There and Back Again, Russia's Evolving Approach to the Freedom of Navigation

*Frederik Rogiers**

Abstract

A State's position on international law is "determined by the basic principles of its foreign policy." Soviet international law scholar Gregorii Tunkin's statement seems as valid as ever today. Russia's aggression against Ukraine since 2014, the horrors of Bucha and Russia's increasingly questionable statements leave little room for imagination that it is a nation that cares little for international law as Western nations see it. While Russia's approach to international law has received increasing attention in recent years, not all fields of international law have been explored in equal depth. This article intends to put the spotlight on Russia's evolving approach to one of the bedrock principles of the international law of the sea, the freedom of navigation and its corollary, the right of innocent passage, specifically for warships and government vessels. It will become clear that, rather than following in its footsteps, Russia is in many ways backtracking on the more liberal views developed by the Soviet-Union in its final years and is *en route* to embracing some modern form of closed seas doctrine.

Keywords

Soviet Union – Russia – Black Sea – Arctic Sea – warship – Law of the Sea – freedom of navigation – innocent passage – transit passage

1 Introduction

A State's position on international law is "determined by the basic principles of its foreign policy."[1] Soviet international law scholar Gregorii Tunkin's statement seems more valid than ever today. From observing the horrors of Bucha, many

* Academic Assistant and PhD Researcher at Ghent University (Belgium).

1 J.J. Darby, 'The Soviet Doctrine of the Closed Sea', 23 *San Diego Law Review* (1986), p. 685.

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may question the respect that Russia has left for international law.[2] However, while Russia's approach to international law has received increasing attention in recent years,[3] not all fields have been explored in equal depth.

One such field has, after a short period of relative calm following the end of the Cold War, received increasing media attention over the past decade: the law of the sea and the freedom of navigation. While US Freedom of Navigation operations along the Chinese coast generally tend to get the lion's share of coverage,[4] China and Russia have recently begun flexing their muscles at sea as well.[5] The result of such flexing has been an increase in the number of incidents involving warships, often – though not exclusively – involving the US, China or Russia.[6] In 2019, for example, an American and a Russian ship almost collided after a show of force from the latter, which was meant as a diplomatic statement,[7] while in 2022, a Russian vessel caused quite a stir near the Belgian and Dutch coasts when it appeared to be spying on local wind farms.[8]

Images of a grand and powerful Russian navy might come to mind taking into account all of these incidents, and indeed, reading the updated version of Russia's Maritime Doctrine from July 31st 2022, strengthened naval combat and increasing attention to new theatres such as the Arctic and Pacific regions are

2 S. Ostrovsky *et. al.*, 'Ukrainians in Bucha Reflect on Horrors and Brutality Suffered at Hands of Russian Forces', *PBSO News Hour*, 28 February 2023, <https://www.pbs.org/newshour/show/ukrainians-in-bucha-reflect-on-horrors-and-brutality-suffered-at-hands-of-russian-forces>, visited on 30 September 2023.

3 *E.g.,* L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford, 2015.

4 *E.g.,* U.S. 7th Fleet Public Affairs, '7th Fleet Cruiser Conducts Freedom of Navigation Operation in South China Sea', *Commander, U.S. 7th Fleet*, 28 November 2022, <https://www.c7f.navy.mil/Media/News/Display/Article/ 3229885/7th-fleet-cruiser-conducts-freedom-of-navigation-operation-in-south-china-sea/>, visited on 30 September 2023; *see also* Ministry of Foreign Affairs of the People's Republic of China, 'FM Spokesman Gives Full Account of Air Collision', *Xinhua*, 4 April 2001, <http://www.china.org.cn/english/2001/Apr/10070.htm>, visited on 30 September 2023.

5 K. Bartlett, 'Russia Warship Drills with South African, Chinese Navies Amid Criticism', *VOA News*, 17 February 2023, <https://www.voanews.com/a/russian-warship-drills-with-south-african-chinese-navies-amid-criticism/6967240.html>, visited on 30 September 2023.

