Innocent passage of warships

Recent developments in US–Soviet relations

Erik Franckx

Late in 1989 the USSR and the USA harmonized their positions with respect to the innocent passage of warships through the territorial sea. In the past, their respective positions had always been diametrically opposed to one another. Since UNCLOS II the USSR had been a staunch supporter of a prior authorization regime. Even though the USSR changed its theoretical position on the subject during the first sessions of UNCLOS III, it was not until the conclusion of this 1989 agreement that the USSR fully recognized the practical implications of such a position along its own coast.

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Relations between the USSR and the USA have improved considerably recently. A good example of this new tendency towards cooperation can be found in the attitude of both parties with respect to the innocent passage of warships through the territorial sea. This is one of those problems of international law which has never received a clear-cut answer, neither in treaty nor customary law, and the USSR and the USA have been in constant disagreement on this point ever since codification required States to clarify their positions. This fundamental disagreement, which has lingered on for many years and recently even took on the form of a direct, albeit very limited, military confrontation, was settled recently by agreement. Although parties had been meeting regularly since 1986 in order to discuss the full range of law of the sea issues, these direct confrontations over the issue of innocent passage caused the discussion to focus on this issue. This article analyses and summarizes this evolution in order to focus on the newly reached agreement. Following a description of the issue and the positions taken by the parties, the 1989 Joint Statement is discussed, and the so-called Uniform Interpretation is annexed thereto. Finally, comments are made with respect to the changes in relevant Soviet national legislation.

Introduction

The positions of the USSR and the USA concerning the innocent passage of warships through the territorial sea have not always been consistent over the years. To illustrate this point it will suffice to compare the positions held by these countries during the Hague Codification Conference (13 March–13 April 1930) on the one hand, and the First UN Conference on the Law of the Sea (UNCLOS I, Geneva, 28 February–28 April 1958) on the other.

The Preparatory Committee, established by the Council of the League of Nations in order to provide the 1930 conference with a draft
text, distributed a questionnaire among States in which the question was raised whether warships enjoyed a right of innocent passage in the territorial sea. The USSR informed the Preparatory Committee that warships did have a legal right of innocent passage through territorial waters; the USA on the other hand made it clear that in its opinion warships required authorization by the coastal State before entering its territorial waters. At that time these positions were moreover clearly reflected in the respective Soviet and US state practice and legal writings.

The USSR was the first country to reverse categorically and officially its position on the subject. During the Seventh Session of the International Law Commission in 1955 Mr Krylov, the Soviet member, stated that there was a considerable measure of agreement that, whereas merchant vessels had a right to passage, warships required prior authorization because ‘they threaten’. This position was confirmed by the government representative during the conference itself.

The USA on the other hand only changed course during the conference itself, once again taking the opposite view from the USSR. According to the US representative, coastal States needed no greater protection than the one supplied by the definition of ‘innocent’ and the USA therefore favoured the deletion of the whole article concerning the right of innocent passage of warships. This meant that as long as the passage of warships was innocent, warships should receive the same treatment as merchant ships.

The position of both countries, therefore, is not only characterized by a lack of consistency, but also by the fact that both countries always found themselves in the opposite camp.

During the UNCLOS III negotiations (3 December 1972–10 December 1982) a fundamental policy revision by the USSR apparently implied that, for the first time in history, both countries would be standing on the same side of the line. This new Soviet policy review reflected the spectacular transformation of the USSR into a leading maritime power by the end of the 1960s and early 1970s. As a result, the interests of the USSR became very similar to those of other maritime powers, such as the USA, leading O’Connell in 1975 to the conclusion: ‘(I)t is logical to suppose that the Soviet navy has gone cold on the notion that warships may not transit the territorial sea without previous permission.’

Nevertheless, internal legislation enacted in 1983 on this topic, which was intended to incorporate this new position into Soviet law, remained rather ambiguous. The USA tested the new Soviet position for the first time in practice in 1986 in its Freedom of Navigation Program, started during the Carter administration. Two navy ships, the USS Yorktown and USS Caron entered Soviet territorial waters off the Crimea peninsula on 13 March 1986. The USSR reacted strongly to this action, which it labelled ‘demonstrative, aggressive and provocative’. A clear-cut answer on the legal grounds on which the alleged violation was based, however, was not provided.

