

Rethink About the Right of Innocent Passage of Warships

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Abstract: Freedom of navigation and innocent passage are intertwined with the development of the International Law of the Sea. They are important components of the United Nations Convention on the Law of the Sea (UNCLOS). The concept of innocent passage is reflected in internal waters, the territorial sea and international straits. China's attitude towards innocent passage of warships has been consistent in accordance with the Third United Nations Conference on the Law of the Sea, in its domestic law and its practices. According to Article 6 of the Law of the People's Republic of China on *the Territorial Sea and the Contiguous Zone*, foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China, which is a kind of conditional innocent passage.

Key Words: United Nations Convention on the Law of the Sea warships
Innocent passage approval

1、From freedom of navigation to innocent passage

Navigation was one of the earliest ways in which man used the sea. The Age of Discovery gave rise to the desire to divide the seas and struggle. Spain and Portugal divided the maritime sphere of influence, and this hegemony over the sea became a hindrance in the development of sea faring activities in other countries and was challenged by new maritime countries, such as the Netherlands - the "maritime coachman", and the demand for breaking the monopoly over the sea became increasingly strong. The freedom of the seas has been characterized by a fierce struggle for rights.

In 1609, Hugo Grotius argued in his book *Mare Liberum* that "By the Law of Nations navigation is free to all persons whatsoever" and that "Every nation is free to travel to every other nation, and to trade with it."¹ The core idea of "the freedom of the seas" is that the seas belong to all mankind and should be open to all nations. No nation can have exclusive use of the seas. Freedom of navigation and maritime transport is enjoyed by all states. By the eighteenth century, many scholars of international law have advocated for

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¹ (Netherlands) Hugo Glausius, *Mare Liberum/the Freedom of the Seas*, East China Normal University Press, 2005,1.

the freedom of the seas, which just shows that the sea was not absolutely free at that time. In 1702, the Dutch jurist Cornelius van Bynkershoek distinguished between the territorial sea and the high seas, arguing that the territorial sea was under the sovereign jurisdiction of coastal states, while the high seas belonged to no state. The understanding of the freedom of the seas focused on the high seas.

At that time, Britain became a maritime power and began to oppose freedom of the seas. In 1618, John Selden introduced the doctrine that the sea was as subject to a country's private dominion as land in his book *Mare Clausum*: "States were losing the right to declare 'closed seas' or to levy taxes. Ownership of the sea was disappearing. In the eighteenth century, all well-known publicists advocated the freedom of the high seas, and there was no distinction between the high seas and the territorial sea."¹ Selden proposed the concept of "innocent passage" for the first time.² It was gradually accepted and developed into one of the elements of today's maritime navigation regime.

With the progress of science and technology, the sea plays an increasingly important role in the world's politics and economics. European powers began to take the lead by using the superior forces accumulated by the Industrial Revolution for colonial expansion. Portugal, Spain, the Netherlands, Russia, Britain, the United States, Germany and Japan became maritime powers and then evolved into world powers. As Marx pointed out in the *Communist Manifesto*: "This market has given an immense development to commerce, to navigation, to communication by land. This development has, in its turn, reacted on the extension of industry."³

At the end of the nineteenth century, the United States entered a period of fullmaritime expansion. Alfred Thayer Mahan's "The Influence of Sea Power" came into being, laying a theoretical foundation for the United States to embark on the path of sea domination. Mahan comprehensively and systematically discussed the relationship of a powerful fleet, prosperous commerce and overseas bases. According to him, "a nation on the verge of the sea or to develop itself with the help of the sea is a trump card", and that maritime hegemony is the decisive factor in winning or losing the war.⁴ The "control of the sea" has further reduced the space for freedom of the sea. Hence, the international maritime order needs to be regulated urgently.

1.1 Freedom of navigation and innocent passage from the Third United Nations Conference on the Law of the Sea

When implementing the norms of international law of the sea, freedom of navigation and innocent passage through the territorial sea share a close relationship. In 1958, the four Geneva Conventions on the Law of the Sea⁵ were adopted at the First United Nations Conference on the Law of the Sea, which established the freedom of navigation, including freedom of the four major high seas. Section III of the *Convention on the High Seas and the Contiguous Zone Convention* were divided into three parts: subsection A provides rules which are applicable to all ships, subsection B mentions rules applicable to merchant

¹ Chou Ken-sheng, *Outline of International Law*, China Founder Publishing House, 2004 edition, p. 57.

² Shiro Terada, translation by Han Xian, *Seven Masters of International Law*, P. 106. BEIJING: China University of Political Science and Law Press, May 2003 First Edition.