6 *See also*, C. Moore, *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force*, Routledge, New York, 2021 p. 2.

7 B. Lendon *et. al.*, 'US and Russian Warships Nearly Collide in the Pacific', *CNN*, 7 June 2019, <http://edition.cnn.com/2019/06/07/politics/us-russia-navy-near-collision-intl/index.html>, visited on 30 September 2023.

8 'Netherlands Accuses Russia of Spying on Offshore Wind Farms', *The Maritime Executive*, 21 February 2023, <https://maritime-executive.com/article/netherlands-accuses-russia-of-spying-on-offshore-wind-farms>, visited on 30 September 2023.

key points.[9] However, these points are also accompanied by fears of encirclement and potential confrontation with the West.[10]

An interesting question is the direction in which this fear might lead Russia, for as they say, a drowning man will clutch at a straw. In 2021, based on Russia's recent actions in the Baltic Sea, Alexander Lott wrote that a pattern of increasing restrictions on international navigation was beginning to take hold, rooted in the *mare clausum* practices of its Soviet predecessor.[11] This article builds on that conclusion by comparing Russian actions in the Black and Arctic Seas and putting the spotlight on some of Russia's recent legislation, in particular, regarding the right of innocent passage for foreign warships.

The structure of this article is as follows. First, the article will briefly sketch the current international law of the sea framework regarding the territorial sea and the regime of innocent passage based on the 1982 Law of the Sea Convention.[12] Following this, the author will take a step back and trace the evolution of Russia's Soviet predecessor on the freedom of navigation and the right of innocent passage in particular. In doing so, it will become clear that the USSR's views on granting foreign warships the right of innocent passage became more permissive as its own naval strength grew, culminating in its pivotal role during UNCLOS III. Finally, the author will compare several case-studies from the Black Sea and Arctic Sea that clearly paint a picture of a State, slowly but surely, turning its back on the idea of a permissive passage regime for foreign warships.

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9 For an English translation of the 2022 Doctrine see Anna Davis and Ryan Vest, 'Maritime Doctrine of the Russian Federation', 31 July 2022, *Russia Maritime Studies Institute,* paras. 50–52 [hereafter the 2022 Maritime Doctrine]; D. Rakov, 'Russia's New Naval Doctrine: A 'Pivot to Asia'?', *The Diplomat*, 19 August 2022, <https://thediplomat.com/2022/08/russias-new-naval-doctrine-a-pivot-to-asia/>, visited on 30 September 2023.

10 Para. 53 2022 Maritime Doctrine; O.R. Chiriac, 'The 2022 Maritime Doctrine of the Russian Federation: Mobilization, Maritime Law, and Socio-Economic Warfare', *CIMSEC*, 28 November 2022, <https://cimsec.org/the-2022-maritime-doctrine-of-the-russian-federation-mobilization-maritime-law-and-socio-economic-warfare/>, visited on 30 September 2023.

11 A. Lott, 'The (In)applicability of the Right of Innocent Passage in the Gulf of Finland – Russia's Return to a *Mare Clausum*?', *The International Journal of Marine and Coastal Law*, 2021, pp. 241–262.

12 *UN Convention on the Law of the Sea*, 10 December 1982 Montego Bay, entered into force on 16 November 1994, UNTS vol. 1833, p. 3 [LOSC].

