

FURTHER STEPS IN THE CLARIFICATION OF THE SOVIET POSITION ON THE INNOCENT PASSAGE OF FOREIGN WARSHIPS THROUGH ITS TERRITORIAL WATERS

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Preface

The article in the present form was submitted for publication during the month of August, 1989. Since then, however, major changes have occurred which directly impact the substance of this article.

*Soviet Foreign Minister Eduard Shevarnadze and U.S. Secretary of State James Baker reached a common understanding on the problem here discussed in Jackson, Wyoming on September 23, 1989.** A "Uniform Interpretation of the Rules of International Law Governing Innocent Passage" was attached to a joint statement signed by both ministers the same day. Three particular points mentioned therein are important for this study. First, all ships, including war vessels, may exercise innocent passage without prior notification or consent. Second, in accordance with Art. 24 of the 1982 Convention, a coastal state may not establish laws and regulations which have the practical effect of impairing or denying innocent passage through its territorial sea. Third, and most important here, is the coastal state's right to require ships to use designated sea lanes and traffic separation schemes. Such right, however, is conditioned by two elements: primo, such measures may only be established where needed to protect the safety of navigation, secundo, in areas where no such sealanes or traffic separation schemes exist, ships retain the above-mentioned innocent passage rights. As will be noted, the latter element especially formed the crux of the dispute between the parties.*

Besides the observation that this new element confirms the prediction ventured by the author in his conclusions, one could possibly argue that it rather undercuts the "raison d'être" of the article itself.

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** This account is based on Oceans Policy News (September/October 1989) at 1-2.

It is submitted, however, that the article remains illustrative of the different forces, often of an opposite nature, through which policy decisions are shaped in the U.S.S.R. The different departments and ministries obviously had other priorities in mind when, during the Third World Nations Conference on the Law of the Sea (hereinafter cited as UNCLOS III), they put forth a new policy accepting the innocent passage of warships through the territorial sea as a rule. The evolution of the writings of Soviet scholars, of which a detailed analysis is provided, is noteworthy in this respect. Although this new position in general was favored initially, restrictions relating to the Soviet coastline were gradually introduced. The latter intensified considerably after the Soviet government was obliged to clarify its position. Even though the motivation differed, a general consensus emerged in Soviet legal writings during the second half of the 1980's implying that the innocent passage of foreign warships through Soviet territorial waters had to be restricted considerably. After the signature of the above-mentioned common understanding it is therefore expected that a new change of position will occur in Soviet legal writings on this subject in the years to come.

The Soviet attitude towards innocent passage of warships¹ has not always been consistent throughout the history of this country. A last swing of the pendulum occurred during UNCLOS III, when the Soviet Union moved towards the recognition in principle of such a right for warships. It thereby reversed its post-UNCLOS I policy as enshrined in its reservation to the 1958 Convention on the Territorial Sea and Contiguous Zone: "The Government of the U.S.S.R. considers that a coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters."² This evolution has been documented in a rather detailed manner by Western authors analyzing Soviet practice and legal writings during these different phases.³

¹ This note will focus on the so-called lateral passage, i.e., traversing the sea without entering internal waters or calling at a roadstead or port facility outside internal waters. As will be seen, it has been this particular aspect which has led to direct confrontations in state practice.

² Convention on the Territorial Sea and the Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, 1670, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 273.

³ Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331-347 (1987) (hereinafter Butler); Franckx, *The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign*

Some authors, commenting on the U.S.S.R. attitude during UNCLOS III, have characterized this particular aspect of Soviet policy as a "novelty"⁴ or a "radical departure" from formerly held views.⁵ But these characterizations require a certain understanding of nuances, for it has been emphasized that Soviet writings as well as Soviet municipal legislation on the subject have obscured the issue to a certain extent.⁶ Indeed, a certain ambiguity remains with respect to the exact relationship between the innocent passage of warships on the one hand, and the reference to "sea lanes customarily used for international navigation" as enclosed in Soviet municipal legislation on the other. The crux of the problem is found in Art. 12(1) of the "Rules Concerning the Navigation and Sojourn of Foreign War Vessels in the Territorial Waters [Territorial Sea] of the U.S.S.R., the Internal Waters and Ports of the U.S.S.R." as confirmed by Decree of the Council of Ministers on April 28, 1983.⁷ Taking into account the importance of this article, it seems appropriate to cite the text in full:

Innocent passage of foreign warships through the territorial waters [territorial sea] of the U.S.S.R. for the purpose of traversing the territorial waters [territorial sea] of the U.S.S.R. without putting in to internal waters or ports of the U.S.S.R., is permitted by way of sea lanes, customarily used for international navigation:

in the Baltic Sea, by way of the traffic separation scheme in the area of the Kyru peninsula (Hiiumaa island) and in the area of the

Territorial Waters, 18 J. MAR. L. & COM. 33-65 (1987) (a completely reworked version of an earlier Dutch article in 1984-85/1 REVUE BELGE DE DROIT INTERNATIONAL 272-297) (hereinafter Franckx).

⁴ Grzybowski, *The New Soviet Law of the Sea*, 32 OSTEUEPOA RECHT 163, 174 (1986).

⁵ Allison, *The Soviet Union and UNCLOS III: Pragmatism and Policy Evolution*, 16 OCEAN DEV. & INT'L L. 109, 116 (1986).

⁶ Butler, *supra* note 3, at 339-343; Franckx, *supra* note 3, at 44-47.

⁷ 34 Izveshcheniia Moreplavateliam (Notices to Mariners) 42-47 (1983), *also published in* 1 Izveshcheniia Moreplavateliam 79-85 (1984) [hereinafter 1983 Rules]. For an English translation, see 1 W. BUTLER, *THE U.S.S.R., EASTERN EUROPE, AND THE DEVELOPMENT OF THE LAW OF THE SEA*, C.2, 1-13 (1986); *see also* Franckx, *supra* note 3, at 63-65. The promulgation of this Decree of the Council of Ministers was called for by Art. 13 of the Law of November 24, 1982, On the State Boundary of the U.S.S.R., 48 Ved. Verkh. Sov. S.S.S.R. (Communications of the Supreme Soviet of the U.S.S.R.) 891 (1982) [hereinafter 1982 Law]. For an English translation, see W. BUTLER, *BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM* 270-284 (1983). This article states, "Foreign warships . . . effectuate innocent passage through the territorial waters (territorial sea) of the U.S.S.R. in a manner stipulated by the Council of Ministers."

Porkkal lighthouse;

in the Sea of Okhotsk, by way of the traffic separation scheme in the area of Cape Aniv (Sakhalin island) and the Fourth Kuril Strait (Paramushir and Makanrushi islands);

in the Sea of Japan, by way of the traffic separation scheme in the area of Cape Kril'on (Sakhalin island).

A tentative application of this obscure construction to the Vil'kitskii Strait located on the Soviet Arctic coast,⁸ leads to the conclusion that three possible legal constructions could be advanced. Either the enumeration is exhaustive, excluding innocent passage in the strait since it does not form part of the above-mentioned article, or it is of a mere illustrative nature, in which case the Vil'kitskii Strait would still be excluded since it did not fit under the requirement "*customarily used for international navigation*" (emphasis added). Finally, it could be argued that if no such sea lanes actually exist, the general principle of Art. 8 of the 1983 Rules become applicable,⁹ i.e., warships enjoy a right of innocent passage.¹⁰

⁸ This strait, which forms the most northerly point of the Northeast Passage, is totally encompassed by Soviet territorial waters because of a group of islands close to the Western entrance located at approximately 22.5 miles from Bolshevik Island to the north and about 11 miles of the continent. See W. BUTLER, *NORTHEAST ARCTIC PASSAGE* 123-124 (1978). At two different occasions, namely in 1965 and 1967, the United States sent Coastal Guard icebreakers to this strait in order to effectuate the passage. But due to strong diplomatic pressure by the Soviet Union, the United States department twice instructed the ships at the eleventh hour not to attempt the passage. The ultimate legal basis invoked by the U.S.S.R. to deny these American ships the passage was sought exactly in the territorial sea status of the waters involved and the Soviet authorization procedure for foreign warships intending to pass through Soviet territorial waters. Much has been written, especially on the 1967 incident. See, e.g., the writings of Professors Butler and Pharand in this respect, W. BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 66-70 (1971) and W. BUTLER, *NORTHEAST ARCTIC PASSAGE* 122-127 (1978). See also Butler, *Soviet Arctic and the Northeast Passage*, 2 *THE NAUTILUS PAPERS* 1-8 (1971); Pharand, *The Soviet Union Warns United States Against Use of Northeast Passage*, 62 *AM. J. INT'L L.* 927-935 (1968). This preliminary appraisal was later completed by a more thorough analysis, Pharand, *Innocent Passage in the Arctic*, 6 *CANADIAN Y.B. INT'L L.* 3-60 (1968). The material relating to the Northeast Passage is found at 15-41. This material is slightly reworked in D. PHARAND, *THE LAW OF THE SEA OF THE ARCTIC* 20-43 (1973). The changed Soviet position on the right of innocent passage for warships during UNCLOS III justified a new legal appraisal of the situation.