³ *Marx/Engels Collected Works*, Volume I, People's Publishing House, 2012, p. 401.

⁴ Mahan, *The Influence of Sea Power*, trans. Yibing, Beijing Daily Press, 1(2012).

⁵ The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf, the Convention on Fishing and the conservation of the Living Resources of the High Seas and the Convention on Optional Protocol on Dispute Settlement.

ships and subsection C contains rules applicable to government ships other than warships. Article 14 of the *Convention on the Territorial Sea and the Contiguous Zone* mentions that “Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.” and that “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”¹ All of these belong to Subsection A, namely rules applicable to all ships. Thus, based on the Convention, chapter on innocent passage was formulated in the Third United Nations Conference on the Law of the Sea.

Freedom of high seas, including freedom of navigation, and innocent passage through the territorial sea are important elements on *the United Nations Convention on the Law of the Sea* (hereinafter referred to as “the Convention”), which was adopted by the Third United Nations Conference on the Law of the Sea.²

1.2 Deliberations on innocent passage at the Third United Nations Conference on the Law of the Sea

The innocent passage of foreign warships through the territorial seas of coastal States has always been a highly controversial issue and was of great concern to the States participating in the Third United Nations Conference on the Law of the Sea.

As early as the Seabed Committee, statements by the Soviet Union, Spain and Malaysia suggested that warships (including submarines) should obtain prior authorization for passage through straits within their territorial sea.³

During the Third United Nations Conference on the Law of the Sea, several informal and formal proposals were put forward on innocent passage of foreign warships through the territorial sea of coastal States, which were extensively discussed at sessions. The Gabonese Republic’s proposal requires both prior authorization and notification to the coastal State for the passage of warships through the territorial sea.⁴ The other was issued by 28 countries. The amendments proposed in 1998 proposed the addition of a “security” provision to satisfy the sponsors.⁵ Both proposals received considerable support and triggered intense debate. Opponents argued that the adoption of the amendments would affect the delicate balance that had been struck; while supporters insisted on the right of the coastal State to regulate the passage of warships, whether or not the provisions of the

¹ See the UN International Law Commission website: <http://www.un.org/chinese/law/ilc/fish.htm>

² Article 87 Freedom of the High Seas of the Convention. 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII. 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area. Article 90 Right of navigation refers to Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

³ Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 Commentary*, Volume II, Martinus Nijhoff Publishers, 1993, p.165.

⁴ Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 Commentary*, Volume II, Martinus Nijhoff Publishers, 1993, p.168.

⁵ Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 Commentary*, Volume II, Martinus Nijhoff Publishers, 1993, p.168

eventual convention expressly so provided. When signing the Convention, the States declared again that its provisions were not prejudicial to their right to take measures to regulate the innocent passage of warships through their territorial sea.

The title of Section III of *the Convention* is “Innocent passage through the territorial sea”, consists of three subsections: subsection A, “Rules applicable to all ships”, subsection B, “Rules applicable to merchant ships and government ships operated for commercial purposes” and subsection C is “Rules applicable to warships and other government ships operated for non-commercial purposes”. This is in line with the provisions of *the 1958 Convention on the Territorial Sea and the Contiguous Zone*.¹ Article 17, “Right of innocent passage”, is under subsection A and provides that “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” Subsection A, including Article 17, applies to all ships and shall be read together with Articles 18 (Meaning of passage) and 19 (Meaning of innocent passage).²

Although article 17 of the Convention makes it clear that the right of innocent passage applies to all States and their ships, the controversy lies in whether the consent of the coastal State should be required for the innocent passage of foreign warships. Most of the major western maritime Powers advocate that warships should enjoy the same right of innocent passage as merchant ships, while most of the developing countries that advocate the need to obtain the prior consent of the coastal State for the passage of warships through the territorial sea.³

The attitudes of the maritime powers also went through significant change. Take the Soviet Union as an example, it had taken a conservative position at the First Conference on the Law of the Sea. However, it supported the right of innocent passage of warships since the Third Conference on the Law of the Sea. Russia now allows innocent passage of foreign warships to sail through its territorial sea but prohibits the passage of more than three foreign warships and foreign government vessels from the same country at the same time. Foreign nuclear-powered ships, warships, other government ships, ships carrying nuclear energy, other dangerous and noxious substances or materials must have the requisite documents for passage through Russian territorial sea, comply with international conventions on special precautionary measures for such ships, navigate a specific course of the territorial sea and submit to a special arrangement for the zoning of the course.⁴ In terms of State practice, many major maritime States such as the United States, the United Kingdom, France, Germany, Italy, the Netherlands and Russia advocate that warships should enjoy the same right of innocent passage as merchant ships, while about 40 developing countries insist that warships must have the consent of the coastal State to pass through its territorial sea.⁵

¹Shao Jin: “Rules of General International Law concerning the innocent passage of foreign warships through the territorial sea”, China annual of international law (1989) Foreign Translation Publishing House.