2 The Current International Law of the Sea Framework

The current international law of the sea framework regulating the navigation of warships is contained within the 1982 LOSC, a package deal resulting from a series of protracted negotiations from 1973 to 1982.[13] The basic premise of the Convention is to divide the oceans into a series of different maritime zones with decreasing prerogatives for the coastal State, the further one goes out to sea. Specifically, the baseline forms the boundary between a State's sovereign territory and internal waters on the one hand, and one's territorial sea on the other.[14] This territorial sea may extend up to 12 Nm from the baseline[15] and the coastal State's sovereignty extends to it as on land,[16] with the exception that foreign ships are to be granted the right of innocent passage.[17] This passage means navigation through the territorial sea, with or without stopping at a local port facility within or outside internal waters, and should be continuous and expeditious, albeit allowing for stopping or anchoring if incidental to ordinary navigation or rendered necessary due to *force majeure* or distress, or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[18] Art. 19 LOSC further adds that passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal State and sums up a list of activities which are to be considered as non-innocent.[19] While under art. 21 LOSC, the coastal State may adopt laws and regulations relating to innocent passage through the territorial sea, under art. 24 (1) (a) LOSC, these should not have the practical effect of denying or impairing innocent passage.[20] Finally, under art. 25 (1) LOSC, the coastal State may take the necessary steps in its territorial sea to prevent passage that is not innocent.[21] The Convention does not clarify however what such actions might entail.

13 J. Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone and under UNCLOS', *Merkourios* 2012, p. 25.

14 Arts. 2, 5, 7 and 8 LOSC.

15 Art. 3 LOSC.

16 Art. 2 (1) LOSC; For conciseness, the contiguous zone, exclusive economic zone, continental shelf and high seas are not specifically mentioned.

17 Art. 17 LOSC.

18 Art. 18 LOSC.

19 Art. 19 LOSC.

20 Arts. 21 *iuncto* 24 (1) (a) LOSC.

21 Art. 25 (1) LOSC.

Within straits used for international navigation,[22] a regime of transit passage was established that is broader than the regime of innocent passage through the territorial sea,[23] and which must not be suspended.[24]

Finally, warships are defined in art. 29 LOSC[25] and are given immunity from coastal State jurisdiction under arts. 32 *iuncto* 95 LOSC.[26] Art. 30 LOSC further clarifies that if a warship does not comply with the laws and regulations of the coastal State concerning innocent passage, the coastal State "may require it to leave the territorial sea immediately."[27]

3 The Soviet Union's Blue-Water Journey and Evolving Views of the International Law of the Sea

Surprisingly perhaps, the Soviet-Union proved to be one of the US' closest allies in obtaining the current law of the sea navigation regime during the UNCLOS III negotiations. However, such likeness in views was a very recent phenomenon at the time, as for most of their history, the US and USSR shared diametrically opposed views on the law of the sea's navigation regime, especially as concerned warships.

For most of its history, the Soviet Union and the Russian Empire before it, had cared primarily for their coastal security and had thus sought dominion over the seas near them, like the Baltic Sea or Black Sea, leading Russian leaders to long seek control of the strategic Bosphorus Straits.[28] In its early years however, the Soviet Union held relatively permissive beliefs about the right of foreign warships to enter the territorial sea. While, during the 1930 Codification Conference at The Hague, the US was of the opinion that warships required prior authorization from the coastal State to enter the territorial sea,[29] the USSR made no such requirement.[30] Franckx calls this the USSR's first

22 Art. 34 LOSC.

23 Arts. 38 and 39 LOSC, one might pay specific attention to the mention that ships and aircraft may traverse the international straits in "normal mode" under art. 39 (1) (c) LOSC.

24 Art. 44 LOSC.

25 Art. 29 LOSC contains the definition of warships.

26 Arts. 32 *iuncto* 95 LOSC.

27 Art. 30 LOSC.

28 V.J. Puryear, *Napoleon and the Dardanelles*, University of California, Berkely, 1951, pp. 325–326.

29 Reply of the United States to the Questionnaire of the Preparatory Committee, League of Nations Doc C.74.M.39.1929.V (L.N. Pub. No. 1929.V.2) p. 66 and p. 73.