⁹ "Foreign warships enjoy the right of innocent passage through the territorial waters [territorial sea] of the U.S.S.R. subject to the observance of the provisions of these Rules, the laws and rules of the U.S.S.R. concerning the regime of the territorial waters [territorial sea] of the U.S.S.R., and also subject to the observance of the international treaties of the U.S.S.R." 1983 Rules, *supra* note 7, at art. 8.

¹⁰ Franckx, *Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'kitskogo*, 24 *POLAR REC.* 207-214 (1988).

When the United States forced the Soviet government to clarify its position on this subject in 1986 by sending two of its warships through Soviet territorial waters south of the Crimean Peninsula, it triggered a strong Soviet reaction.¹¹ Much attention was paid in the press reports to the intelligence gathering aspect of the matter as well as the violation of the Soviet state border as possible juridical bases on which the Soviet Union could found its protest. The former, if translated into legal terminology, meant that the U.S.S.R. would base its claim on the "non-innocence" of the passage in accordance with Art. 19(2)(c) of the 1982 U.N. Convention on the Law of the Sea.¹² If that would have been the case, one could argue that if no such activities were conducted during the passage, the innocent passage would have been tolerated. The latter argument, concerning the violation of the state border, was not clarified in all its details. Only a hint was given by Admiral Chernavin when he stated *en passant* in an interview which appeared in the *Izvestiia*: "Seizing the opportunity, I must remind what all mariners know: The innocent passage of foreign warships through the territorial waters of the U.S.S.R. is only permitted in specially authorized coastal areas which have been announced by the Soviet Government. By the way, in the Black Sea there are no such areas along the coast of the Soviet Union."¹³ If read together with a statement attributed by the British press to a competent Soviet official referring to the absence of traditional seaways in the area, it still remained open to conjecture whether Art. 12(1) of the above-mentioned 1983 Soviet Rules did in fact constitute the fundamental legal bar according to which foreign warships were denied the right of innocent passage through Soviet territorial waters in the Black Sea.¹⁴

Recently the Soviet Union has clarified its position on the theoretical as well as practical level. This note first will discuss briefly both of

¹¹ Rousseau, *Chronique des faits internationaux*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL 625, 657-658 (1986); see also Butler, *supra* note 3, at 343-347.

¹² United Nations Convention on the Law of the Sea, *opened for signature* December 10, 1982, reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (U.N. Sales No. E.83.V.5) (1983) [hereinafter 1982 Convention]. Art. 19(2)(c) reads, "Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: . . . (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State."

¹³ *Izvestiia*, Mar. 23, 1986, at 3, col. 6.

¹⁴ See Butler, *supra* note 3, at 345-346. According to Butler, "[t]he legal grounds appear to rest" on this construction.

these aspects and then highlight the salient features which characterize Soviet policy formulation in this respect. Finally, before reaching conclusions, attention will be paid to the most recent developments which appear to indicate that parties are inclined at present to settle this matter on paper rather than on the field.

I. THEORETICAL LEVEL

Much has been written about UNCLOS III, but authoritative statements giving an accurate account of the negotiations and the bargaining process on the numerous issues involved are few. This is mainly due to the creation of a parallel unofficial negotiating process during this Conference, resulting in a plethora of unofficial procedures and unofficial drafts, some of which had great influence on the final outcome but none of which formed part of the Official Records. This peculiarity makes it very difficult for outsiders to comment upon provisions of the 1982 Convention, for their basic source of information, i.e. the *travaux préparatoires*, is characterized by the presence of numerous lacunae.¹⁵

In order to alleviate this flaw, a large-scale project was devised in the West, according to which "insiders" would be invited to submit papers concerning specific topics of the Convention on fields in which they possessed a certain expertise. The result is a six-volume series entitled "United Nations Convention on the Law of the Sea 1982: A Commentary."¹⁶ Since this is certainly no official interpretation

¹⁵ Or to use the words of Professor Quéneudec, "L'action combinée de la négociation multilatérale classique et de diverses formules de "négociation groupusculaire" pour la préparation de textes officiels n'engageant personne, mais servant de référence pour tous, rend donc extrêmement difficile le recours aux travaux préparatoires de la nouvelle Convention . . . La majeure partie des travaux s'étant déroulée dans un cadre officiel et parfois même en dehors de la Conférence proprement dite, ceux qui voudront étudier la Convention de 1982 ou seront chargés de l'interpréter pourront difficilement se référer à 'l'histoire documentaire des négociations, . . .'" See Quéneudec, Foreword in Lévy, J.-P., *La Conférence des Nations Unies sur le droit de la mer - Histoire d'une négociation singulière* 13, 14 (1983).

¹⁶ Two volumes have been published so far. Volume 1, apart from an article on the negotiating process and one on the work of the Drafting Committee, contains simply a number of relative official documents. See 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (M. Nordquist ed. 1985). For an overview of basic goals and the approach involved in selecting contributions, see Foreword by the editor, *id.*, at xli-xliv. Volume 5 contains commentaries on Part XV, XVI and XVII (articles 279-320) of the 1982 Convention. See 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (S. Rosenne & L. Sohn eds. 1988).

sponsored by the United Nations,¹⁷ one of the moving actors behind this scheme stressed that it would be most instructive if a similar Soviet-sponsored initiative, which appeared to be underway, were to see daylight.¹⁸

Today, three parts of a similar five-volume Socialist initiative have already been published under the common title "The World Ocean and International Law."¹⁹ Taking into account the basic political and ideological battle concerning ocean matters between the U.S.S.R. and other socialist countries on the one hand, and the United States and its allies on the other, delegates of the Socialist bloc at UNCLOS III had already during the Conference formulated the idea that a voluminous series, the aim of which should be the "objective elucidation of facts which led to the creation of a new legal order for the sea, of all vicissitudes of the diplomatic struggle concerning many aspects during its creation and the disclosure of the true intention and meaning of various provisions and requirements of this legal order," should be published in the U.S.S.R.²⁰ This series is written by a collective of Socialist authors.²¹ The collective participants vary according to the topics discussed in each particular volume. Academics as well as practitioners are involved, many of whom participated actively in the UNCLOS III proceedings and the drafting of the 1982 Convention. As such, it certainly forms the most authoritative statement of the Socialist understanding of the 1982 Convention and its prolegomenae.

Of particular importance here is Volume 2, for it contains a sub-heading under Chapter II (Territorial Sea) entitled "The Right of Innocent Passage Through the Territorial Sea." This part, moreover, was written by two Soviet jurists, namely P. Barabolia and R. Sorokin,

¹⁷ Financial support for this project was mainly provided by the U.S. government and different U.S. foundations.

¹⁸ Personal communication with S. Rosenne, December 8, 1987.

¹⁹ 1 THE WORLD OCEAN AND INTERNATIONAL LAW: FUNDAMENTAL PRINCIPLES OF THE CONTEMPORARY LEGAL ORDER OF THE WORLD OCEAN (A. Movchan & A. Iankov eds. 1986) [hereinafter WORLD OCEAN 1]; 2 THE WORLD OCEAN AND INTERNATIONAL LAW: THE LEGAL REGIME OF THE COASTAL SEA AREAS (A. Movchan & A. Iankov eds. 1987) [hereinafter WORLD OCEAN 2] and 3 THE WORLD OCEAN AND INTERNATIONAL LAW: HIGH SEAS, INTERNATIONAL STRAITS AND ARCHIPELAGIC WATERS (A. Movchan & A. Iankov eds. 1988). For a book review of the first two volumes, see Franck, 3 INT'L J. ESTUARINE & COASTAL L. 354-356 (1988).

²⁰ Movchan and Iankov, *Introduction*, WORLD OCEAN 1, *supra* note 19, at 3, 9-10.

²¹ The following nationalities are represented: Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland and the U.S.S.R.

both members of the U.S.S.R. delegation to UNCLOS III. One can, as a consequence, hardly think of a better source to elucidate the Soviet position on this particular subject.

This contribution of P. Barabolia and R. Sorokin, it is submitted, authoritatively crystallizes on an official level ideas which had germinated in Soviet legal writings during the early 1980's. The next section will briefly overview these different opinions before elucidating the content of the above-mentioned contribution of P. Barabolia and R. Sorokin.