²Satya N.Nanda and Shabtai Rosenne, United Nations Convention on the Law of the Sea 1982 Commentary, Volume II, Martinus Nijhoff Publishers, 1993, p.125

³J.Ashley Roach & Robert W. Smith, United States Responses to Excessive Maritime Claims, Brill Academic Pub, 2nd ed., 1996, pp.266-267.

⁴Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 17 July 1998, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf. Access: 11 November, 2019.

⁵ For more: <http://policy.defence.gov/OUSDP-Offices/FON>.

2、 China's position on innocent passage of warships

Since the People's Republic of China resumed its lawful seat in the United Nations, the Chinese delegation has repeatedly stated its position on innocent passage in the territorial sea in its statements on the United Nations Seabed Committee and the Third United Nations Conference on the Law of the Sea. China's domestic legislation and practice are consistent with that.

2.1 Seabed Committee period

In its statement during the conference of the Seabed Committee, the Chinese delegation stated its position on innocent passage of warships. China holds that foreign merchant vessels may pass through the territorial sea with innocent passage, but warships should apply for prior approval, notification or permission. The Chinese delegation also explained its understanding towards the meaning of "innocent passage".

For innocent passage through a strait, the representatives of China pointed out in the group 2 of the conference of the Seabed Committee that straits within the territorial sea of States, whether or not regularly used for international navigation, should be administered by the littoral States. Foreign merchant ships may pass through with innocent passage, but should comply with the relevant laws and regulations of the coastal States, and that foreign warships must obtain prior authorization to pass through straits belonging to the coastal States. The Straits within the Territorial Sea.¹

The provisions of *the Convention on the Territorial Sea and the Contiguous Zone*, adopted by the First United Nations Conference on the Law of the Sea, on innocent passage, the representatives of China, in his statement at the conference, pointed out that article 14 of *the Convention on the Territorial Sea and the Contiguous Zone* only provides that 'ships of all States' have the right of innocent passage through the territorial sea.

In 1973, at the second conference of the United Nations Seabed Committee, the Chinese delegation submitted a "working paper on the law of the sea in areas under national jurisdiction" (hereinafter referred to as "the working paper"), expressing the Chinese delegation's consistent position on the law of the sea. The "working paper" shows China's attitude towards innocent passage. It includes China's views on innocent passage. Firstly, it defines the term as "innocent passage". It means passage that does not impair the peace, security and good order of the coastal State. Secondly, foreign non-military ships can pass through the territorial sea without innocent. Thirdly, the passage of foreign military ships through the territorial sea shall be subject to prior notification to the competent authorities or prior authorization by the competent authorities. Fourthly, foreign ships and aircraft passing through other countries' territorial waters and the airspace over them shall abide by the necessary laws and regulations formulated and promulgated by the coastal State.²

2.2 The period of the Third United Nations Conference on the Law of the Sea

During the Third United Nations Conference on the Law of the Sea, the passage of warships through the territorial sea continued to be a point of contention. The claims of maritime Powers and developing countries were different: the former argued for the

¹Department of International Law, Faculty of Law, Peking University: *A collection of law of the sea materials*, People's Publishing House, 1974, p. 33.

²Peking University, Faculty of Law, Teaching and Research Department of International Law: *A Collection of Materials on the Law of the Sea*, People's Publishing House, 1974 edition, p. 74.

exercise of the right of innocent passage by foreign warships within the territorial sea of the coastal State, while the latter demanded that foreign warships be required to notify the competent authorities of the coastal State in advance or to obtain permission from them before passing through its territorial sea. Although a text reflecting both propositions was included in the document entitled “*Main Trends*” presented in the Second Committee in 1974, the provisions on the subject in *the Informal Single Consultative Text* produced at the third part of the session in 1975 reflected only the position of the major maritime Powers and expressly provided that the rule of innocent passage applied to warships, which was opposed by more than 30 States.

The above-mentioned article was deleted from *the Revised Single Formal Negotiated Text* produced in the fourth part of the session in 1976, and the 1976 text has been reproduced in various subsequent negotiated texts.

