Naval War College Review

Volume 41
Number 2 *Spring*

Article 6

1988

The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union

Ronald D. Neubauer
U.S. Navy

The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union

Lieutenant Commander Ronald D. Neubauer, JAGC, U.S. Navy

Five years have elapsed since the United Nations Convention on the Law of the Sea (1982 LOS Convention) was opened for signature in Jamaica on 10 December 1982.[1] Currently, over 150 nations have signed the 1982 LOS Convention, and over 30 nations have ratified it. The Convention will enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession with the Secretary-General of the United Nations.

U.S. policy regarding the 1982 LOS Convention was announced by President Reagan in his 10 March 1983 Ocean Policy Statement. The United States would not sign the 1982 LOS Convention "because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries."[2] Nevertheless, the non-seabed mining provisions of the Convention reflect customary international law, and the President committed the United States to recognize "the rights of other [coastal] states so long as the rights and freedoms of the United States and others under international law are recognized. Moreover, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight. . . ."[3]

During the Third United Nations Conference on the Law of the Sea (UNCLOS III) negotiating process, the United States and the Soviet Union pursued common interests and goals regarding freedom of navigation, including maintaining the right of innocent passage in the territorial sea.

Lieutenant Commander Neubauer is the Assistant Staff Judge Advocate for Commander, Naval Sea Systems Command. He recently served in the Office of the Judge Advocate General (International Law Division) with additional duty to the Deputy Director, Politico-Military Policy and Current Plans Division (Ocean Policy, OP-616).

International commentators widely noted that our shared goals were realized in the regime for innocent passage reflected in the 1982 LOS Convention. However, notable Soviet naval writers have recently published positions with a strong bias towards coastal State security of the "Motherland," at the expense of the maritime mobility contemplated during UNCLOS III.

This article will address the proposition put forward in the new Soviet writings on innocent passage in the territorial sea, that coastal States are entitled to limit warship innocent passage to "traditional" or other navigation routes designated by the coastal State. The analysis will begin with the innocent passage regime as reflected in the text of the 1982 LOS Convention. It will then consider the view of Soviet naval publicists, the negotiating history and general background of the innocent passage regime, and policy implications.

Text

In order to place the issue in context, we must first comprehend the basic provisions that comprise the regime of innocent passage. Article 17* recites the fundamental doctrine that "ships of all States . . . enjoy the right of innocent passage through the territorial sea." Article 18 defines "passage" as "continuous and expeditious" navigation through the territorial sea. Passage may include stopping and anchoring, but only incidental to ordinary navigation or because of *force majeure*, distress, or rendering assistance to those in danger or distress.

Article 19 defines the meaning of "innocent passage." First, "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." This formulation creates a presumption that passage is innocent unless otherwise demonstrated. Next follows a list of *objectively defined activities* which, if engaged in, shall be considered to be "prejudicial to the peace, good order or security of the coastal state," in other words, non-innocent:

- any threat or use of force against the coastal State;
- any exercise or practice with weapons;
- collection of information to the prejudice of the defense or security of the coastal State;
- any act of propaganda;
- launching, landing, or taking on board any aircraft or military device;
- "loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State";
- willful and serious pollution;

*Unless otherwise specified, references to "Articles" refer to the articles of the 1982 LOS Convention.

- any fishing activity;
- any research or survey activity;
- interfering with communications or other facilities; and
- "any other activity not having a direct bearing on passage."

Article 21 specifies matters as to which the coastal State "may adopt laws and regulations . . . relating to innocent passage. . . ." Among these are "the safety of navigation and the regulation of maritime traffic." Foreign ships exercising the right of innocent passage are required to comply with such coastal State laws and regulations and with generally accepted international regulations relating to the prevention of collisions at sea. Article 22 authorizes a coastal State to, "*where necessary having regard to the safety of navigation*, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships." (Emphasis added.)

Article 24 provides that the "coastal State shall not hamper the innocent passage of foreign ships through the territorial sea" or "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage" or "discriminate in form or in fact against the ships of any State. . . ."

Under Article 25, the "coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." Additionally, the coastal State may, "without discrimination in form or in fact among foreign ships, suspend *temporarily* in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. . . ." (Emphasis added.)