A. Evolution in the writings of Soviet scholars during the 1980's

The fundamental change in the position of the U.S.S.R. during UNCLOS III on the subject of the regime of innocent passage of warships through territorial waters was perceived as an essential policy option in order to compensate for the negative effects of an overall extension of the territorial sea up to twelve nautical miles. When compared with the situations in capitalist countries, such an extension proved to be much more disadvantageous to the sea-use capabilities of the socialist countries, especially if a prior consent or authorization procedure were to be generally applied.²² Such a new policy, however, also would have direct implications on the innocent passage of foreign vessels along the U.S.S.R. coast. This overview will try to shed some light on the opinion of Soviet authors on this particular aspect of the matter. Three periods will be distinguished in this respect. First, a period leading up to the enactment of the 1983 Rules will be analyzed. The 1983 Rules were first published in *Izveshcheniia Moreplavateliam* (Notices to Mariners) number 34 of 1983²³ and were later reprinted in number 1 of the same publication of 1984²⁴ (Period 1980-1983/4); secondly, the period between this municipal legislation, and the first direct confrontation between the U.S.S.R. and the United States (Period 1983/4-1986); finally, the period running up to the second confrontation (Period 1986-1988) will be scrutinized.

²² S. MOLODTSOV, *LEGAL REGIME OF THE WATERS OF THE SEA* 57 (1982) (as stressed by Gorev when reviewing this book). See Gorev, 4 *MEZHDUNARODNAIA ZHIZN'* 138-139 (1983).

²³ Which served, for example, as basis for the studies of Ostrometskii, *Law on the State Border of the U.S.S.R. and the Regime of Navigation in the Waters of the U.S.S.R.*, *SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA* 1983, 130, 134 note 14 (1984) and Franckx, *supra* note 7, at 63-65.

²⁴ As used for instance in B. KLIMENKO & A. PORK, *TERRITORY AND BOUNDARY OF THE U.S.S.R.*, 287-94 (1985) and W. BUTLER, *THE U.S.S.R., EASTERN EUROPE, AND THE DEVELOPMENT OF THE LAW OF THE SEA*, C.2, 1-13 (1986).

a. 1980-1983/4

During this period, authors foremost stressed the fundamental issue that according to the 1982 Convention, warships did enjoy a right of innocent passage.²⁵ But already in this early period of the Soviet changed fundamental policy, voices were raised against a liberal interpretation of this provision. A most restrictive entry on this point can for instance be found in the 1982 edition of the Dictionary of International Law where, concerning warships, one can simply read under the heading "Innocent Passage of Ships" that many states apply a permissive or notification system of passage concerning warships.²⁶ In a 1983 article, Barsegov emphasizes the restrictions on which a coastal state can rely when allowing foreign war vessels in its territorial sea.²⁷ Of direct importance to this study is an article written by Barabolia and Sorokin in the journal *Morskoi Sbornik* of 1982 where these authors, commenting upon the 1982 Convention, state that "[i]t ensues out of the provisions of the Convention that

²⁵ See Franckx, *supra* note 3, at 40 where reference is made to S. Molodtsov, *supra* note 22, at 56-60; Kalinkin, *New Evolution Concerning the Right of Innocent Passage of Foreign Ships Through the Territorial Waters of States* in PROBLEMS OF INTERNATIONAL MARITIME AND AIR LAW 76, 88 (M. Lazarev, V. Menzhunskii, & L. Speranskaia eds. 1979); KALINKIN, THE REGIME OF MARITIME AREAS 49 (1981); Uzunov, *The Regime of Navigation in the Light of the U.N. Convention on the Law of the Sea*, 1 SOVETSKII EZHEGODNIK MORSKOGO PRAVA 104, 106 (1984). A contribution of Kolodkin to the 1982 manual on international law, edited by Professor Tunkin, can also be mentioned. After having stressed that the convention also applied the regime of innocent passage to warships, Kolodkin states that the law on the Protection of the State Boundary of the U.S.S.R. obliges foreign commercial as well as war vessels to comply with navigational, radio, port, customs, sanitary and other regulations. Kolodkin, *International Law of the Sea* in INTERNATIONAL LAW 413, 420 (G. Tunkin ed. 1982).

²⁶ DICTIONARY OF INTERNATIONAL LAW 107 (B. Klimenko ed. 1982).

²⁷ Barsegov, *International Legal Aspects of Navigation under a Pluralism of Regimes in the World Ocean*, PROBLEMS OF THE DEVELOPMENT OF MARITIME NAVIGATION 113, 119 (L. Liubimov, I. Mogilevkii & N. Gorelik eds. 1983). Barsegov first states that the detailed provisions of Art. 19(2) of the 1982 Convention (as well as Art. 30 of that Convention which allows the coastal state under certain conditions to require foreign warships to leave the territorial sea) removed the objections of states to recognize the right of innocent passage with respect to warships. "However," he continues, "this does not mean the rejection of the right of coastal states to provide in their legislation the manner of admittance in their waters of foreign warships, to regulate the number of foreign warships simultaneously sojourning in their waters, and the period of their sojourn in the territorial sea, as well as the rejection of the right to declare determined areas closed for navigation." This idea can also be found in I.U. BARSEGOV, THE WORLD OCEAN: LAW, POLITICS, DIPLOMACY 194 (1983). See also Kalinkin, *supra* note 25, at 51 for an admittedly similar passage.

the innocent passage of warships through territorial waters is effectuated by the shortest traditional sea routes or corridors established by the coastal state."²⁸ A similar line of thought can be found in the argumentation of Iakovlev, published in 1983.²⁹ After having emphasized the cardinal importance of the basic rule allowing warships to enjoy a right of innocent passage in territorial waters,³⁰ Iakovlev adds another essential new evolution in this respect, namely that a foreign war vessel cannot rely on the notion of innocent passage to sail the territorial waters of a foreign country wherever it pleases "although it may not be forbidden to cross the territorial waters along the usual routes of international navigation or by means of appropriate sea lanes or traffic separation schemes."³¹

b. 1983/4-1986

Also important in this evolution is certainly a 1984 article by Malinin wherein the author challenges the point of view expressed by Kalinkin in his 1981 book.³² According to Kalinkin, the 1982 Convention reflects a balance of rights and duties of the coastal state on the one hand and the state under whose flag the innocent passage is effectuated on the other. Instead, Malinin argues that the new rules on innocent passage convincingly prove that the emphasis was placed on securing the rights and interests of the coastal state.³³ The article, however, does not elucidate how this would actually influence the regime of innocent passage.³⁴

²⁸ Barabolia & Sorokin, *The Adoption of the New Convention on the Law of the Sea* 11 MORSKOI SBORNIK 82, 84 (1982).

²⁹ Iakovlev, *The New Legal Order in the World Ocean* in ACTUAL PROBLEMS OF THE LAW OF THE SEA, 6-22 (A. Kolodkin ed. 1983).

³⁰ He calls it a "corner stone" provision which incorporates one of the most important elements of agreement arrived at during UNCLOS III. *Id.* at 10.

³¹ *Id.*

³² See *supra* note 25, at 54.

³³ For detailed argumentation on this point, see Malinin, *The Right of Innocent Passage of Foreign Ships Through the Territorial Sea According to the 1982 Convention* in LEGAL QUESTIONS CONCERNING THE CARRIAGE BY SEA OF GOODS AND THE SAFETY OF NAVIGATION 43, 46-47 (Iu. Panin ed. 1984). An article by the same author of the same year stated that, in order to be approved by all states, the regime of innocent passage of warships should provide additional guarantees for the security of coastal states. Malinin, *The New Provisions Regarding the Innocent Passage of Foreign Ships in the Territorial Sea and the Jurisdiction of the Coastal State* in LEGAL AND ECONOMIC ASPECTS OF REGULATING INTERNATIONAL NAVIGATION 150, 151 (A. Kolodkin ed. 1984).

³⁴ *Id.* When applying the system to the U.S.S.R., Malinin simply refers to the 1982 Law on the Protection of the State Boundary. Mention is made of the fact

This is done in a very succinct way by an article of the same year which appeared in the Soviet Yearbook of International Law and which for the first time refers to the 1983 Rules. Ostrometskii argues that lateral passage is allowed in areas defined by Art. 12(1) of the 1983 Rules, namely the Baltic Sea and the Seas of Okhotsk and Japan.³⁵

Three handbooks on the Law of the Sea published in 1985 summarily touch upon the problem. The first, Komarova's rather condensed study, devotes only a few words to the problem. Innocent passage also applies to warships, either crossing the territorial sea without entering internal waters or in order to enter or leave the internal waters of a state. Once more reference is made to the Soviet 1982 Law when applying this rule to the coasts of the U.S.S.R.³⁶ The book written by Boitsov, Ivanov, and Makovskii is somewhat more explicit.³⁷ Based on the 1958 Convention on the Territorial Sea and the Contiguous Zone, they reach the conclusion that no concrete rules are provided concerning the manner in which the innocent passage of warships must be effectuated. Therefore, each coastal state establishes such a system itself. The U.S.S.R. did so by means of its 1982 Law and 1983 Rules. But only a general conclusion is reached according to which foreign warships enjoy the right of innocent passage if they comply with the provisions of these Rules, the U.S.S.R. laws and regulations concerning the regime of the territorial waters as well as the U.S.S.R.'s international treaties.³⁸ In applying the rule to Soviet territorial waters, Meshera recognizes that foreign warships enjoy a right of innocent passage either when proceeding to a Soviet port or "to ports of third countries without entering internal waters of the U.S.S.R."³⁹

Of crucial importance in this evolution, although not exclusively related to the law of the sea, was a book published in early 1985 under the auspices of the diplomatic academy of the Ministry of

that a concrete regime had to be worked out by the Council of Ministers of the U.S.S.R. He does not, however, mention the concrete action taken by that body in this respect, namely the 1983 Rules. *Id.*

³⁵ Ostrometskii, *supra* note 23, at 137.