Since the seventh part of the 1978 session, China and over 20 developing countries have made contributions to the discussion and formulation of the Convention by submitting joint proposals on many occasions, including proposals on the need to obtain prior authorization or notification for the passage of foreign warships through the territorial seas of coastal States and on the security of the territorial seas of coastal States.

First of all, **in terms of the nature of warships and ordinary commercial vessels**, innocent passage is only a convenient way provided by the coastal State and should be regulated by domestic law.

The text of *the Informal Composite Consultations* produced at the sixth session did not reflect the attitudes of the Chinese delegation and many other States on the passage of military ships through the territorial sea. So, on April 28, 1978, the Chinese delegation stated at the informal meeting of the Second Committee: “We all know that the nature of warships and ordinary commercial vessels are different. For both kind of ships, whether to grant foreign military ships the facilities for innocent passage in the territorial waters should be decided by the coastal State by its laws and regulations.”¹ “The way *the Informal Comprehensive Consultative Text* expresses, which makes no distinction between ordinary and military ships, is unacceptable to the Chinese delegation.” The Chinese text emphasizes the difference between the nature of warships and ordinary commercial vessels and considers the innocent passage of foreign warships in the territorial sea of a coastal State as a convenience provided by the State, which should be determined by the State under its laws and regulations.

During the ninth session of the Conference in 1980, China joined the informal proposal put forward by Argentina and others in solidarity with the legitimate demands of developing countries for the right of coastal States to establish necessary regulations for the passage of foreign warships through the territorial sea, “including the right to require prior consent and notification of passage through the territorial sea”. China’s attitude indicates that the passage of foreign warships through the territorial sea of a coastal State is subject to the domestic regulations of the coastal State, including prior of consent and notification to the coastal State.

Secondly, the “security” of the territorial sea. In 1982, the eleventh session of the Conference, 28 States, including China, submitted a joint proposal (C.2/Informal Meeting/58/Rev.1) and a formal amendment (A/CONF.62/L.117) in the Second Committee and the plenary, suggesting that coastal States should have the right to require the passage of foreign warships to abide by their national laws and regulations. The

¹ The collection of documents of the delegation of the People’s Republic of China to relevant United Nations meetings (1978.1- 6), People’s Publishing House 1978, pp. 131-132.

passage through the territorial sea should be preceded by the approval or notification of that State. The “security” of the coastal State should be included in the formulation of laws and regulations for innocent passage through the territorial sea.

Considering the sharp confrontation between the co-sponsors and the opposing States on this issue and to avoid a breakdown of the meeting, it was agreed that the two sides would not insist on a vote and that the President of the General Assembly would make a statement in plenary conference, that is “without prejudice to the right of the coastal State to take measures to ensure its security following Article 19 (Meaning of innocent passage through the territorial sea) and Article 25 (Right of protection of the coastal State) of the Convention. Lastly, the provisions of the Convention on innocent passage through the territorial sea are almost identical to those of *the 1958 Convention on the Territorial Sea and the Contiguous Zone*.

In its statement of March 31, 1982, the Chinese delegation stressed again that the regime for the passage of warships through the territorial sea “concerns the sovereignty and security of coastal States and is of great importance to many countries”.¹ Since the lack of clarity of the relevant provisions in the current draft convention and the potential of further differences in interpretation and implementation, China and the countries concerned jointly put forward a proposal to add a clause. By which, a coastal State, in accordance with its own laws and regulations, should require a foreign military vessel to obtain prior approval or notification of that state through its territorial waters.

Lastly, this position on innocent passage was restated on the occasion of the signing of the Convention. At the Conference at which the Convention was adopted on April 30, 1982, the Chinese delegation reiterated in its statement: “The provisions of this Convention relating to innocent passage in the territorial sea are without prejudice to the right of the coastal State to require, under its national laws and regulations, the prior approval or notification by the coastal State of the passage of foreign warships through the territorial sea.”²

On December 9, 1982, at the signing ceremony of the Convention on the final session of the Third United Nations Conference on the Law of the Sea, the Chinese delegation also stated in its statement: “We have repeatedly pointed out in the previous sessions that the provisions of the Convention on innocent passage through the territorial sea do not provide clear provisions on the regime for the passage of warships through the territorial sea, and some countries, including China, have proposed amendments to the Convention. At the April session of this year, in response to the proposed by the President of the conference, the co-sponsors did not insist that the amendment be put to the vote. However, the statement made by the President of the Conference at that time has made it clear that this does not affect the principled position of the co-sponsors calling for the safeguarding of their security.”³

In summary, China’s attitude was clear and never wavered during the Third United Nations Conference on the Law of the Sea. In terms of nature, warships are different from merchant ships, coastal states have the right to make necessary regulations on the passage of foreign warships through their territorial sea, and the passage of foreign warships through the territorial seas of coastal states requires prior approval for or prior notification

¹State Oceanic Administration, *Selected Laws and Regulations of Territorial Seas and Contiguous Zones*, Law Press, 1985, Pp. 193-194.