Finally, Article 30 provides that, "[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."

Thus, except for sea-lanes and traffic separation schemes *necessary* to the safety of navigation, the text of the 1982 LOS Convention does not authorize coastal States to limit the passage of ships, whether warships or merchantmen, to traditional or other specifically designated navigation routes. It is also important to note that the innocent passage regime does not authorize coastal States to condition innocent passage for warships on any type of prior notification or permission.

Position of Soviet Naval Writers

The current thinking of some Soviet writers is reflected in a recent article by Captain 1st Rank R. Sorokin, *Innocent Passage of Warships Through Territorial*

Waters.[4] Captain Sorokin repeats the generally accepted view that the regime of innocent passage is intended to strike a balance between the need for maritime mobility and the need for coastal State security. He rejects an interpretation that would permit coastal States to require prior notification or authorization for warships but argues that warships may be restricted to selected routes.

Perhaps because it lacks a sound basis in either practice or the 1982 LOS Convention text, Captain Sorokin's rationale in support of a right of the coastal State to restrict innocent passage to designated routes is a bit difficult to follow. In a nutshell, however, he seems to argue that since innocent passage exists solely to enable passage through the territorial sea, the coastal State may require that such passage, particularly for warships, take place only along the most direct routes that have traditionally been used for international navigation. He then argues further that by conforming to the designated routes within the territorial sea, foreign warships may unequivocally demonstrate that their passage is "innocent."

These arguments, however, lack legal foundation. Nowhere does the 1982 LOS Convention declare that innocent passage must be limited to the shortest possible routes. Furthermore, as noted above, Articles 21 and 22 give the coastal State the authority to establish sea-lanes and traffic separation schemes in its territorial sea only insofar as necessary to ensure navigational safety. The coastal State is *not* empowered to establish sea-lanes solely under the guise of "security."

From the proposition that a ship conforming to designated routes "confirms that she is engaged in innocent passage and has not intruded into territorial waters,"[5] Captain Sorokin then leaps to his fundamental conclusion: "Thus the innocent passage of warships through territorial waters can be viewed as a traversing of territorial waters of the coastal state over the shortest traditional international shipping lanes or over routes established by the coastal state (along recommended courses, lanes, or traffic separation schemes) especially designated for the innocent passage of foreign ships, while complying with legislation of the coastal state and provisions of the 1982 UN Convention on the Law of the Sea."[6]

It is not entirely clear whether Captain Sorokin believes that, as a matter of international law, warship innocent passage can only occur along the shortest international routes or specifically designated routes, or whether he believes that the coastal State may lawfully restrict warship innocent passage to such routes. Whatever the precise rationale, he clearly argues that where a coastal State has designated such routes, a warship may not exercise innocent passage outside them.

The U.S.S.R. has enacted domestic law consistent with this position. Article 13 of the Law of the Union of Soviet Socialist Republics on the State Frontier of the U.S.S.R. of 24 November 1982 provides: "Foreign warships

and underwater vehicles shall enjoy the right of iunocent passage through the territorial waters (territorial sea) of the USSR in accordance with the procedure to be established by the Council of Ministers of the USSR."[7]

The Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) and Inrernal Waters and Ports of the U.S.S.R., approved by the U.S.S.R. Council of Ministers decree of 28 April 1983, enumerates the routes permitted for warships not entering internal waters and ports of rhe U.S.S.R. Article 12.1 of those Rules provides: "The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without enrering internal waters and ports of the USSR shall be permitted along routes ordinarily used for international navigation:

- in the Baltic Sea: according to the traffic separation systems in the area of the Kypu Peninsula (Hiiumaa Island) and in the area of the Porkkala Lighthouse;
- in the Sea of Okhotsk: according to the traffic separation schemes in the areas of the Cape Aniva (Sakhalin Island) and the Fourth Kurile strait; (Paramushir and Makanrushi Islands);
- in the sea of Japan: according to the traffic separation system in the area of Cape Kril'on (Sakhalin Island)."[8]

Thus, along the enormous Soviet coastline, only these several areas are open to innocent passage for warships.