³⁶ L. KOMAROVA, CONTEMPORARY INTERNATIONAL LAW OF THE SEA 12 (1985).

³⁷ F. BOITSOV, G. IVANOV & A. MAKOVSKII, LAW OF THE SEA 36-38 (1985).

³⁸ *Id.* at 37-38.

³⁹ Meshera, *Sea Waters of the Soviet Union*, SOVIET LAW OF THE SEA 48, 53 (V. Meshera ed. 1985). The latter part of this sentence must be read against the argument that the configuration of the Soviet coast is such that ships do not need to pass through Soviet territorial waters in order to visit a neighboring port.

Foreign Affairs of the U.S.S.R., entitled "Territory and Boundary of the U.S.S.R."⁴⁰ Based on the 1982 Law and 1983 Rules,⁴¹ this work elucidates the present Soviet position in detail. It starts out by saying that foreign warships may not enter those parts of the territorial sea closed for navigation. Then, attention is drawn to the fact that no international routes exist close to the Soviet coast. The author states that "in principle such passage is established . . .," and then follows a reproduction of Art. 12(1) of the 1983 Rules.⁴² The peculiarities of the Soviet coast are such that ships need not pass through Soviet territorial waters if they intend to visit a neighboring country. Passage is only necessary if a Soviet port is called for, but that requires Soviet authorization. "In other cases the intentional entry of foreign war vessels into Soviet waters must be considered as a flagrant violation of the sovereignty of the Soviet state and its legislation."⁴³ When summing up his argumentation, Pork distinguishes three points. First, based on the principle of sovereignty, the coastal state "has the right to regulate, authorize and, when necessary, to prohibit" the passage of foreign war vessels. Small and dependent countries are allowed to require previous permission in order to guarantee their security *vis à vis* imperialistic powers. Second, the right to enter foreign territorial waters is used by those warships which head for a port of the coastal state or which sail through its waters in accordance with the rules established by that country. Third, the passage of those ships through the territorial sea without prior permission or notification can only take place along internationally used sea routes, "i.e., which run through straits connecting two high seas or which lead from a closed sea to the high seas."⁴⁴ Finally, Pork adds that foreign warships enjoy innocent passage, if not heading for internal waters, only "along sea lanes used for international navigation."⁴⁵

In the 1985 Dictionary of International Law of the Sea, the first of its kind in the U.S.S.R., two entries of Sorokin first restate the result of such a restrictive interpretation⁴⁶ and second, apply this

⁴⁰ B. KLIMENKO & A. PORK, *supra* note 24. The section of importance here was written by A. Pork.

⁴¹ *Id.* at 264-278 and 287-294 (both texts were reproduced in this book).

⁴² *Id.* at 142.

⁴³ *Id.* at 143.

⁴⁴ *Id.*

⁴⁵ *Id.* at 144.

⁴⁶ Sorokin, *The Right of Innocent Passage*, in DICTIONARY OF THE INTERNATIONAL

system to the Soviet coast.⁴⁷ The 1985 international law manual of the Soviet Navy simply restates the contents of Art. 12(1) when discussing the rights of foreign warships in the Soviet territorial sea.⁴⁸

At the end of 1985, a very elaborated article of Melkov appeared on this topic as part of a booklet entitled "Actual Questions Relating to the Theory of Contemporary International Law."⁴⁹ The author first analyzes the situation as it existed under the 1958 Convention. Although the author agrees that according to this convention, the right of innocent passage was granted in principle to warships,⁵⁰ he concludes that this rule did not form part of customary international law.⁵¹ As a result, the reservations made by the socialist countries were well-founded in international law. Once more, the writings of Kalinkin on this subject are challenged. First, Kalinkin's argument that by establishing an authorization procedure, the U.S.S.R. did in principle recognize that foreign warships enjoy the right of innocent passage through the territorial sea is refuted. Melkov submits that a clear distinction has to be made between the right of innocent passage on the one hand, i.e., the juridical possibility of effectuating the passage, and the passage of the vessel as physical action on the other. By introducing an authorization procedure, the Soviet Union not only rendered the physical passage more difficult but in fact completely denied the right of innocent passage as such.⁵²

LAW OF THE SEA 190, 190 (Iu. Barsegov ed. 1985) [hereinafter DICTIONARY OF INTERNATIONAL LAW OF THE SEA]. Here he states, "In the 1982 Convention no difference whatsoever is made between the passage of warships and merchant ships, but out of it follows that a state can require innocent passage of warships to be effectuated only by determined routes (corridors) and traffic separation schemes."

⁴⁷ Sorokin, "On the State Boundary of the U.S.S.R.," *id.* at 161, 162. An enumeration is provided based on Art. 12(1) of the 1983 Rules which is directly linked with the notion "sea lanes, customarily used for international navigation."

⁴⁸ Markov, *The Territorial Sea and Contiguous Zone* in MANUAL OF INTERNATIONAL LAW OF THE SEA, 82, 97-98 (G. Gorshkov ed. 1985).

⁴⁹ Melkov, *The Right of Innocent Passage Through Territorial Waters* in ACTUAL QUESTIONS RELATING TO THE THEORY OF CONTEMPORARY INTERNATIONAL LAW 44-60 (G. Melkov ed. 1985).

⁵⁰ *Id.* at 47.

⁵¹ State practice was widely divergent; many countries claimed an authorization procedure, others required notification. Furthermore the argument is developed that for an international custom to exist, not only the quantity of states is important, but also the representation of all socio-economic systems. Since the socialist countries did not agree, no international custom could emerge *in casu*. See *id.* at 49-51.

⁵² *Id.* at 49.

A second point relates to the proper place of the authorization procedure under the 1982 Convention. According to Kalinkin, the 1982 Convention still allows coastal states to establish such a procedure. The work of Barsegov is also criticized in this respect.⁵³ Melkov, however, is of the opinion that the 1982 Convention most certainly does not allow for such a procedure.⁵⁴

A third point, finally, focuses on the critical view expressed by Malinin in 1984 when he objected to Kalinkin's position that the 1982 Convention reflects a balance of rights and duties in respect of innocent passage.⁵⁵ Together with Malinin, Melkov believes that the provisions of the 1982 Convention secure the lawful interests of coastal states.⁵⁶ After having stressed this fundamental change in the Soviet position, i.e. the recognition of the right of innocent passage for warships, Melkov analyzes how this new policy is reflected in municipal legislation. Reference is made to the 1982 Law and 1983 Rules. Lateral innocent passage, the author continues, "according to Art. 12 of the 1983 Rules, is permitted by way of sea lanes, customarily used for international navigation. . . ," reproducing exactly the same enumeration as the one to be found in Art. 12 of the 1983 Rules. "Just concerning such innocent passage does the conventional right of innocent passage apply, also extended at present in the U.S.S.R. to warships of foreign states."⁵⁷ Melkov then raises and also answers the question of why this right is limited to the above-enumerated areas. Here he relies exclusively on the provision of Art. 18 of the 1982 Convention which requires that lateral passage ought to be continuous and expeditious. "One cannot label, for instance, the navigation along the Soviet coasts within the territorial waters from Batumi⁵⁸ to the mouth of the Donau river, or from Murmansk to the Bering Strait, as innocent passage through the territorial sea of the U.S.S.R."⁵⁹ Since those voyages would take days, and the latter even weeks, they cannot, according to this author, be categorized as continuous and expeditious. "Not one coastal state consented to such

⁵³ Barsegov writes, ". . . this does not mean the rejection of the right of coastal states to provide in their legislation the manner of admittance in their waters of foreign warships . . ." See Barsegov, *supra* note 27.

⁵⁴ Melkov, *supra* note 49, at 51.

⁵⁵ See *supra* notes 32-33 and accompanying text.

⁵⁶ Melkov, *supra* note 49, at 52.

⁵⁷ *Id.* at 53-54.

⁵⁸ Located near the Soviet-Turkish border on the Black Sea coast.