30 Reply of the USSR to the Questions Drawn up by the Preparatory Committee, League of Nations Doc C.74(b).M.39(b).1929.V (L.N. Pub. No. 1929.V.13) p. 3.

of three phases in terms of their views on the right of innocent passage for warships, and sees specific ties to the Union's weakness in policing its waters at the time.[31]

A significant change occurred following the end of the Second World War. Now, the USSR's search for secure coasts and the defensive character of its fleet led it to take a more restrictive stance against innocent passage for warships,[32] now believing that prior authorization was required.[33] For this purpose, the legal doctrine of closed seas was adopted.[34] According to this regime, only littoral States – for reasons of geographical, historical and military-strategic reasons[35] – had any say in determining the rules applicable to such waters.[36] Indeed, a country unsure of its ability to resist a military attack will strive to keep the potential enemy as far away as possible.[37]

This self-doubt would not last, however. In 1956, at around the same time as the change in views to the innocent passage of warships, Admiral Sergey Gorshkov was appointed Commander in Chief of the Soviet Navy.[38] Utilizing the 1962 Cuban Missile Crisis, the admiral succeeded in persuading the Soviet establishment of the need for a new ocean-going fleet, which would lead to a significant naval buildup throughout the 1960s and 70s.[39] By the time of the UNCLOS III negotiations, the USSR had left its defensive doctrine behind and had gained a vested interest in defending the freedom of navigation concept both in the territorial sea and through international straits.[40]

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31 E. Franckx, 'The U.S.S.R. Position on the Innocent Passage of Warships through Foreign Territorial Waters,' *Journal of Maritime Law & Commerce*, 1987, pp. 61–62.

32 *Ibid*. p. 41.

33 Summary Records of the 307th Meeting, *Yearbook of International Law Commission*, Vol. 1, 1955, p. 145, UN Doc A/CN.4/SER.A/1955.

34 W. E. Butler, *The Soviet Union and the Law of the Sea*, Johns Hopkins University Press, Baltimore, 1971, pp. 125–126.

35 Darby, *supra* note 1, p. 689.

36 An example of a treaty in many ways codifying this closed sea approach to the Black Sea is the 1936 Montreux Convention, see *Convention regarding the Régime of Straits*, entered into force 9 November 1936, LNTS 173.

37 Darby, *supra* note 1, p. 689.

38 H.C. Bjerg, 'Book review: Admiral Gorshkov – The Man Who Challenged U.S. Navy', *Naval Historical Foundation*, 20 May 2020, <https://www.navyhistory.org/2020/05/admiral-gorshkov-the-man-who-challenged-u-s-navy/>, visited on 30 September 2023.

39 *See also* B. Ranft and G. Till, *The Sea in Soviet Strategy*, Palgrave Macmillan, London, 1989, pp. 93–103.

40 P. Thévenin, 'A Liberal Maritime Power as Any Other? The Soviet Union during the Negotiations of the Law of the Sea Convention', 52:2 *Ocean Development and International Law* (2021), p. 201.

The advent of the Soviet blue water navy[41] and its change in doctrine had not gone unnoticed to its adversaries either, which had by then recognized that the USSR had joined the ranks of the maritime powers.[42] In the early 70s, when developing States were seeking support for a new Law of the Sea Convention, the USSR and other maritime powers equally saw their chance to finally settle the outer limit of the territorial sea and secure the rights related to the navigation of warships for the future.[43] Back in 1967, it was even the Soviet Union that made the first contact with the Western maritime powers on the possibility of cooperation.[44] This led to the formation of the Group of Five, with the US and USSR forming the backbone of a maritime alliance with the UK, France and Japan, who would, until the end of UNCLOS III, work together to defend the freedom of navigation from the developing world.[45]

This was not going to be an easy task. The Union had after all taken on the position of self-appointed defender of the Third World and had to ensure that it looked sufficiently sympathetic to its plight.[46] Still, the many divergences in views should not be ignored.[47] For example, by the time of the negotiations, the concept of an "economic zone" had become highly popular amongst developing states.[48] On the other hand, both the United States[49] and the Soviet Union insisted the zone continue to enjoy high seas status and associated

41 The terms 'blue water navy' and 'green water navy' are used to differentiate navies based on their capabilities, size and field of action, with a blue water navy referring to the largest navies, capable of longtime and diffuse open seas operations as opposed to a green water navy which must operate closer to home; *see* R.C. Rubel, 'Talking about Sea Control', 63:4 *Naval War College Review* (2010), pp. 44–46.