Negotiating History

There is no rule of customary international law to the effect that coastal States may limit innocent passage of warships to traditional or other designated navigation routes. The 1958 Convention on the Territorial Sea and the Contiguous Zone contains no such provision.[9] None of the Official Drafts preceding the 1982 LOS Convention had a rule to that effect. Even the Soviet Draft Articles on the Territorial Sea (Soviet Draft) did not include such a rule. In fact, the Soviet Draft articles on innocent passage were nearly identical in structure and substance to those finally adopted in the Convention.[10]

Like the 1982 LOS Convention, the Soviet Draft provided that coastal States may adopt laws and regulations for safety of navigation (Soviet Draft, Article 20) and, where *navigational conditions* make it desirable, establish traffic separation schemes (Soviet Draft, Article 21). The Soviet Draft also contained the provision that coastal States "shall not hamper innocent passage through the territorial sea or discriminate amongst foreign ships in respect of such passage." (Soviet Draft, Article 18.)

The notion that coastal States should have the right to limit warship passage to traditional or other designated navigation routes was contained within a proposal advanced by Mr. Roe, a representative of the Republic of Korea, at an UNCLOS III committee meeting on innocent passage in the

territorial sea. Mr. Roe stated: "[T]he passage of warships through a territorial sea which did not constitute a necessary and important route for international navigation should be differentiated from the passage of other types of vessel [sic]. A coastal State should have the right to require foreign warships passing through its territorial sea to give prior notification of that passage or to obtain prior authorization for it."[11] The proposal regarding warship passage through "necessary and important routes" received little discussion and was of no consequence at UNCLOS III. However, there was intermittent discussion of the larger issue as to whether a coastal State could require prior notification or authorization for warship innocent passage. Due largely to opposition from the United States *and the Soviet Union*, however, no provision to that effect found its way into the 1982 LOS Convention or any of the preceding Official Drafts.

A final germane point from the negotiating history was made by Mr.Olszowka, representing Poland, which was a cosponsor of the Soviet Draft. At a meeting on innocent passage Mr. Olszowka stated that "all the acts which were to be incompatible with the right of innocent passage were specified in Article 16, paragraph 2 [subsequently numbered Article 19.2]."[12] This view, which coincides with that of the United States, supports the interpretation of the 1982 LOS Convention that not all conduct in violation of coastal State law or regulation is non-innocent; to be non-innocent, the activity must be proscribed in Article 19. Further, it confirms that the determination under international law of whether passage is "innocent" depends entirely upon the activities of the vessel, *not* upon its status (e.g., warships) nor whether its route happens to be one ordinarily used for international navigation.

Policy Implications

The principal policy task for UNCLOS III regarding the territorial sea regime was to achieve a reasonable balance between two legitimate and vital competing needs: freedom of navigation, an inclusive community interest; and coastal State security, an exclusive community interest. The Conference produced a workable compromise between these interests, which was accepted, in the form of the innocent passage rules, by international consensus. Fidelity to international law, such as the law of the sea, promotes peaceful and orderly relations between States. Accordingly, peace and order are imperiled when nations take actions or impose regulations that are inconsistent with the internationally accepted norms. This is especially so where, as here, the rule unilaterally imposed by the Soviet Union has only recently been rejected by international consensus, and the circumstances in which the rule was rejected have not materially changed.

A major goal of the innocent passage regime, as with any rule of international law, is to minimize the potential for dispute. Accordingly, the rules for innocent passage were designed to be objective, written in language resistant to divergent interpretations. The regime of innocent passage in the 1982 LOS Convention embodies the policy that all passage, including that of warships, is presumed to be innocent. The burden is on the coastal State to show non-innocence in accordance with the relatively specific, objective criteria in Article 19. The finite list of activities in Article 19 makes certain the categories of non-innocent activity. A warship may only be required to leave the territorial sea if her passage is non-innocent under Article 19, thus preventing coastal States from using violation of any variety of law or regulation as an excuse to require warships to leave the territorial sea. To further minimize the potential for conflict, coastal States may not hamper innocent passage, impose requirements that have the practical effect of denying or impairing innocent passage, or administer innocent passage in a discriminatory manner.