⁵⁹ Melkov, *supra* note 49, at 54.

an 'innocent passage' including the U.S.S.R. and the United States and its allies."⁶⁰

An article by Anashkin in the first half of 1986 remains very general.⁶¹ He states that the 1982 Convention regulated the innocent passage of foreign warships more strictly. After having referred to those elements of Art. 19(2) of the 1982 Convention which relate to warships, Anashkin stresses that it is also very important to refer to the right of states to suspend temporarily for security reasons specified areas of their territorial seas as well as the right to designate and prescribe special sea lanes and traffic separation schemes. He concludes by stating that contrary to the Geneva Convention on the Territorial Sea and the Contiguous Zone, the 1982 Convention contains a whole list of new provisions designed to secure the safety of the coastal state with respect to the innocent passage of all categories of foreign ships, including warships.⁶²

A further detailed analysis of the Soviet interpretation of the respective provisions of the 1982 Convention, as well as the exact meaning of the Soviet legislation, is found in a 1986 article by Sorokin which appeared almost simultaneously with the first United States-U.S.S.R. confrontation in the Black Sea.⁶³ Sorokin develops an argumentation according to which the 1982 Convention allows for innocent passage of warships if the latter use the shortest sea routes, which the coastal state may, moreover, fix. Anywhere else warships are allowed only in accordance with the provisions established by the coastal state which, as a rule, means with its consent.⁶⁴ When applied to the Soviet coast, Sorokin argues that not all existing traffic separation schemes and sea lanes around the Soviet coast can be used by foreign warships, but only those especially enumerated in the Soviet legislation. A central element in his argumentation is Art. 12 of the 1983 Rules, as mentioned above, which is said to provide an exhaustive enumeration.⁶⁵

The Dictionary of International law contains a similar clear statement, although more concise, of the few places around the Soviet

⁶⁰ *Id.*

⁶¹ Anashkin, *The 1982 Convention on the Law of the Sea and Some Questions on the Regime of Sea Areas and International Navigation* in ACTUAL PROBLEMS OF SOVIET AND FOREIGN LAW OF THE SEA 74 (Iu. Panin ed. 1986).

⁶² *Id.* at 77.

⁶³ Sorokin, *Innocent Passage of War Vessels Through Territorial Waters*, 3 MORSKOI SBORNIK 75 (1986).

⁶⁴ *Id.* at 77.

⁶⁵ *Id.* at 77-78.

coast in which foreign warships do enjoy a right of innocent passage, under the heading "Innocent Passage in Territorial Waters."⁶⁶

c. 1986-1988

After the 1986 incident, the restrictive position clearly gained more influence. This topic was first addressed during the Third Anglo-Soviet Symposium on the Law of the Sea, which took place in Moscow in June 1986.⁶⁷ Two major papers were delivered: one by Butler, expressing the western view, and one by Barabolia, refuting that position.⁶⁸ The latter's main point of argumentation can best be described as follows: according to positive international law and the provisions of the 1982 Convention, the sailing of warships through the territorial sea where there are neither transit, nor international, nor shortest navigation routes, is *ipso facto* to be considered by the coastal state as a violation of its peace, good order and security.⁶⁹ It is true that Barabolia, when applying this theory to the incident here at hand, indicates that "no shortest transit navigation routes"⁷⁰ are present in the area. According to him, this position is reflected in the 1983 Rules, of which Art.12 (1) is said to contain an exhaustive enumeration. "The rest of the areas of the Soviet territorial waters lie outside the customary international navigation routes. Consequently, foreign vessels and warships . . . have no right to put in to these waters."⁷¹ But, he finally bases the non-innocent character of the American vessels on two points. First, the missiles on board one of them constituted a threat of force as described by Art. 19(2)(a). Second, since the ships were heavily equipped with electronic instru-

⁶⁶ DICTIONARY OF INTERNATIONAL LAW OF THE SEA at 202-03 (B. Klimenko, ed., 2nd rev. & compl. ed., 1986).

⁶⁷ It was here that Prof. Butler first delivered his paper, which later appeared in the American Journal of International Law. See Butler, *supra* note 3.

⁶⁸ Both arguments (Butler, *Innocent Passage and the 1982 UNCLOS: The Influence of Soviet Law and Policy*; Barabolia, *Some Aspects of Innocent Passage Through the Territorial Sea*) were reproduced in the SOVIET YEARBOOK OF MARITIME LAW, at 19-31 and 31-42, (1989) respectively. It should be noted that it took three years to publish the records of these proceedings of the 1986 conference. Delays concerning publication of the proceedings of these yearly conferences, which are held alternately in both countries, varies considerably. The proceedings of the Fourth Anglo-Soviet Symposium, which took place in London from 6-8 July 1987, were published in a special number of Marine Policy (Vol. 12, No. 3, 1988) about a year later and consequently preceded publication of the proceedings of the third symposium.

⁶⁹ Barabolia, *supra* note 68, at 36, 39.

⁷⁰ *Id.* at 41.

⁷¹ *Id.* at 40.

ments, their sailing towards the Soviet coast was an act aimed at gathering intelligence to the prejudice of the defense and security of the coastal state (Art. 19(2)(c)). This point of view seems to emphasize the first part of Admiral Chernavin's remarks, as discussed above.

Gorshkov labeled the United States' intrusion in Soviet territorial waters a violation of the latter's national as well as international legislation.⁷² A more elaborate article by Barsegov and Sagirian does likewise.⁷³ According to them, the 1982 Convention allows coastal states to require foreign warships to use designated or prescribed sea routes and traffic separation schemes. This is the delicate balance achieved by the Conference between the interests of the flag and coastal states. The United States' interpretation of the right of innocent passage distorts this balance.⁷⁴ Once again, this interpretation is applied to the Soviet legislation, which only allows for such passage in the Baltic Sea and the Seas of Okhotsk and Japan.⁷⁵ Furthermore, these authors submit that a "clear purposive necessity" has to be present, which justifies the presence of these ships in foreign territorial waters.⁷⁶ *In casu*, the ultimate goal of the warships seemed to be the gathering of intelligence.⁷⁷

B. Socialist understanding of the respective provisions of the 1982 Convention

The evolution analyzed above clearly demonstrates the gradual emergence of a rather restrictive interpretation of the 1982 Convention in the Soviet literature. The evaluation is not always based on the same arguments but most of the time links the innocent passage of foreign warships near the Soviet coast exclusively to the areas enumerated in Art. 12 (1) of the 1983 Rules. Besides the book by B. Klimenko and A. Pork, of which the title may be misleading, the overwhelming majority of writings making this connection in a straightforward manner were published in not easily accessible Russian journals or books, and without any clear official endorsement.⁷⁸ As

⁷² Gorshkov, *U.S. Politics Concerning the World Ocean in International Law of the Sea*, 4 MORSKOI SBORNIK 77, 78 (1987).

⁷³ Barsegov & Sagirian, *Naval Provocation of the U.S.A. and International Law*, 2 MEZHDUNARODNAIA ZHIZN' 120, 125 (1987).

⁷⁴ *Id.* at 125.

⁷⁵ *Id.* at 126.

⁷⁶ *Id.* at 126-127.

⁷⁷ *Id.* at 127-128.

⁷⁸ Barabolia's speech on the subject, delivered at the Third Anglo-Soviet Sym-

a result, the above-mentioned publication "The World Ocean and International Law," explaining this restrictive interpretation in a detailed manner, represents an authoritative elucidation of the Socialist interpretation of the 1982 Convention in this respect.

The contribution by P. Barabolia and R. Sorokin, entitled "The Right of Innocent Passage Through the Territorial Sea," leaves the impression that this section was especially written for the purpose of discussing the passage of foreign warships.⁷⁹ After having explained the radical change in the Soviet position at the beginning of UNCLOS III,⁸⁰ the article stresses that the Soviet Union had been an active and persistent supporter in official as well as unofficial gatherings of the granting of a right of innocent passage through territorial waters to all ships.⁸¹

When discussing Art. 22 of the 1982 Convention concerning sea lanes and traffic separation schemes in the territorial sea, these authors stress the "extreme importance" of this article for the coastal state: "[N]ot only to guarantee the safety of shipping, but also to regulate the traffic of ships in order that all vessels, including warships, do not pass through the territorial sea where they please, but follow the shortest sea lanes along concrete recommended routes."⁸² The article then applies this general rule to the Soviet coasts:

Traffic separation schemes and recommended routes adopted in many areas of the territorial sea of the U.S.S.R., are published in "Notices to Mariners" . . . It must be taken into account that there

posium on the Law of the Sea in 1986, came closest to this official endorsement, but, as mentioned above, these proceedings were not published until 1989. *See supra* note 68.

⁷⁹ Almost no attention is paid to the innocent passage of merchant ships (an item normally enclosed under the broader heading) and it is exactly the U.S.S.R. regulation of that right for foreign warships in Soviet waters which is elucidated in detail.