² “The Chinese delegation to the United Nations” (1982.1-6), World Knowledge Press, 1983, p. 91.

³ State Oceanic Administration, *Selected Laws and Regulations of Territorial Seas and Contiguous Zones*, Law Press, 1985, P195.

to that state.

The statement made by the President of the General Assembly at the ninth plenary meeting is explicit that coastal States have the right to take measures to ensure their **security** following the relevant provisions of the Convention.

3. China's domestic law and State practice on innocent passage

During the negotiation of the Convention, and after China's signature and ratification of the Convention, Chinese government has insisted that the passage of foreign warships through its territorial sea requires China's prior consent, which can be shown in the form of "permission", "approval" or "notification".

3.1 Permission and approval

On September 4, 1958, the 100th meeting of the Standing Committee of the First National People's Congress approved *the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea* (hereinafter referred to as the Declaration on the Territorial Sea), which demands that the foreign warships that pass innocently through China's territorial waters must first obtain permission from the Chinese government.¹

Article 3 of the Declaration on the Territorial Sea clearly states, "no foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the Peoples Republic of China". It is worth noting that the "permission" in the Declaration of Territorial Sea applies to all foreign aircraft and warships.

Innocent passage of foreign warships through China's territorial seas in the relevant domestic laws of China is subject to the prior approval of the Chinese government. The first domestic law of China that deals with innocent passage is *the Maritime Traffic Safety Law of the People's Republic of China* (hereinafter referred to as the "Maritime Traffic Safety Law"). According to the Article 11, Paragraph 2 of Maritime Traffic Safety Law approved on 2nd September, 1983: "Military vessels of foreign nationality may not enter the territorial sea of the People's Republic of China without the approval of the Government of the People's Republic of China."²

On February 25, 1992, Article 6 (2) of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone restates that, "The entry of a foreign military vessel into the territorial sea of the People's Republic of China must be subject to the approval of the Government of the People's Republic of China".³ On October 25, 1991, Yan Hongmo, then Director of the State Oceanic Administration, made the "*Explanation on the Law of the Peoples' Republic of China on the Territorial Sea and Contiguous Zone (Draft)*" (hereinafter referred to as the "Explanation") at the 22nd meeting of the Standing Committee of the Seventh National Peoples' Congress, in the "Regime on the Passage of Foreign Ships through the Territorial Sea", it was held that "Given the realities in China, the Draft adopts an authorization system for the passage of foreign warships through the

¹Section 3 of the Government of the People's Republic of China Declaration on Territorial Sea. Website of the Chinese People's Congress: http://www.npc.gov.cn/wxzl/gongbao/1958-09/04/content_1480851.htm (9 December, 2019)

²Maritime Traffic Safety Law of the People's Republic of China, Website of the Chinese People's Congress: www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_4434.htm (9 December, 2019)

³ Article 6 (2) of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone, Website of the Chinese People's Congress: http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4562.htm (9 December, 2019)

territorial sea. Article 6 (2) of the Draft provides that the entry of foreign military vessels into the territorial sea of the People's Republic of China requires the approval of **the Government** of the People's Republic of China". The Draft also argues that "such a provision is consistent with China's 1958 'Declaration on the Territorial Sea' and the 1983 Law on Maritime Traffic Safety".

The author believes that prior permission and prior approval is the requirement for a prior express consent in both the Declaration on the Territorial Sea adopted with the approval of the Standing Committee of the National People's Congress and relevant Chinese domestic laws regarding the innocent passage of foreign warships through China's territorial sea. However, there is a certain difference between "permission" and "approval". It is inaccurate to say that the system of authorization for the passage of foreign warships through the territorial sea adopted in the draft law is consistent with the provisions of China's 1958 Declaration on the Territorial Sea.

As for the nature of the Explanation on the Draft Law, it should have a report submitted by the drafting department to the National People's Congress or the Standing Committee for consideration, including an introduction to and explanation of the background and process of drafting, the main contents of the draft law and the main system to be established. To some extent, such explanation may reflect the legislative intent, they are not legislative interpretations in themselves and should have no legal effect.

