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24 Navigational Rights and Freedoms

Yoshifumi Tanaka

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Edited By: Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens

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The coastal State may 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.²⁶ At the same time, the coastal State is under the obligation to clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given.²⁷

Further, the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.²⁸ While this provision does not specify the necessary steps, they could include requesting an offending ship to stop certain conduct, requesting a ship to leave the territorial sea, and the intervention of State authorities to board and exclude the ship from its territorial sea, and so on.²⁹ In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.³⁰ Concerning the preservation of the environment of the coastal State, in particular, Article 220(2) of the LOSC clearly provides that where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has violated laws and regulations of that State during its passage therein, the coastal State may undertake physical inspection of the vessel relating to the violation, and may, where the evidence so warrants, institute proceedings, including detention of the vessel.

Article 27 of the LOSC provides for the criminal jurisdiction of the coastal State in its territorial sea. Where a crime had been committed before the ship entered the territorial sea and the ship is only passing through the territorial sea without entering internal waters, however, the coastal State may not exercise criminal jurisdiction over the ship.³¹ This is a mandatory prohibition on the exercise of the criminal jurisdiction of the coastal State in the territorial sea.

(p. 545) Under Article 28(1) of the LOSC, 'the coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship'. The term 'should not' seems to suggest that the restriction of the civil jurisdiction is a matter of comity.³² Under Article 28(2), the coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State. However, Article 28(2) is not applicable to inward/outward-bound navigation.³³

2.4 The right of innocent passage of foreign warships

The right of innocent passage of foreign warships is one of the most contentious issues concerning navigational rights. On the one hand, this right is of paramount importance for major naval powers in order to secure global naval mobility. On the other hand, the passage of foreign warships through the territorial sea may be a threat to the security of the coastal State. These two groups of States thus have different views as to whether or not foreign warships have the right of innocent passage in international law.

The right of innocent passage of foreign warships was at issue in the 1949 *Corfu Channel* case. Albania asserted that it could regulate the passage of foreign warships in its territorial waters. In contrast, the United Kingdom maintained that warships possess a right of innocent passage through the territorial sea of another State. While the ICJ accepted the right of innocent passage of foreign warships in straits used for international navigation, it did not directly address the question whether foreign warships have the same right of

innocent passage in the territorial sea.³⁴ It may have to be accepted that customary international law is obscure on this subject.

The Territorial Sea Convention contains no provision relating to the right of innocent passage of foreign warships.³⁵ Likewise the LOSC contains no explicit provision on this particular issue. Nonetheless, three points must be noted. First, Article 17 of the LOSC, which provides the right of innocent passage, is under the rubric 'Rules Applicable to All Ships'. It can be presumed, therefore, that Article 17 is (p. 546) applicable to all ships, including warships. Second, Article 20 requires submarines and other underwater vehicles to navigate on the surface and to show their flag in the territorial sea. Third, Article 19(2) sets out a catalogue of activities which render passage non-innocent. Some of these activities, such as any exercise or practice with weapons, the take-off or landing of aircraft, and the launching or receiving of any military device, relate specifically, if not exclusively, to warships. All in all, those provisions suggest that warships have the right of innocent passage.³⁶

On the other hand, State practice is sharply divided on this subject. Some 40 States, mainly developing States, require prior notification or prior authorization of the passage of warships through their territorial sea.³⁷ By way of example, upon ratification of the LOSC in 1996, the People's Republic of China declared as follows:

The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.

Article 6 of Chinese Law on the Territorial Sea and the Contiguous Zone of 25 February 1992 stipulates that: 'To enter the territorial sea of the People's Republic of China, foreign military ships must obtain permission from the Government of the People's Republic of China'.³⁸

Some other States, such as Germany, Italy, the Netherlands and the United Kingdom, expressed the view that claims to prior authorization and prior notification are at variance with the LOSC. The United States has also protested against the claims to both prior authorization and prior notification.³⁹ In this regard, it is of particular interest to note that paragraph 2 of the 1989 Uniform Interpretation of (p. 547) the Rules of International Law Governing Innocent Passage between the USA and the USSR states that:

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 authorisation is required.

While the Uniform Interpretation applies only to these two States, the influence of these two naval powers cannot be neglected politically.

In approaching the question as to whether prior notification or prior authorization is compatible with the LOSC, a distinction must be drawn between the requirement of prior notification and that of prior authorization. There may be some scope to argue that the requirement of prior notification could fall within the scope of Article 21(1)(a) of the LOSC which allows the coastal State to adopt laws and regulations in respect of the safety of navigation and the regulation of maritime traffic.⁴⁰ If this is the case, the right of innocent passage of foreign warships and the requirement of prior notification by the coastal State