A political flashback occurred two years later. On 12 February 1988 the same US Navy ships were sent to the same region for the same purpose. This time, however, the Soviet ships bumped the US vessels, No personnel casualties occurred and only minor superficial damage was reported on both sides. Another factor which distinguishes the 1988 incident from the 1986 one, and of more importance here, is that this
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10Detailed accounts of this incident are given in the Soviet press (Izvestiia, 23 March 1986, p 3, cols 9–7) and by W. Butler, op cit, Ref 10, pp 343–346 as well as C. Rousseau, ‘Chronique des faits internationaux’, Études Géopolitique, 1986 pp 625, 657–658. According to sources cited in these works, it was not the first time that the US had instructed its ships on a similar mission. The latter was also stressed in the note of protest delivered to the US embassy in Moscow on the occasion of this incident. See TASS report published in Izvestiia, 19 March 1986, p 4, col 8. Apparently, only the 1986 incident received attention in the press.


12This section is based on the accounts which appeared in the Izvestiia, 14 February 1988, p 4, cols 1–4 and on the International Herald Tribune, 15–14 February 1988, p 1, cols 4–7 and p 5, col 4. A similar article by the same author, G. Wilson, appeared in the Washington Post, 13 February, where he is a staff writer. Even the television news covered the incident by means of images made by hidden video cameras on board the US ships.


14In other words, passage for the purpose of traversing the territorial waters without continued on p 487

time Soviet authorities provided a straightforward juridical argument: ‘As far as the right of innocent passage is concerned, the following has to be elucidated: According to existing Soviet rules, foreign warships only enjoy such right in places where sea lanes for international navigation are established. The configuration of the USSR coast is such that sea routes of this kind only pass in three places: In the Baltic Sea and the Seas of Okhotsk and Japan. In the Black Sea there are no such designated sea lanes. This the American official authorities and commandants of warships are well informed about and know it.’

The crux of the problem proved to be Article 12(1) of the 1983 Rules, where one can read that lateral innocent passage is permitted by way of sea lanes, customarily used for international navigation: in the . . . followed by an enumeration of five such traffic separation schemes. Since 1988 it has become clear that the USSR officially endorsed the most restrictive interpretation one could possibly give to this provision, ie that the enumeration is exhaustive and that, if no sea lanes are provided for in a certain region, no innocent passage will be tolerated there.

As a result, even though one could have expected a merger of Soviet and US positions after UNCLOS III, this did not happen, at least not immediately. During the post-UNCLOS III period the USSR took a very peculiar official position, almost annihilating the right of innocent passage for foreign warships off its own coast. Or, as a Chinese commentator correctly observed in 1989: ‘The Soviet concept of the right of innocent passage of warships is not the same as that of the Western powers.’

Joint statement of 1989

After a long period of disagreement, as illustrated above, both parties finally issued a joint statement on the issue on 23 September 1989 indicating that from now on they would defend a common point of view on this matter. During a two-day meeting held in Jackson Hole (a remote town in Wyoming, USA), which is said to have ‘presented the greatest logistical challenge of any ministerial conference in US history’, Soviet Foreign Minister E. Shevardnadze and US Secretary of State J. Baker formally declared that they recognized the need to encourage States to harmonize their internal laws, regulations and practices with the provisions of the 1982 United Nations Convention on the Law of the Sea (the LOS Convention). This by itself is not independent, for the USSR apparently recognizes the navigation provisions of the LOS Convention as reflecting customary international law, independent of arguments about signature and ratification. The joint statement subsequently turns to the issue of innocent passage: both parties (1) considered it useful to issue a ‘Uniform Interpretation of the Rules of International Law Governing Innocent Passage’, and (2) agreed to take the necessary steps to conform their internal legislation with this understanding.

Uniform Interpretation of 1989

In eight points both sides clarify the fundamental issues at stake, which led to the open confrontations of 1986 and 1988. First, it is agreed that the applicable rules governing innocent passage are to be found in the
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putting in to internal waters of the coastal State.

*About the different possible interpretations to be given to this particular provision, see E. Franckx, 'Non-Soviet shipping in the northeast passage and the legal status of Priliv Vil'kitskogo', Polar Records, Vol 24, 1988, pp 269, 272-273, where the application of Article 12(1) to Vil'kitski Strait, located on the Soviet Arctic coast, is commented upon. It is remarkable that Bulgaria, which enacted legislation concerning its ocean space in 1987, included a similar ambiguous provision which stated that all ships (warships are not treated separately under the heading 'Territorial Sea') exercising the right of innocent passage must use established sea lanes, traffic separation schemes, navigable channels and recommended sea lanes... [Emphasis added]. Act of 8 July 1987 Governing the Ocean Space of the People's Republic of Bulgaria. English translation provided in Law of the Sea Bulletin, Vol 13, May 1989, p 8, 12 which also allows for different interpretations.


*Update From State, November-December 1989, p 1. This is a bimonthly publication of the US Department of State.

**The text of this Uniform Interpretation is reproduced as Appendix 2.

This element is further developed in the section on new Soviet internal legislation below.