3.2 Approval and Notification

On 15 May 1996, the decision of the 19th meeting of the Eighth Standing Committee of the National People's Congress on the ratification of the convention states: "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea relating to innocent passage in the territorial sea shall not prejudice the right of a coastal state, in accordance with its laws and regulations, to require **the prior permission** or notification of that state for the passage of foreign warships through the territorial sea".¹

This decision can be explained as follows: first, as a coastal state that has signed and ratified the Convention, China may enact relevant laws and regulations regarding innocent passage of its territorial sea. Second, these laws and regulations may include requirements that foreign warships must obtain prior permission or notification from the Chinese government for passage through China's territorial sea.

Given that the conjunction between "permission" and "notification" in the "decision" is "or", which means it can be chosen. Moreover, there is no provision in the Law on the Territorial Sea and Contiguous Zone and the Maritime Traffic Safety Law, stipulating that foreign warships must notify the Chinese government in advance of their passage through China's territorial sea.

3.3 China's Practice on Innocent Passage

China's state practice regarding innocent passage through the territorial sea is mainly embodied in its protest against and criticism of the intrusion of foreign warships into its territorial sea.

After the 1958 Territorial Sea Declaration was issued, the United States warships and aircraft continued to violate China's territorial waters and airspace, to which China lodged

¹ Decision of the Standing Committee of the National People's Congress on the ratification of the United Nations Convention on the Law of the Sea, No. 4, of 15 May 1996 Pass. Website: www.npc.gov.cn/wxzl/gongbao/2000-12/16/content_5003571.htm (9 December, 2019)

repeated protests. On September 7, 1958, the Ministry of Foreign Affairs issued a serious warning to the United States warships for encroaching on China's territorial sea, and on May 25, 1960, United States warships intruded into China's Fujian coast, and on May 27, the Chinese Government issued its 100th warning to the United States Government. On April 26, 1962, United States warships twice intruded into the waters near Shuixing Island in China's Xisha Islands, and the Chinese Government issued the 200th serious warning to the United States. From September 7, 1958, to July 1, 1964, 315 U.S. warships violated China's territorial sea 201 times and 405 U.S. aircraft violated China's airspace 233 times, and on June 23, 1969, China issued the 469th serious warning about the violation of China's territorial sea and airspace by whole aircraft and whole ships.¹

Over the past few years, the United States warships have repeatedly entered the territorial sea of China's Xisha (Paracel) Islands without permission or sailed within 12 nautical miles of the Gaven Reef and Johnson South Reef in the Nansha (Spratly) Islands. China's island-defending forces and warships and aircraft have taken action immediately, identifying and verifying the United States warships and warning them off. China's Ministry of Defence expressed firm opposition to the actions of the United States warships and stressed that *the Law on the Territorial Sea and the Contiguous Zone* stipulates that foreign warships must obtain prior approval to enter China's territorial sea.

American's warships have repeatedly sailed into and through the waters of the Nansha Islands, entered and crossed the territorial sea of the Xisha Islands,² and even stopped within 12 nautical miles of the reefs to conduct life-saving training.³ Such actions as deliberately stopping in the territorial sea and conducting life-saving training, which is "not directly related to the passage". These are clearly "non-innocent passage".

The U.S. warship trespassed into the territorial sea of South China Sea islands without the permission of the Chinese government, which is a demonstration that America has always insisted on the right of innocent passage through waters of other States without prior notice or approval.⁴ This deliberate action of non-innocent passage challenge China's claim to straight baselines around the Xisha Island.

The protests and refutations by China's Ministry of Foreign Affairs and Ministry of National Defense are aimed at the unauthorized entry of the US warship into Chinese territorial sea in violation of Chinese law. They are not denying the right of innocent passage of the US warship.

4、The View of the Chinese academia

On the right of innocent passage of warships, there are two main views in Chinese academic community: the affirmative and the negative.

¹ Reference: "China issued the 469th serious warning" in the face of the US invasion in 1969. Website: <http://www.xixik.com/content/e2f11b5356193849> (26 September, 2019)

² Statement by Yang Yujun, spokesperson for the Ministry of National Defense, on the unauthorized entry of a U.S. warship into Paracel Islands Territorial Waters". Website: http://www.mod.gov.cn/affair/2016-01/30/content_4638339.htm (16 December, 2019)

³ "Regular press conference held on 6 May 2019 by the spokesperson of the Ministry of Foreign Affairs, Geng Shuang". Website: https://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/t1661103.shtml (16 December, 2019)

