

Innocent Passage of Warships

International Law and the Practice of East Asian Littoral States

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Abstract

The United Nations Convention on the Law of the Sea (LOSC) is well known as the “Constitution for the Oceans”; however, the passage of foreign warships through the territorial sea of a coastal State is not clearly addressed. All East Asian littoral States (except North Korea and Cambodia) are parties to the LOSC but their practices regarding the innocent passage of warships are different. This article provides an analysis of the innocent passage regime of the LOSC, the practice of East Asian littoral States regarding the innocent passage of warships as well as factors that have influenced the trends in their practices.

Keywords

East Asian – law of the sea – territorial sea – innocent passage – warships

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by customary international law as affirmed in the Preamble of the LOSC: "Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."²⁰ However, customary international law also does not provide a clear answer on this debate. The doctrine of innocent passage for warships has long been one of the most controversial issues in the recent history of international law. There have been neither written agreements nor uniformity in State practice in the past 100 years.²¹ At the 1930 Hague Codification Conference, of the 23 States that were involved in addressing the issue of the right of passage of warships in the territorial sea, four favoured the requirement of prior notification or authorization; 15 allowed innocent passage of warships without special formalities; and one considered that it was a controversial issue in existing international law.²² Due to these different views (among other issues), the conference failed to produce a convention on the territorial sea. When the International Law Commission of the United Nations (ILC) was asked to prepare a draft for the Law of the Sea Convention by the UN member States, Article 26 of its 1954 Draft provided that: "save exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification."²³ However, two years later, in its commentary on the articles concerning the law of the sea in 1956, the ILC stated that:

The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18.²⁴

In the end, this provision was not adopted at the first United Nations Conference on the Law of the Sea (UNCLOS I). Since States had different views on the issue of innocent passage of warships, their practices were not uniform.²⁵ These different views between maritime powers and other coastal States over the passage of warships in the territorial sea continued to UNCLOS III. Failure to reach consensus among states on this issue led to the LOSC being silent on the innocent passage of warships.

20 LOSC, Preamble; see also Jin, *supra* note 17, at 61.

21 Jin, *supra* note 20, at 62.

22 *Ibid.*

23 *Yearbook of International Law Commission 1954* (United Nations, 1960), at 161.

24 *Yearbook of International Law Commission 1956* (United Nations, 1957), at 276.

25 Zou, *supra* note 19, at 198.