(A)ny other activity not having a direct bearing on passage.

**An English translation, kindly provided by the US Department of Defense, is reproduced as Appendix 3.

LOS Convention (point 1). All ships, including warships, enjoy a right of innocent passage without prior notification or authorization (point 2). Since part of the Soviet arguments after the two incidents mentioned above concerned the alleged non-innocent character of the passage (reference was made on more than one occasion to the intelligence gathering capabilities of both vessels), points 3 and 4 elaborate on this provision of the 1982 Convention. Because Article 19(2) constitutes an exhaustive enumeration, it is argued, all ships passing through the territorial sea and not engaged in any of the activities listed there are to be considered to be in innocent passage. This appears to be a rather weak argument, for subsection (1) of Article 19(2) is an open-ended category which prevents the enumeration from becoming exhaustive as to its content. Of more practical value, however, is the requirement of the coastal State to inform the ship in question of the reason why the innocent character of the passage is questioned. It moreover has to provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

Points 5 and 6 relate to the laws and regulations which coastal States may adopt in accordance with international law in general, but focused on the problem of sea lanes and traffic separation schemes, which formed the centre of the dispute between parties as demonstrated above. The coastal State, according to the Uniform Interpretation, is allowed to prescribe the use of sea lanes and traffic separation schemes if needed to protect the safety of navigation. It furthermore elucidates this rule by providing: 'In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage'. In this respect Article 24 of the LOS Convention is stressed where it states that such laws and regulations may moreover not have the practical effect of denying or impairing the exercise of the right of innocent passage. It is submitted that this joint clarification of the impact of sea lanes and traffic separation schemes on the issue of innocent passage of warships solved the very substance of the dispute which existed between parties after UNCLOS III.

Point 7 refers to Article 30 of the LOS Convention and reformulates its main thrust. If a warship disregards the laws and regulations enacted by the coastal State in this respect or, as added by this point 7, renders its passage non-innocent, and does not respond to a request for compliance therewith, it may be required to leave the territorial sea immediately.

Since, in this time of improved relations between the USSR and the USA, the use of force to settle common disputes has become anachronistic, the Uniform Interpretation ends with the statement that all differences concerning the application of these rules on innocent passage 'shall be settled through diplomatic channels or agreed means'. Read together with the elucidation of the sea lanes and traffic separation schemes, this eighth and final point reduces the chances of another bumping incident in the future.

New Soviet internal legislation

A few days before the high level meeting between Baker and Shevardnadze took place in Jackson Hole, the Soviet Council of Ministers had enacted a Resolution in which it accepted the proposal of the Soviet Ministry of Foreign Affairs, Ministry of Defence and State Security
Concerning the changes in accordance with the 1989 Joint Statement, see Izvesheniia Morepolavateliam No. 9973 (1989). See also the appendix to no 1 of the same publication of 1986, as updated on 70 March 1990, p 71 insert. This new drafting, which totally corresponds to the text proposed by the decree of the Council of Ministers of 20 September 1989 (see appendix 3), entered into force on 23 September 1989.

All these countries made a similar reservation to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone in which they asserted the coastal State's power to establish a procedure of authorization for the passage of foreign warships. Of these countries only Romania made a declaration upon signature of the LOS Convention, implying that it belonged to the group of states which favoured prior authorization and notification, procedures which it thought to be in accordance with the text of the Convention. See The Law of the Sea: Status of the United Nations Convention on the law of the Sea, Office of the Special Representative of the Secretary-General for the Law of the Sea, UN Sales Nu E.85.V.5, United Nations, New York, 1985, p 23.


Committee to sign a joint statement with the USA enclosing a ‘Uniform Interpretation’ as appendix.

This Resolution also incorporated a redraft of Article 12(1) of the 1983 Rules, which no longer includes the provision that sea lanes, prescribed for foreign warships, have to be customarily used for international navigation. Also the enumeration of five traffic separation schemes was omitted. The new version of Article 12(1) reads: ‘Foreign warships in innocent passage through territorial waters (the territorial sea) of the USSR for the purpose of traversing the territorial waters (the territorial sea) of the USSR without entering into internal waters or calling at ports of the USSR, use sea lanes or traffic separation schemes in those areas where they are designated or prescribed’.

According to this new Resolution, Article 12 in its new form enters into force on the day the USSR and the USA exchange letters. The last sentence of the 1989 Joint Statement, as a consequence, was already complied with to a great extent at the time of signature on 23 September.

As was the case with the 1983 Rules, no publication appeared in the Official Gazette. One had to turn, therefore, once again, to the Soviet Notices to Mariners to find the official text of the amendment. Eventually the Svod Zakonov, the comprehensive Soviet Code of Laws, will also have to be amended in this respect.