⁴ "Defense Ministry spokesman Wu Qian's question and answer on US vessel unauthorized entry into Paracel Islands territorial waters", Chinese military website: within 12 nautical miles of the Xisha Islands. Link: http://www.81.cn/xwfy/2018-05/27/content_8044121.htm. And "Two US warships have intruded within 12 nautical miles of Paracel Islands, executive aircraft 'exercise in motion'." Link: <https://new.qq.com/omn/20180527/20180527A1GT2Z00> (18 December, 2019)

4.1 Affirmation

Supporters argue that warships enjoy the same right of innocent passage through the territorial sea as merchant ships, no need for prior approval, permission or notification by the coastal State. The foundation is that article 17 of the Convention, “right of innocent passage”, provides that “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. This article is located under subsection A, “Rules applicable to all ships”. The Convention does not distinguish between merchant ships or warships or provide that warships are not a kind of ship. Hence, ships of any States enjoy the right of innocent passage through the territorial sea.

They also mentioned that subsection A is the first of the three subsections of section III on “innocent passage through the territorial sea”, which is a general provision and a specific provision applicable to subsections B and C. From all the three subsections that warships should be considered to enjoy the same right of innocent passage as ordinary merchant ships.¹ Subsection A “includes rules requiring submarines and other submersibles to navigate on the surface of the water, granting a right of innocent passage to submarines”. At the adoption of the Convention, submarines were only warships, and the granting of the right of innocent passage to submarines indicates that the right of innocent passage was also granted to warships”.² Furthermore, Article 24 of section A, “duties of the coastal State”, provides that the coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except under this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention.

Positivists cite *the 1958 Convention on the Territorial Sea and the Contiguous Zone* to prove that the Convention provides for the right of innocent passage for all ships, including warships.³ “The 1958 territorial sea convention provides that ships of all states, whether for military or civilian use, shall have the right of ‘innocent passage’ through the territorial sea. Although the present convention imposes some further restrictions on the passage of warships, it basically follows the provisions of the 1958 territorial sea convention.” “The basic provisions of the two conventions on innocent passage through the territorial sea are the same or almost the same.”⁴ Thus, foreign warships enjoy the right of innocent passage in the territorial sea.

4.2 Denial

There are those who are of the view that warships do not enjoy the right of innocent passage. “The right of innocent passage applies only to merchant ships, and warships do not enjoy this freedom.” “To affirm the right of innocent passage for merchant ships while denying the right of passage for warships represents the correct theory and is in line with

¹ Chen Zhenguang, On the Right of Innocent Passage of Territorial Sea, *Politics and Law*, no. 1, 1985, Pp. 31-34.

² Li Hongyun, On the Right of Innocent Passage of Foreign Warships In Territorial Waters, *Chinese and Foreign jurisprudence*, no. 4, 1988, Pp. 88-92

³ Shen Weiliang, Xu Guangjian. *The Third United Nations Convention on the Law of the Sea and United Nations Convention on the Law of the Sea*, *China Annual of International Law* (1983), page 410-411. China National Translation and Publishing Corporation.

⁴ Shao Jin, *General Rules of International Law concerning the innocent passage of foreign warships through the territorial sea*, *Chinese Annual of International Law* (1989), no. 12 China Foreign Translation Publishing House.

international practice.”¹ “Following the provisions of the Convention on the Territorial Sea and the Contiguous Zone adopted by the Geneva Conference in 1958, the right of innocent passage applies to the ships of all countries, without distinction between warships and merchant ships. This certainly cannot be defined as general international practice and is not a rule acceptable to all States.”²

Interestingly, this argument that the 1958 Convention on the Territorial Sea and Contiguous Zone gives the right of innocent passage without distinction between warships or merchant ships, which is used to prove that the Convention also makes the same provision but ignores the author’s denial that this view represents general international practice, and then argues that the author’s endorsement of the right of innocent passage of warships is a misreading of the author’s argument.

Opponents also argue that the passage of warships through the territorial sea and the passage of ordinary merchant ships are not equated at all. The content: “regime for the passage of military vessels through the territorial sea is inconsistent with the generally accepted theory and practice of international law.”³

China’s current laws and regulations, decisions of National People’s Congress and academic opinions all emphasize the need for prior approval for or prior notice to warships to pass through territorial sea. But there was no clear answer whether China recognized the right of innocent passage of warships or not.