⁸⁰ According to this article, an extension of the territorial sea up to 12 miles was much more disadvantageous to the U.S.S.R. than to the imperialistic powers if an authorization procedure were to be the rule for warships. *Compare supra* note 22 and accompanying text. Example was given of the Aegean Sea where the latter powers could make arrangements in order to be able to use those waters anyhow. *See Barabolia and Sorokin, The Right of Innocent Passage Through the Territorial Sea*, in *WORLD OCEAN 2*, *supra* note 19, at 49, 51. Already at this early point of their reasoning, it should be noted that these authors link the innocent passage of warships to the passage through straits. This, notwithstanding the fact that the 1982 Convention devotes a special part to the navigation through straits used for international navigation. *See arts. 34-45 of the 1982 Convention.*

⁸¹ *Id.* at 52.

⁸² *Id.* at 58.

are practically no very short sea routes along the Soviet coast where foreign warships may pass in transit "innocent passage." Exceptions only exist in areas of the U.S.S.R. territorial sea in the Gulf of Finland where there exist pilotage recommended routes for the navigation of ships, and also areas in certain Kuril straits. In all other areas of the Soviet territorial sea, if warships do not proceed into Soviet ports, all entering into the territorial sea and passage through it may be looked upon as "non-innocent passage" and warships may be required to leave the territorial sea of the U.S.S.R. immediately.⁸³

Such a restrictive attitude, the authors maintain, is mainly a justified reaction to the aggressive American policy in this respect. "A serious danger with respect to the maintenance of peace in many areas of the world ocean lurks in an attempt by the United States and certain of its NATO partners to construe the provisions of the Convention concerning innocent passage as allowing the passage of warships in practically any area of the territorial sea."⁸⁴ Reference is made more specifically to the practice of the United States, which started in 1979, of sending warships up to three miles off the coast of countries such as Burma, Libya and Argentina.⁸⁵

The article concludes,

Thus, it ensues out of the analysis of present international norms and the provisions of the U.N. Convention on the Law of the Sea that the innocent passage of warships through the territorial sea is strictly regulated and may be effectuated only where traditionally very short sea routes pass or routes are concretely designated by the coastal state. These provisions limit the possibility of warships of imperialistic powers to penetrate in any area of the territorial sea of other countries and to violate national laws on the regime of navigation in those waters. Any premeditated entrance is considered in international law as 'non-innocent passage' or an unfriendly act.⁸⁶

⁸³ *Id.* at 59. Once again, the term "transit 'innocent passage' " points at a certain confusion between the regime of straits, where transit passage is generally applicable according to the 1982 Convention (arts. 37-44), and the territorial sea, where innocent passage is the rule (arts. 17-32).

⁸⁴ *Id.* at 61.

⁸⁵ *Id.* at 61-62. This policy is based on the refusal of the United States to accept a territorial sea of more than 3 nautical miles. This contrasts sharply with the latter's acceptance during UNCLOS III of a 12-mile maximum limit as incorporated in its official proposals.

⁸⁶ *Id.* at 62. It may be interesting to note what immediately followed this con-

As far as the U.S.S.R. is concerned, the 1983 Rules are mentioned as designating such routes, with the additional remark that the enumeration encountered in that enactment is of an exhaustive nature.⁸⁷

On the theoretical level, a new threshold was crossed in the elucidation of Soviet government policy on this issue. There can no longer be any doubt that Art. 12(1) of the 1983 Rules formed the legal bar on which Soviet authorities based their 1986 protest concerning the entrance of two American warships in Soviet Black Sea territorial waters. S. Molodtsov's latest handbook on the law of the sea expressly refers to this article. Since the Black Sea is not mentioned in Art. 12(1) of the 1983 Rules, the conclusion must be reached that lateral innocent passage is not tolerated in the Black Sea. "[This] was emphasized by Soviet authorities with respect to the illegal penetration on March 13, 1986 of the American Navy cruiser 'Yorktown' and destroyer 'Caron' in the territorial waters washing the Black Sea coast of the U.S.S.R.'" ⁸⁸

Whether such interpretation of the 1982 Convention is acceptable to the rest of the world community is a totally different question, one which Professor Butler already has answered in the negative.⁸⁹ At present, however, it will suffice to simply note this official clarification of Soviet policy.

II. PRACTICAL LEVEL

It did not take long for the U.S.S.R. to apply this clarified position to a concrete incident along its coast. A political flashback similar to the 1986 incident occurred on February 12, 1988.⁹⁰ The same American vessels which had entered the Black Sea via the Turkish Straits two days earlier sailed straight to the Crimean Peninsula. The ships were followed by two patrol vessels of the Soviet Black Sea fleet, the Bezzavetnyi and SKR-6. Early February 12 they arrived approximately 50 nautical miles off the Crimean coast. At 10:00

clusion. "At the same time, individual declarations of states made upon signature of the 1982 Convention stating that they did not recognize the right of innocent passage for warships through territorial waters, cannot be regarded as lawful."

⁸⁷ *Id.* at 63.

⁸⁸ S. MOLODTSOV, INTERNATIONAL LAW OF THE SEA 85 n.14 (1987) (as mentioned in notes 13-14, the comments found in the Izvestiia article mentioned at 85 n.14 do not contain a clear government position).

⁸⁹ See Butler, *supra* note 3, at 341, 345-46; see also Butler, *Custom, Treaty, State Practice and the 1982 Convention*, 12 MARINE POL'Y 182, 185-86 (1988).

⁹⁰ See *supra* note 11 and accompanying text.

A.M., while still about nine miles away from Soviet territorial waters, the ships received a message in English, on the appropriate radio channel, that their course was leading into Soviet territorial waters which they were not to violate. The Yorktown acknowledged receipt of the message but replied that it was using its right of innocent passage. Eight minutes later the American ships received the following message, "According to Soviet law, foreign warships do not enjoy the right of innocent passage in this region. In order to avoid an incident, I ask you not to violate the territorial waters of the U.S.S.R." The U.S. ships responded that their action did not violate such law. Several other messages were transmitted, including one that the Soviet ships were authorized to strike the U.S. ships with their vessels. Despite this, the Yorktown and the Caron did not change course. Consequently, the latter entered Soviet territorial waters at 10:45 AM and the former at 11.03 AM and remained there until 12:49 PM. Although the passage was strictly a lateral one, they approached within four nautical miles of the Soviet coast.

The 1988 voyage of the Yorktown and the Caron differed mainly from the 1986 voyage in that the crossing was made from west to east this time instead of vice-versa, and in 1988 light collisions between the Soviet and American vessels occurred. No casualties to personnel and only superficial damage to the ships were reported by both sides. The Soviets put the blame for these collisions on the dangerous maneuvers executed by the American warships. The United States, on the other hand, maintained that the Soviets deliberately bumped the American vessels.

This incident received attention not only in the West⁹¹ but also in the East. Unlike the 1986 incident, where the Soviet press reports in the *Izvestiia* were scattered over three different issues and where one had to wait ten days before Navy headquarters gave their interpretation of the incident, the February 1988 occurrence received full coverage in the U.S.S.R. only two days after the incident.⁹² It first

⁹¹ See, e.g., Wilson, *Soviets Bump U.S. Ships in Black Sea*, Wash. Post, Feb. 13, 1988, at A23; Lee, *Soviets Protest Collision of Warships in Black Sea*, Wash. Post, Feb. 14, 1988, at A46 (discussing the reactions in Moscow of Soviet Foreign Ministry spokesman G. Gerasimov and K. Makarov, first deputy commander in chief of the Soviet Navy, who gave the Soviet version of the incident). Even the television news covering the incident used images made by hidden video cameras on board the U.S. ships.

⁹² See, e.g., *Izvestiia*, Feb. 14, 1988, at 4, cols. 1-4; Borisenko, *Izvestiia*, March 8, 1988, at 5, cols. 4-7 (TASS correspondent in Washington who reproduced the

consisted of a TASS Report headed "Categorical Protest," which contained the contents of the letter of protest given to the American Ambassador in Moscow on February 13. The same day, an interview of Admiral Makarov of the Soviet Navy was reproduced, accompanied by a map indicating the routes followed. The last two articles provided excerpts of the press conferences held respectively in Moscow and Washington on this issue. Finally, a translation was provided of a short ABC statement in which the intelligence gathering capacity of the two U.S. vessels was highlighted.

Of special importance here, as in 1986,⁹³ are the communications of Soviet Naval headquarters.⁹⁴ After having stressed the fact that the two American warships penetrated the Soviet 12-mile territorial sea, Admiral Makarov stated:

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 U.S.S.R. 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 commanders of warships are well informed about and know it.⁹⁵

As was the case on the theoretical level, the Soviet Union no longer veiled its claim in mystery but rather gave a straightforward answer to a *ditto* challenge.