Conclusions

The USSR and the USA have finally harmonized their positions on the delicate issue of innocent passage of warships. The full recognition of an international right of innocent passage for warships certainly has major implications for the USSR. Not only did the USSR have to bring its internal legislation into line with this new position – as it had already done twice in the past, once in 1960 and again in 1983 – the writings of Soviet scholars, which started more and more to adhere to the official government position as reflected in state practice, especially after the last Black Sea incident, by introducing far-reaching restrictions on foreign warships relating to the Soviet coastline, will have to be reconsidered.

Besides the USSR itself, this agreement may well influence the position of the Soviet allies, which all took an identical position after UNCLOS I and, with the exception of Romania, also after UNCLOS III. Apparently Poland is intending to change its national legislation in a similar manner. The restrictive analysis of the right of innocent passage of warships, as included in the multi-volume series The World Ocean and International Law, which represents an authoritative elucidation of the socialist interpretation of the LOS Convention, may as a consequence have become outdated less than two years after its publication.

With the USSR and the USA, two major seafaring States, defending the same position, the question can be raised whether the momentum gained by this agreement will finally result in the general acceptance of the right of warship innocent passage by the international community as a whole. It is noteworthy in this respect to pay particular attention to the peculiar drafting of the last Report of the Secretary-General on the Law of the Sea. Reference is made to this 1989 Joint Statement and 1989 Uniform Interpretation, but only two passages are incorporated in full.
Because of the deadlock which existed, the President of the Conference obtained, not without effort, that the proposal asking for incorporation of 'prior authorization and notification' into the Convention was withdrawn by its authors. In return, a statement was read in plenary in which the sponsors of the document underlined that their decision did not prejudice the right of coastal States to take measures to protect their security in accordance with articles 19 and 25 of the Convention.


Appendix 1

Joint Statement by the United States of America and the Union of Soviet Socialist Republics

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.

The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices with those provisions.

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

FOR THE UNITED STATES OF AMERICA:

Signed by J. Baker,
US Secretary of State
Jackson Hole, Wyoming, September 23, 1989

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:

Signed by E. Shevardnadze,
Soviet Foreign Minister

Appendix 2

Uniform Interpretation of Rules of International Law Governing Innocent Passage


2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide
the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

'Text kindly provided by the US Department of Defense.'

Appendix 3

Resolution of 20 September, 1989
No. 759 Concerning the Soviet-US Accord on the Question of Innocent Passage of Vessels, including Warships, through Territorial Waters¹

The Council of Ministers of the USSR resolves:

1. To accept the proposal of the Ministry of Foreign Affairs of the USSR, agreed upon with the Ministry of Defense of the USSR and the USSR State Security Committee concerning signature of a joint statement by the Union of Soviet Socialist Republics and the United States of America with the attached uniform interpretation of the rules of international law governing innocent passage and an exchange of letters between the USSR and the USA on this question, and to present them ad referendum to the Presidium of the Supreme Soviet of the USSR.

The draft of the Resolution of the Presidium of the Supreme Soviet of the USSR on this question is attached.

2. To publish the title and Article 12, paragraph 1 ‘Rules of navigation and presence of foreign warships in the territorial waters (territorial sea) of the USSR, the internal waters and ports of the USSR,’ confirmed by Resolution No. 384 of the USSR Council of Ministers of 28 April, 1983, in the following form:


1. Foreign warships in innocent passage through territorial waters (the territorial sea) of the USSR for the purpose of traversing the territorial waters (the territorial sea) of the USSR without entering into internal waters or calling at ports of the USSR, use sea lanes or traffic separation schemes in those areas where they are designated or prescribed.’

3. To establish that the cited Article 12, paragraph 1 ‘Rules of navigation and presence of foreign warships in the territorial waters (territorial sea) of the USSR, the internal waters and ports of the USSR’ in the new form shall enter into force from the day the USSR and US exchange letters, that are an integral part of the Soviet-American package accord on the innocent passage of ships, including warships through territorial waters.

To permit the MFA of the USSR to transmit the text of this resolution to the US side prior to exchange of the indicated letters between the USSR and the US.

4. To instruct the Ministry of Defense of the USSR and the USSR State Security Committee, together with the Ministry of Foreign Affairs of the USSR, to work out with US military experts signals for contact by the authorities of one party with a warship of the other party, if these authorities believe that the ship’s passage is not innocent.

Chairman of the USSR Council of Ministers,
N. Rishkov

Chief of Staff, USSR Council of Ministers,
M. Shkabardnya

¹English translation kindly provided by US Department of Defense.