From my point, the premise of “approval” is to agree that the other party has some kind of right, but the exercise of that right requires application and approval. Although China’s legislation does not stipulate, legal logic and national practice recognize the right of innocent passage of foreign warships in China’s territorial sea, which is a kind of conditional right of innocent passage. Namely, foreign warships must apply to the Chinese government and obtain its approval before exercising the right of innocent passage in China’s territorial sea. This also means that without the approval of the Chinese government, they cannot enter and sail into the Chinese territorial sea. As Mr. Wang Tieya stated, “Under generally accepted principles of international law, a coastal state may require prior permission or notification as a condition for the passage of a foreign warship through its territorial sea.”⁴

Warships making innocent passage in the territorial sea of a coastal state shall abide by the laws and regulations of the coastal State concerning passage through its territorial sea. If any warship violates the laws and regulations of the coastal state with respect to its territorial sea and disregards any request from the coastal state to comply with the laws and regulations, the coastal State may require the warship to leave its territorial sea immediately. The flag State is internationally responsible for any loss or damage suffered by the coastal State as a result of non-compliance by foreign warships with the laws and regulations of the coastal state relating to its territorial sea or with the provisions of the Convention or other rules of international law.

5、 Conclusion

In the Article 29 of the Convention, the definition of warships is given as follows: “For the purposes of this Convention, “warship” means a ship belonging to the armed

¹Chou Gengsheng, *international law (volume I)*, Commercial Press, 1976, p. 370.

²Chou Gengsheng, *international law (volume I)*, Commercial Press, 1976, p. 370.

³ Liu Nanlai, Zhou Ziya. *International Law of the Sea*. Ocean Press, 81(1986).

⁴Deng Zhenglai, *Anthology of Wang Tieya*, China University of Political Science and Law, 2003, p. 336.

forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline". It can be said that warships are a type of ship.

From the Seabed Committee to the Third United Nations Conference on the Law of the Sea, discussions on the right of innocent passage of warships have revolved around whether prior consent (e.g., permission, approval) or prior notification from the coastal State is required. It's not about whether warships have a right of innocent passage or not. The maritime powers insist that the passage of warships do not require the consent of or prior notification to the coastal State. While developing countries, mainly from the perspective of national security, require prior consent or notification to the coastal State. It is clear that such a claim does not deny the right of innocent passage of a foreign warship through the territorial sea of a coastal state, but attaches conditions to such a right, namely, prior permission, authorization or prior notification to the coastal state. In particular, the requirement of approval and prior notification cannot be based on the denial of the right of innocent passage to foreign warships. In other words, if the right of innocent passage of a foreign warship is not recognized, there is no question of its authorization, and it is difficult for a foreign warship to obtain such a right based on a single notice.

here are three points on the right of innocent passage of warships: the innocent passage system, the prior notification system and the approval system. China operates a system of approval.¹ However, the approval system was neither discussed as a regime governing the innocent passage of warships during the commission on the seabed nor during the third United Nations Convention on the Law of the Sea. Proposals were made and discussed about approval, permission or notification as conditions for the exercise of the right of innocent passage by foreign warships.

In terms of China's legislation and practice, from the 1958 Declaration on the Territorial Sea to the 1983 Maritime Traffic Safety Law, and the 1992 Law on the Territorial Sea and Contiguous Zone, China's attitude on innocent passage of warships in the territorial sea has always required prior and explicit consent. China recognizes and respects the right of innocent passage of warships in the territorial sea of coastal States under international law, including that in the Convention. However, foreign States have not been able to exercise the right of innocent passage in the territorial sea. The passage of warships through China's territorial sea requires the prior and explicit consent of the Chinese Government, which is initially expressed as "permission" and, in the case of the Maritime Traffic Safety Law and the Territorial Sea and Contiguous Zone Law, as "approval", which is a conditional right of innocent passage.

This "approval" can be interpreted to mean the following: first, China recognizes the right of innocent passage of foreign warships in China's territorial sea. Second, foreign warships intending to pass through China's territorial sea shall submit applications for innocent passage through China's territorial sea to the relevant departments of the Chinese Government. Third, the relevant departments shall examine and approve such applications. Fourth, the approved foreign warships that have obtained approval submit applications for innocent passage shall pass through China's territorial waters following the conditions or requirements of the approval. If it is not approved, the warships shall not pass.

The 1958 Declaration on the Territorial Sea, along with the relevant domestic laws (*the Maritime Traffic Safety Law, Law on the Territorial Sea and Contiguous Zone*) and

¹Duan Jielong, *Chinese Practices and Cases in international Law*. Law Press, 111(2011) .

the decision of the National People's Congress to ratify the Convention, all stressed that the passage of foreign warships through China's territorial sea requires the prior approval of the Chinese government. In other words, only the Chinese government (or the relevant departments authorized by the Chinese government) has the right to receive and approve applications for innocent passage of foreign warships

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