42 *Soviet Frustrations in the Law of the Sea Conference,* CIA Intelligence Memorandum, 1981, p. 2.

43 *See e.g., UN Documents, A/C.1/PV1524*, 15 November 1967, United Kingdom; *UN Documents, A/C.1/PV1526*, 13 November 1967, France; *UN Documents, A/C.1/PV1525*, 10 November 1967, USSR.

44 *Letter dated 15 August 1970 from the representatives of Bulgaria, Hungary, Syria and the Union of Soviet Socialist Republics to the United Nations addressed to the Secretary-General*, 10 September 1970, A/8047, (XXV session), paras. 1–2.

45 A. Beesley, 'The Negotiations of UNCLOS III: Developing and Developed Countries as Partners – A Pattern for Future Multilateral International Conferences?', Spring *Law and Contemporary Problems* (1983), pp. 187–188.

46 *CIA Intelligence Memorandum*, *supra* note 42.

47 Thévenin, *supra* note 40, pp. 193–194.

48 *See* e.*g.,* the 1972 Yaoundé Conference (*Conclusion of the General Report of African States Regional Seminar on the Law of the Sea*, UN Doc. A/AC 138/79, 21 July 1972) and the *Declaration of Santo Domingo*, UN Doc. A/AC.138/80, 7 June 1972.

49 S. P. French, 'Memorandum for Colonel Frank J. Murray', *USMC, Maritime/UN Negotiations Division*, 18 November 1976.

freedoms.[50] Even after the USSR relented, Moscow warned developing States that high seas freedoms continued to apply in the EEZ.[51] While a complete overview of the Union's views during UNCLOS III goes beyond the scope of this article, it is important to mention that the Soviets also argued in favour of transit passage through international straits[52] and for the right of innocent passage for warships.[53]

Despite evolutions at UNCLOS III, however, internal Soviet legislation enacted in 1983 was more ambiguous on the right of innocent passage for warships. A first law limited itself to recognizing that the right of innocent passage for warships would have to be exercised in a manner stipulated by the Council of Ministers.[54] Even if the latter did indeed confirm the right of innocent passage for warships on 28 April 1983, it came with a catch. While art. 8 of the Rules explicitly confirms this right, art. 12 (1) seems to limit lateral innocent passage, i.e. without entering the internal waters of the coastal State, to sea lanes and traffic separation schemes.[55]

This ambiguous attitude led the US to test the Soviet position on this important question multiple times throughout the 1980s in the Black Sea. A first freedom of navigation operation in 1986 was opposed by the USSR, albeit without providing clear legal grounds as to why they had protested.[56] The more famous Black Sea Bumping incident of 12 February 1988, in which Soviet ships quite literally bumped into those of the US, did however lead to a legal response: "According to existing Soviet rules, foreign warships only enjoy such right in places where sea lanes for international navigation are established … In the Black Sea there are no such designated sea lanes".[57] Yet, at the same time, the Soviets continued to make use of the right of innocent passage

50 *CIA Intelligence Memorandum*, *supra* note 42.

51 Thévenin, *supra* note 40, p. 218.

52 *See e.g.,* A/AC.138/SC.II/SR.45, 16 August 1972, p. 109.

53 *See* UN Document, A/CONF.62/C.2/L.26, 29 July 1974, Arts. 14 and 26; *see also* E. Franckx, 'Innocent Passage of Warships: Recent Developments in US-Soviet Relations', *Marine Policy*, 1990, p. 485.

54 Art. 13 Law of 24 November 1982 "On the State Boundary of the USSR", 48 VVS 891 (1982).

55 "*Rules Concerning the Navigation and Sojourn of Foreign War Vessels in the Territorial Waters of the USSR, the Internal Waters and Ports of the USSR"* confirmed by Decree of the Council of Ministers on 28 April 1983 [hereafter 1983 Rules]; *see also* Franckx, *supra* note 31, pp. 35–37.

