares in their direction. Because of the proximity in which American and Soviet naval units were operating, a series of near and actual collisions occurred. These incidents in particular heightened the risk of conflict and alerted the national leaderships in both Washington and Moscow to the potentially dangerous nature of this problem, whoever had initiated it. Both sides became sobered to the severity of the situation when on 25 May 1968 a Soviet Tupolev-16 maritime patrol bomber made a low pass over the carrier USS *Essex* in the North Sea and then, turning to make another run, dipped its wing into the water. The U.S. Navy picked up the remains of the aircrew.

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I

On 10 November 1970, following something of an improvement in Soviet-American relations (as exhibited by willingness to discuss strategic arms limitations), the Soviets responded to a long-standing U.S. offer to hold talks on the subject of safety at sea. Commencing a year later, these discussions were the first direct exchanges between the two sides on naval matters since the end of the Second World War. Partly because of a relative paucity of bureaucratic experience in their foreign policy establishments with bilateral negotiations, and partly because it was obviously sensible to do so, both sides called primarily upon their armed forces to staff their negotiating teams. Thus the majority of negotiators were naval officers—representatives of the very people who would have to live under any new agreement and would be charged with making it work. Despite political tension arising from conflicts in the Middle East and Southeast Asia, the two sides held very direct and productive talks. The result, achieved in relatively little time, was a very substantive navy-to-navy agreement that was signed on 25 May 1972 at the Nixon-Brezhnev summit in Moscow—exactly four years to the day after the crash of that Soviet maritime patrol bomber.[1]

Officially known as the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, and more commonly as IncSea, the agreement contained several unusual features.[2] It provided, *inter alia*, that each side should avoid dangerous maneuvers, hindrance of navigation by dropping various objects near ships, and mock attacks simulating the use of weapons against aircraft or ships.

The Incidents at Sea Agreement also contained another then-unique feature; this was the requirement of Article IX for an annual review. Put into the agreement at the behest of the deputy chairman of the U.S. delegation, Herbert S. Okun, this provision allowed for continuing mutual contact between the two navies and enhanced to the greatest possible extent both the implementation of the agreement itself and the professional associations and interests of naval officers on both sides. The Soviet and American naval staffs and attachés each used the new channels to call attention to apparent deviations from the terms of the agreement, and for other relevant information as well. These matters were then considered at the annual reviews. Such annual review provisions are now found in, for example, many of the arms control agreements, both bilateral and multilateral, to which the sides (that is, the U.S. and Russia) are now parties.

Not long after it entered into force, the new agreement was severely tested during the 1973 October War in the Middle East. Nearly 150 U.S. and Soviet warships were crowded into the waters of the eastern Mediterranean, placing a premium on "sea room"; the atmosphere was highly charged. However, while compliance was not perfect, the agreement was effective in that major incidents did not occur and the regional crisis did not escalate into conflict between the world's two major navies.[3]

During the first half of the 1980s, relations between the United States and the USSR again became strained, and occasionally very tense. Contributing to this situation were the Soviet war in Afghanistan and the Nato deployment of Pershing II ballistic missiles and ground-launched cruise missiles in Western Europe. This period also saw a movement toward larger-scale exercises at sea and forward operations on the part of both sides. However, the Incidents at Sea Agreement, which had itself been negotiated and signed during a key phase of U.S. involvement in the Vietnam War, remained viable. With one exception noted below, the annual reviews were held regularly, and always on a low-key basis. It was the tightly focused military-to-military aspect of the agreement that allowed reviews to continue despite the political storms of the era.

The Incidents at Sea Agreement proved to be the first of a network of interlocking bilateral accords that have led to the establishment of a new operational environment for the two armed forces. These agreements have reduced tensions and enhanced mutual confidence through detailed navigational procedures designed to ensure that (other than when military, naval, or air operations are underway) each side respects the other's traditional freedoms and usages under international law. Although the Incidents at Sea Agreement was meant to address the immediate issue of navigational safety, it had the additional effect of causing the naval forces of both sides, especially those on the surface and in the air, to operate in a manner that was not only inherently safer than had been the case in the unmanaged situation that preceded it but also, as the respective forces recognized, produced an operational environment less suited to surprise attack.[4]

II

By the middle of the 1980s, relations between the two parties had again become exacerbated. Among several occurrences that significantly raised tensions was the death in March 1985 of U.S. Army Major Arthur Nicholson while on duty under the U.S.-USSR Huebner-Malinin Agreement on the territory of the German Democratic Republic. Major Nicholson was shot by a Soviet soldier who apparently believed him to have entered a denied security area. Failure to resolve this case led to deferment of the IncSea review meeting scheduled for June 1985.[5]

With the lessening of U.S.-USSR tensions from 1986 on, Soviet and American military leaders began to exchange visits outside the structure of IncSea reviews. Besides opening ports to ship visits, the military leaders informally discussed ways to reduce potentially dangerous activities. The Chairman of the Joint Chiefs, Admiral William J. Crowe, Jr., expressed concern to his counterpart about the Soviet practice of shining lasers at the cockpits of U.S. military aircraft. In addition, he shared his anxiety about the threat of terrorism to American warships, explaining the need to establish, through Notices to Mariners, special "caution" areas around American ships in certain areas. These concerns made

desirable a set of additional procedures, beyond the scope of the IncSea agreement, that would alleviate the tensions inherent in these new situations.