Evaluation and Conclusion

The essential characteristic of the territorial sea regime is that "ships of all States . . . enjoy the right of innocent passage through the territorial sea."[13] The Soviet view—where there are no designated routes there is no innocent passage for warships—has no basis in customary international law, and is a gross departure from the principles supported by the United States and the Soviet Union and accepted by UNCLOS III. Attempts to restrict foreign warships to a few designated routes unlawfully hamper—indeed, can all but preclude—innocent passage. Exercise of the right of innocent passage reflected in the 1982 LOS Convention by sailing outside Soviet-designated routes does not render the passage non-innocent, and would not, therefore, justify an order to the vessel to leave the territorial sea.

The device of restricting warship innocent passage in the territorial sea to a few designated routes is a transparent effort to circumvent the balance achieved during UNCLOS III between coastal State security and freedom of navigation. It is disturbing that Soviet writers are advocating a position contrary to this balance of interests which was supported by the Soviet Union throughout UNCLOS III. The precedential effect of this position should not be ignored. It would provide incentive to other States in their attempts to impose precisely the kind of prior notification or authorization requirements which were rejected at UNCLOS III. As was so aptly put by Professor John Norton Moore, a prominent international law authority: "[T]he costs associated with any failure to recognize freedom of navigation . . . will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be

eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation. . . ."[14]

Although purporting to penetrate the mentality of Soviet writers may be risky business, in this instance their motivation appears plain: to curtail general access of foreign warships to the Motherland's territorial sea. The Soviet publicists are attempting to construct an argument which will enable them to reap the benefits of the navigational principles enshrined in the 1982 LOS Convention for the Motherland's blue-water navy, while severely restricting navigational rights for foreign warships in the Motherland's territorial sea. This continued Soviet insistence upon coastalist principles at home and navigationalist principles abroad carries with it the potential for confrontation that does not bode well for the international regime of the oceans.

Notes

1. Opened for signature 10 December 1982, reprinted in United Nations Conference on the Law of the Sea, *United Nations Convention on the Law of the Sea*, U.N. pub. sales no. E.83 V.5 (1983).

2. U.S. President, "Statement on United States Ocean Policy," *Weekly Compilation of Presidential Documents*, 10 March 1983, no. 383.

3. *Ibid.*

4. See R. Sorokin, "Innocent Passage of Warships Through Territorial Waters," *Morskoi sbornik*, no. 3, 1986.

5. *Ibid.*, p. 75.

6. *Ibid.*

7. Vedomosti S.S.S.R., no. 48, 1982, item 891, translated in William E. Butler, ed., *Collected Legislation of the USSR and Constituent Union Republics* (Dobbs Ferry, N.Y.: Oceana Publications, 1979), and William E. Butler, ed., *The USSR, Eastern Europe, and the Development of the Law of the Sea*, (New York: Oceana Publications, 1983); for a detailed analysis of Soviet law relating to innocent passage in the territorial sea, see William E. Butler, "Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy," *American Journal of International Law*, v. 81, 1987, p. 331; for an examination of the development of Soviet law of the sea policy, including innocent passage in the territorial sea, see Anthony P. Allison, "The Soviet Union and UNCLOS III: Pragmatism and Policy Evolution," *Ocean Development and International Law*, v. 16, 1986, p. 109.

8. *International Legal Materials*, v. 24, 1985, pp. 1715, 1717.

9. U.S. Treaties, etc., "Convention on the Territorial Sea and the Contiguous Zone," done 29 April 1958, v. 15, UST 1606, TIAS 5639.

10. United Nations Third Conference on the Law of the Sea, Vol. 3, U.N. Doc. A/C.62/C.2/L.26, U.N. pub. sales no. E.75.V.5 (1975), p. 203.

11. United Nations Third Conference on the Law of the Sea, Vol. 2, U.N. pub. sales no. E.75.V.4 (1975), p. 110.

12. *Ibid.*, p. 290.

13. 1982 United Nations Convention on the Law of the Sea, Article 17, U.N. pub. sales no. E.83.V.5 (1983).

14. John Norton Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," *American Journal of International Law*, v. 74, 1980, pp. 77, 79.

Ψ