III. CHARACTERISTICS OF SOVIET POLICY FORMULATION

It clearly lies outside the limited scope of the present note to evaluate this particular interpretation of the 1982 Convention on its own merits. One must wait until the corresponding part of the Western sponsored

contents of an article of the Washington Post which was rather critical as to the true objectives behind this U.S. mission); *id.* at cols. 5-6 (a certain confusion of terms has to be noted. In order to exercise "unimpeded passage," it was said, ships are required to follow the usual sea routes along the coast used for safe and effective navigation).

⁹³ See *supra* note 13.

⁹⁴ See Kimball & Wecker, Wash. Post, Feb. 27, 1988, at A22. As noted by these authors, the Western press tends to misreport the basic issues at stake. It was not the Soviet claim to a 12-mile territorial sea limit that was challenged, but the regime applicable to foreign warships in these waters.

⁹⁵ Izvestiia, Feb. 14, 1988, at 4, col. 4.

commentary on the 1982 Convention becomes available to find out whether such a restrictive interpretation did indeed form part of the consensus which emerged during UNCLOS III.

With respect to the Soviet policy formulation, the following submissions seem to be justified. First, it was not until recently that the Soviet Union thought it necessary to divulge the exact reasoning behind its new and most curious official position concerning the right of innocent passage for foreign warships through Soviet territorial waters. The series "World Ocean and International Law" proved to be the forum chosen by the Soviet government to argue its case before the international community of states. The continuation of the U.S. policy of showing the flag in the Black Sea and challenging the U.S.S.R. position on this particular matter during 1988 presented an outstanding opportunity to apply this theory in practice. On this occasion the underlying legal reasoning of the Soviet position was stated in no uncertain terms. As indirectly stated before,⁹⁶ the salient feature of the Soviet legal construction appears to be a certain confusion between innocent and transit passage. This is highly remarkable, for when discussing the regime applicable to straits, the socialist countries like to stress that they stubbornly resisted during UNCLOS III those countries aiming at an equation of these two concepts.⁹⁷ As it turns out, the U.S.S.R. tended to blur this distinction itself, at least when applied to foreign warships in its own territorial waters.

It may be interesting at this point to note that the 1983 Rules, which were originally published in the Soviet "Notices to Mariners" and incorporated the crucial Art. 12(1) on sea lanes,⁹⁸ were later included as part of a 1985 update to the ninth volume of the *Svod Zakonov* (Code of Laws) of the U.S.S.R.⁹⁹ This certainly emphasizes the degree of importance attached by the U.S.S.R. to this particular enactment.

Second, the policy of challenging the Soviet position in a direct manner by means of the U.S. Navy,¹⁰⁰ requiring the U.S.S.R. to

⁹⁶ See *supra* notes 80, 83 and 92.

⁹⁷ Barabolia, *The Contribution of the Socialist Countries to the Progressive Development of the International Law of the Sea During the Proceedings of the Conference*, WORLD OCEAN 1, *supra* note 19, at 126, 128; see also Bordunov, *The Right of Transit Passage under the 1982 Convention*, 12 MARINE POL'Y 219, 224-25 (1988) (it is "unacceptable to draw any analogies" between transit and innocent passage).

⁹⁸ See *supra* note 7 and accompanying text.

⁹⁹ See 9 SZO S.S.S.R. 216/1-8 (1985 Supp.).

¹⁰⁰ Another related area challenged directly by the United States is the recently

clarify its policy on this subject not only on a bilateral basis but to the world at large, paid off in full and seems to have been a stimulating factor in this process. This policy was part of the broad "United States Freedom of Navigation Program" started during the Carter Administration.¹⁰¹

Third, a country bordering three oceans, fourteen different seas and having maritime boundaries for more than two-thirds of its overall borders,¹⁰² making it by far the country possessing the longest coastline (23,098 nautical miles),¹⁰³ authorizes only a very small and negligible part the area of its vast 12-mile territorial sea as subject to a regime of innocent passage for warships. Of the original Soviet attitude as it took form during UNCLOS III and which recognized a right of

enacted Soviet system of straight baselines. See Scovazzi, *New Developments Concerning Soviet Straight Baselines*, 3 INT'L J. ESTUARINE & COASTAL L. 37-43, 272-75 (1988) (introductory description). The Soviet Council of Ministers confirmed their baseline coordinates on February 7, 1984 relating to the Pacific Ocean and January 15, 1985 with respect to the Arctic coast and the Baltic and Black Seas. According to the Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs in the U.S. Department of State, none of the baselines drawn around the Kamchatka Peninsula appear to meet the required international legal criteria. See *Straight Baselines: U.S.S.R. (Pacific Ocean, Sea of Japan, Sea of Okhotsk, and Bering Sea)*, Limits in the Sea (No. 107), 7 (1987). The United States formally protested against many of the baselines declared by the U.S.S.R. in 1984. *Id.* at 4 n.6. Apparently, a southern segment with a closing width of 71.7 miles was challenged by the U.S. Navy on May 17 and 21, 1987. This incident also triggered a strongly worded Soviet protest. For succinct information on this incident see, e.g., *Izvestiia*, May 23, 1987, at 4, col. 6; *Jerusalem Post*, May 22, 1987, at 3, col. 6 (same); Rousseau, *Chronique des faits internationaux*, 91 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1306, 1341-42 (1987). It is not clear whether at these occasions the nuclear powered USS *Arkansas* came within twelve miles of the Soviet coast. *But cf.* Personal communication with Mr. Robert Smith, Senior Oceans Analyst of the U.S. State Department, Aug. 29, 1988 (the ship did not enter Avatcha Bay, but only came closer than 12 nautical miles to the U.S.S.R. claimed baseline).

¹⁰¹ See USIS/Gist statement of the Embassy of the United States of America, Brussels (No. EUR 119), Dec. 20, 1988, at 1. The Departments of State and Defense are jointly responsible for conducting this program. Besides diplomatic action, the program also envisages operational assertions. "Planning for these operations includes careful interagency review. Although some operations asserting U.S. navigational rights receive intense public scrutiny [such as those that have occurred in the Black Sea and the Gulf of Sidra], most do not. Since 1979, U.S. military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 nations at a rate of some 30-40 per year." *Id.* at 2.

¹⁰² As stated by Movchan and Iankov, *Introduction* in *WORLD OCEAN 1*, *supra* note 19, at 6-7.

¹⁰³ *ATLAS OF THE OCEANS* 227 (A. Couper ed. 1983).

innocent passage of warships in principle, not much remained when applied to its own borders.¹⁰⁴

This most negative position will certainly create difficulties for the Soviet Union on both the international and internal levels. It will undoubtedly encounter difficulty when attempting to secure similar rights for its own vessels off the coasts of third countries.¹⁰⁵ Indeed, a system where the U.S.S.R. has the best of both worlds simply cannot be justified on the international level.¹⁰⁶ Domestically, this restrictive position may well lead to frictions. In September 1987, for instance, A. Kolodkin, Chairman of the Soviet Maritime Law Association, made a strong point concerning the innocent passage in territorial waters and straits in general.¹⁰⁷

¹⁰⁴ Contrast Melkov, *supra* notes 49-60 and accompanying text. After having put considerable effort in elucidating and emphasizing the fundamental policy change of the U.S.S.R. (the authorization procedure denied the *right* of innocent passage while the new Soviet position accepts it in principle), Melkov ends with the question of why this new regime applies only to such a limited area. *Id.* at 54. His answer is not very convincing, for as evidenced by the U.S. missions, one does not necessarily need a multi-day voyage to traverse the Soviet territorial sea to other places. Moreover, since merchant ships also must comply with the requirement of continuous and expeditious passage, does this result in the annihilation of innocent passage of merchant ships in Soviet territorial waters, other than the few places listed in Art. 12 (1) of the 1983 Rules? What it does boil down to is that, although the U.S.S.R. today accepts the right in principle, its field of application has become restricted to such an extent that it would be more realistic to speak of a denial of this right in general with only a few limited exceptions.

¹⁰⁵ Numerous passages are found in Soviet literature criticizing foreign legislation which fails to recognize this right for warships. See, e.g., Ivanov, *The U.N. Convention on the Law of the Sea—One Year after Montego Bay*, 7 *VYMPER* 34, 34 (1984); Sintsova, *Some Aspects of the Legislation of Foreign Countries on the Innocent Passage of Ships Through the Territorial Sea*, in *LAW OF THE SEA AND INTERNATIONAL MERCHANT SHIPPING* 18, 24-25 (1987).

¹⁰⁶ A similar dualistic approach seems to exist with respect to the Soviet policy concerning closed seas. See Darby, *The Soviet Doctrine of the Closed Sea*, 23 *SAN DIEGO L. REV.* 685, 699 (1986), where this author concludes, "[i]t is not unconceivable that the Soviet Union, while claiming that it is only enjoying the rights which international law confers on it when it navigates naval vessels on the peripheral and semi-enclosed seas of other countries . . . , will nevertheless insist on denying that same right to foreign warships on its own peripheral and semi-enclosed seas."