The sides began negotiating a new agreement to deal with such matters, and on 12 June 1989 the new U.S.-USSR Agreement on the Prevention of Dangerous Military Activities (DMA) was signed. It entered into force on 1 January 1990.[6] Like the Incidents at Sea Agreement, the DMA Agreement governs the activities and personnel of the armed forces of each side when operating in proximity to each other during peacetime. Also, and for the first time, it covered certain operations on land. Specifically, the subjects dealt with are:

- Entering the national territory of the other party either by *force majeure* or unintentionally;
- Using a laser in such a manner that it could harm personnel or damage equipment of the other party (a measure that amplifies an understanding reached through the annual IncSea review format);
- Hampering the activities of the other party in a special caution area in a manner that could harm personnel or equipment; and,
- Interfering with command and control networks in a way that could harm personnel or equipment.

Moreover, and of special interest, paragraph 2 of Article II of the agreement provides that "the parties shall take measures to ensure expeditious termination by peaceful means, without resort to the threat or use of force, of any incident which may arise as a result of dangerous military activities." Thus, the agreement deals explicitly with the need to avoid the use of force and to regulate conduct in order to reduce the risk of conflict, especially in circumstances where armed forces are operating in a state of high readiness and in proximity to each other.

Emulating IncSea still further, DMA has a plethora of procedures to implement it. Again, the rules were written by military experts whose colleagues would have to live with them and make them work. These rules are written at a judicious level of detail and include the obligation to maintain communications channels using pre-agreed call signs (in both Russian and English), as well as pre-agreed radio frequencies—leaving nothing to chance. Indeed, a novel requirement is that the parties are mutually and regularly to test communication procedures established by the agreement or subsequently under it: air-to-air, air-to-ground, air-to-sea, with military aircraft while landing, as well as others. Also, as in IncSea, the parties have provided for annual review meetings and have established a joint military commission for this purpose. Again, the emphasis is on military-to-military discussion of problems and solutions.

III

The U.S.-Soviet uniform interpretation of the rules of international law governing innocent passage is another example of agreements directly related to military operations and employed to resolve or otherwise defuse existing tensions

and avoid future conflict.[7] Its genesis was in the so-called Black Sea "bumping" incident of February 1988, when two U.S. naval vessels entered Soviet territorial waters of the Black Sea in an exercise under the U.S. Freedom of Navigation program of their right of innocent passage under international law. The American vessels were "shouldered" by two Soviet warships, to which the United States responded with a diplomatic protest. The USSR maintained at the time that its internal legislation forbidding innocent passage in this area had to be honored. It was plain to both sides, however, that the existing situation was volatile, and it became evident that a uniform interpretation of international law on innocent passage would provide the basis for a mutually acceptable resolution. Ultimately the two governments reached consensus, which they set out in a joint statement; in it the Soviet Union implicitly acknowledged that a correction to its domestic legislation and practice was due.[8]

"Thus the majority of [IncSea] negotiators were naval officers—the very people who would have to live under any new agreement and would be charged with making it work."

A number of the specific provisions of the uniform interpretation bear examination. It was agreed that the relevant rules of international law governing innocent passage of ships in the territorial sea are those of the 1982 United Nations Convention on the Law of the Sea.[9] These provide that *all* ships, including warships, and regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage through territorial seas afforded by international law. Neither prior notification to nor authorization by the coastal state is required. As to what is in accordance with international law, the 1982 convention asserts that passage must be continuous and expeditious; it also provides an exhaustive list of activities that would render the passage other than innocent. In practical terms, as now jointly reaffirmed by the U.S. and the USSR, if a coastal state questions the innocence of a particular ship's passage through its territorial waters, the state is to inform the ship of its concerns and provide it a (reasonably short) period of time to clarify its intentions or conform its conduct. If the ship is not exercising the right of innocent passage, the coastal state may require it to leave the territorial sea—the sole remedy for noncompliance.

The uniform interpretation on innocent passage resulted in a number of benefits. First, the Soviet Union gave full recognition to an international right of innocent passage by warships. Second, the Soviet Union agreed that the navigation provisions of the 1982 Convention on the Law of the Sea were controlling. And thirdly, the goal of the U.S. Freedom of Navigation program having effectively now been met, it was no longer necessary for the U.S. Navy to conduct further such operations within Soviet (and now Russian) territorial waters of the Black Sea. A letter from the U.S. secretary of state to the Soviet foreign minister stated: "Without prejudice to its rights to exercise innocent passage, the United States of America has no intentions to conduct innocent

passage with its warships in the territorial sea of the Union of Soviet Socialist Republics in the Black Sea."[10]

Thus the nations agreed on the right of innocent passage: the Soviet Union indicated its intention not to restrict it, and the United States indicated its intention not to exercise it in the Black Sea territorial waters of the USSR. This outcome has been praised as a "quiet, common sense solution to a mutual problem" that "could be applied to other problems."[11] Indeed, both sides benefited, as was true also of IncSea and DMA.

IV

During the twentieth annual Consultative Meeting between the IncSea delegations of the Russian Federation and the United States, held in Moscow in May 1992, both sides agreed that the agreement continued to play a positive role in the relationships between their navies, as well as contributing to the safety of their ships and aircraft operating near one another's. Both sides also expressed satisfaction that due to their conformity with the agreement, the number of incidents remained insignificant. In addition, the United States and Russia continued to refine and develop the special IncSea signals. Moreover, at this review, they also discussed improvements in communications, agreeing upon a new list of signals related to innocent passage through territorial waters.

It is clear that the success of these accords is not simply a matter of having brought forward into the later ones the useful approaches of the first. Rather, the three agreements, taken together, should be seen as a continuum of progress. They have been highly successful indeed: repetition of serious incidents of the types these agreements were designed to avoid has now become highly unlikely. What are the contributing factors?

- Although obviously subject to civilian control and supervision, all three accords were to a considerable extent negotiated by the cadre of military professionals who would have to implement them. Their discussions tended to be more practical and less political than those conducted in other negotiating fora.
- The focus in the negotiations was on the achievable, in a step-by-step approach; unresolved issues were set aside. The military professionals concentrated on prudential behavior, not on reducing arms or platforms.
- During times of political tensions, the annual reviews were not publicized, again downplaying the political aspect of this relationship.
- The arrangements were worked on, developed, and maintained by professionals having a stake in keeping the mechanism intact as a basis for evolving further methods of conflict and dispute avoidance.

As further testimony to the success of this process, some ten other countries now have bilateral, IncSea-type agreements with Russia. Since the emergence of Ukraine as an independent state, the United States has recognized that, as

Ukraine is a littoral state and has its own naval fleet, it also is a legal successor to IncSea.

Nevertheless, the most important IncSea-type agreement is the original one. Its usefulness as a confidence and security-building measure is evident. Its value today to the United States and Russia as a conflict-avoidance and conflict-resolution mechanism is amply proven.

Notes

1. See William H. Honan, "Mediterranean: Playing Chicken," William H. Honan, ed., *Fire When Ready, Gridley* (New York: St. Martin's Press, 1993), p. 319. For details of the negotiations, see Sean M. Lynn-Jones, "A Quiet Success for Arms Control," *International Security*, Spring 1985, pp. 154–84.

2. Text reprinted in *International Legal Materials*, v. 11, 1972, pp. 778–83.

3. Vice Admiral Leighton Smith, USN, Deputy Chief of Naval Operations (Plans, Policy & Operations), Speech to Participants in the Middle East Peace Process, U.S. Department of State, Washington, 12 May 1992.

4. As previously noted by the present author in "Measures for Strengthening Mutual Guarantees of Non-Aggression Among States," P. Stephen and B. Klimenko, eds., *International Law and International Security* (London and Armonk, N.Y.: M.E. Sharpe, 1991), p. 302.

5. *Keesing's Contemporary Archives* (1985), v. 31, p. 33928.

6. Text in *International Legal Materials*, v. 28, 1989, pp. 877–95. See further, Timothy J. Nagle, note, "The Dangerous Military Activities Agreement: Minimum Order and Superpower Relations on the World's Oceans," *Virginia Journal of International Law*, v. 31, 1990, pp. 125–44.

7. Text in *International Legal Materials*, v. 28, 1989, pp. 1444–7.

8. See further, Lawrence Juda, "Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine," *Ocean Development and International Law*, no. 1, 1990, pp. 111–16. See also William J. Aceves, "Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea," *Naval War College Review*, Spring 1993, pp. 59–79.

9. U.N. Doc. A/CONF. 62/122, reprinted in *International Legal Materials*, v. 21, 1982, pp. 1261–1354. The U.S. is a signatory but not a party to the Convention. The U.S., however, regards the navigational provisions of the Convention as being part of customary international law anyway, thus binding on both the U.S. and USSR (and its successors).

10. Eugene Carroll, "Peace Comes to the Black Sea," *Arms Control Today*, July/August 1990, p. 22.

11. *Ibid.*

Ψ

Every man thinks meanly of himself for not having been a soldier, or not having been at sea.

Samuel Johnson