¹⁰⁷ See personal communication with Dr. U. Jenish, Sept. 17, 1987. See also A. Kolodkin, V. Andrianov and V. Kisilev, September 17, 1987 paper presented at the XVth Pacem in Maribus Conference, Malta. Moreover, a recent interview with A. Kolodkin in Moscow reveals that he would rather prefer to see the Soviet legislation endorse a system listing the regions which are closed for foreign warships than an exhaustive enumeration of those places where these war vessels are allowed. Personal communications with A. Kolodkin, April 14 and 18, 1988.

It is finally hard to imagine how the Soviet government is at present able to fit this restrictive interpretation into its municipal legislation, especially the argument sporadically encountered in Soviet writings, advocating that foreign warships be required to receive prior authorization if they intend to enter the Soviet territorial sea at locations not enumerated in Art. 12(1) of the 1983 Rules. Similar comments made by a spokesman for the Soviet Embassy in Washington at the occasion of the latest incident¹⁰⁸ lead to the conclusion that this position received government endorsement. Reference to such a requirement as found in the 1960 Statute on the State Boundary¹⁰⁹ appears to be totally unwarranted today, for the latter Statute has been explicitly abrogated by the Decree of November 24, 1982.¹¹⁰ Neither the new 1982 Law on the State Boundary¹¹¹ nor its further elucidation in the 1983 Rules¹¹² provide for such an authorization procedure. Instead, they provide to the contrary!¹¹³

The positive assertions in most recent Soviet handbooks on the law of the sea which state, "Soviet legislation on innocent passage of foreign ships through Soviet territorial waters is in *complete accord* with the Convention on the Law of the Sea,"¹¹⁴ must therefore be read with caution.

The result is a continuing disagreement between the U.S.S.R. and the United States on the subject despite the new Soviet theoretical attitude adopted during UNCLOS III. As correctly stated by Jin, "[t]he Soviet Union, an enthusiastic champion for the right of the coastal state to require prior authorization at UNCLOS I, has become

¹⁰⁸ Kimball & Wecker, *supra* note 94; See also Ocean Policy News, March 1988, at 1.

¹⁰⁹ Statute of August 5, 1960, *On the Protection of the State Boundary of the U.S.S.R.*, Art. 16, 34 VED. VERKH. SOV. 324 (1960).

¹¹⁰ Decree of November 24, 1982, *On the Entry into Force of the Law of the U.S.S.R. "On the State Boundary of the U.S.S.R."*, 48 VED. VERKH. SOV. 892 (1982).

¹¹¹ Law of November 24, 1982, *supra* note 7.

¹¹² See *supra* note 7.

¹¹³ See Franckx, *supra* note 3, at 35-47. This, by the way, is also the logical outcome of the theoretical construction of Melkov, according to which the recognition of the right of innocent passage of warships (policy adhered to by the Soviet Union since UNCLOS III) is fundamentally incompatible with an authorization procedure as such. See Melkov, *supra* note 54 and accompanying text.

¹¹⁴ THE INTERNATIONAL LAW OF THE SEA 39 (I. Blishchenko ed. 1988) (emphasis added). For a similar statement, see Kalinkin, *Territorial Waters in THE INTERNATIONAL LAW OF THE SEA* 40, 45 (I. Blishchenko ed. 1988), which served as basis for the above-mentioned translation.

an ardent claimant to the right of innocent passage of warships. It turned out after UNCLOS III, however, that the Soviet concept of the right of innocent passage of warships is not the same as that of Western powers."¹¹⁵

IV. FROM CONFLICT TO COOPERATION?

Apparently it lies in the interests of neither party to continue this head-on collision course. In a period of general normalization between parties, as evidenced by the signing of some historic treaties, these incidents do not easily find their proper place.

Recent developments seem to indicate that the Soviet Union and the United States are presently attempting to settle this particular dispute by way of agreement. A first sign on the wall could be discerned at the occasion of the First Joint U.S.S.R.-U.S. Symposium on International Law of the Sea.¹¹⁶ Although the basic positions of parties remained unchanged,¹¹⁷ Soviet speakers suggested two possible alternatives to solve this deadlock situation: a bilateral U.S.S.R.-U.S. agreement incorporating a more detailed interpretation of the notion or a specialized treaty on international navigation generally.¹¹⁸ This idea was later taken up by Ivanashchenko when reviewing Molodtsov's book of 1987.¹¹⁹ Upon updating Molodtsov's comments on the 1986

¹¹⁵ Jin, *The Question of Innocent Passage of Warships After UNCLOS III*, 13 MARINE POL'Y 56 (1989).

¹¹⁶ Held in Moscow from November 28 until December 2, 1988. For short comments on this meeting, see Koroleva, *First Soviet-American Symposium on International Legal Problems Concerning Navigation, Fishing, and Scientific Research*, 1 MIR OKEANAM 82-83 (1989); Ocean Policy News, Jan. 1989, at 2-5.

¹¹⁷ See Izvestiia, Dec. 6, 1988, at 5, cols. 6-7. Interview with A. Kolodkin, Chairman of the Soviet Maritime Law Association.

It remains to be deplored that the American side reluctantly enters a dialogue on the strengthening of peace and security in the World Ocean. When enumerating the themes which remain an "apple of discord," one can not overlook the different interpretations in the U.S.S.R. and the United States concerning the "right of innocent passage of warships through the territorial sea," which was reflected in practice by the appearance of the U.S. Navy ships Yorktown and Caron at the southern coast of the Crimea. I underline that the U.S.S.R. does allow for a right of foreign war vessels, not to exercise free navigation, but only to traverse the territorial sea for the purpose of sailing from one part of the high seas to another or for calling at a port. Another accent falls on the word "innocent" passage. Meanwhile, the mentioned ships were equipped with devices for the gathering of information of an intelligence nature.

¹¹⁸ See Ocean Policy News, Jan. 1989, at 3.

¹¹⁹ See *supra* note 88 and accompanying text.

incident with a discussion of 1988 incidents, Ivanashchenko argued that further elucidation of this concept is necessary.¹²⁰

Recent treaty practice between the parties points in this direction. On June 12, 1989, after nine months of preparations, the U.S.S.R. and the United States signed an "Agreement on the Prevention of Dangerous Military Activities."¹²¹ This agreement does not settle the matter itself, but the underlying problem is recognized by the terms of the agreement¹²² and *expressis verbis* included as one of the two "Agreed Statements" which were attached to the agreement, "As indicated in Article VIII . . . this Agreement does not affect rights of navigation under international law, including the right of warships to exercise innocent passage." Recognizing the existence of a particular problem is of course not the same as solving it, but it nevertheless constitutes a necessary first step. Apparently, separate bilateral negotiations are presently being held between parties in order to settle this matter once and for all by means of a detailed agreement on the subject.

V. CONCLUSIONS

The innocent passage of warships through the territorial sea of a coastal state has never been clearly defined by international law. For a long time the respective positions of the Soviet Union and the United States in this respect were diametrically opposed. The former required prior authorization, while the latter claimed a right of innocent passage without such prior authorization.

With the achievement by the U.S.S.R. of the rank of a leading maritime power, its maritime interests became very similar to those of other sea powers. During UNCLOS III, this country changed its theoretical point of view. Thereafter, warships would no longer be obliged to obtain prior authorization for innocent passage.

Belief that this theoretical change would place both countries on the same footing proved to be a premature conclusion. By means of municipal legislation severely restricting its geographical application, this newly recognized right was circumvented, clearly undercutting the authority of Barabolia's words when he stated, "the Soviet legislation has undergone *considerable changes* with respect to the right

¹²⁰ Ivanashchenko, Book Review, 5 Sov. Gos. & PRAVO 157, 158 (1989).

¹²¹ Izvestiia, June 13, 1989, at 5, cols. 4-8.

¹²² *Id.* Art. VIII states, "This agreement shall not affect . . . the rights of . . . navigation . . . in accordance with international law."

of innocent passage through the territorial sea of the U.S.S.R.”¹²³

Because this new Soviet municipal legislation proved to be rather ambiguous at first, the United States aimed at clarifying the U.S.S.R. position by sending two of its warships through Soviet territorial waters in 1986, a scenario to be repeated in 1988.

The inherent risk involved in such direct military confrontations, however, cut across the improved general relations between the U.S.S.R. and the United States. As the matter now stands, it is the opinion of the author that the conclusion of a bilateral agreement seems more likely at present than the occurrence of a new incident in Soviet territorial waters involving American and Soviet war vessels.

¹²³ Barabolia, *supra* note 68, at 40 (emphasis added).