56 E. Franckx, 'Further Steps in the Clarification of the Soviet Position on the Innocent Passage of Foreign Warships Through its Territorial Waters', *Georgia Journal of International and Comparative Law*, 1989, pp. 535–539.

57 *Ibid*. 556; *see also* Franckx, *supra* note 53, p. 486.

in other States' coastal waters, leading to incidents with Sweden and Japan.[58] One could call it an example of wanting to have one's cake and eating it too.

By 1989, however, improved relations with the West and the realisation that its current legal straddle position was untenable, led the USSR to conclude the Jackson Hole Agreement with the US.[59] By way of this agreement, the USSR recognized the provisions on the innocent passage of warships in the territorial sea within the LOSC as customary law and accepted that warships enjoyed the right of innocent passage through the territorial sea without the need for prior notification.[60] At the same time, the Soviet Council of Ministers enacted a Resolution amending art. 12 (1) of the 1983 Rules so as to no longer limit the foreign passage of warships to officially designated sea lanes or traffic separation schemes.[61]

4 The Russian Federation's Green-Water Fall from Glory

Fast forward to today, however, and it is becoming clear that Russia seems to be backtracking on the commitments its Soviet predecessor made at Jackson Hole. Despite the ambitions referenced in its Maritime Doctrine,[62] one cannot help but notice that Moscow seems on the defensive once more.[63] The sinking of the Moska[64] and the stitched-together Kuznetsov[65] are clear signs the

58 For a further discussion of the two incidents *see* Franckx, *supra* note 31, pp. 41–43, 47; For a specific discussion on the incident with Sweden *see* F. Bynander, 'The 1982 Swedish Hårsfjärden Submarine Incident: A Decision-Making Analysis', *Cooperation and Conflict*, 1998, pp. 367–407; For a specific discussion on the incident with Japan *see* R. J. Grammig, 'The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea', *Harvard International Law Journal*, 1981, pp. 331–354.

59 Franckx, *supra* note 53, p. 484.

60 *Joint Statement of the United States of America and the Union of Soviet Socialist Republics on the Uniform Interpretation of Rules of International Law Governing Innocent Passage*, 23 September 1989, respectively Preamble and para. 2; *Also* Franckx, *supra* note 53, p. 487.

61 Franckx, *supra* note 53, p. 488.

62 *Maritime Doctrine of the Russian Federation*, 31 July 2022, para. 9.

63 Rakov, *supra* note 9.

64 D. Barrie and N. Childs, 'The Moskva Incident and its Wider Implications', *International Institute for Strategic Studies*, 29 April 2022, <https://www.iiss.org/online-analysis/military-balance/2022/04/the-moskva-incident-and-its-wider-implications/>, visited on 30 September 2023.

65 *The Maritime Executive*, 'Russia's Sole Aircraft Carrier Catches Fire Again', 22 December 2022, <https://maritime-executive.com/article/russia-s-sole-aircraft-carrier-catches-fire-again>, visited on 30 September 2023.

Russian navy – unlike its American adversary[66] – no longer possesses the blue water capabilities of its Soviet predecessor.

While this article does not offer the room to discuss all of Russia's maritime evolutions of the past 30 years, a glimpse at Russia's more recent actions suffices to show that this is a nation that is once again focused on the defence of its nearby seas and that its approach to the innocent passage of foreign warships in its territorial sea, has followed suit. Two regions were chosen: the Black Sea and the Arctic, both with their own peculiarities. While Russia's actions are most subtle in the Arctic, its actions in the Black Sea, if sometimes up for legal debate, do betray a clear evolution towards a restrictive interpretation on the right of innocent passage for warships.[67]

4.1 *The Black Sea as a Russian Closed Sea*

For Russia, the Black Sea is already a theatre of war,[68] it is an area of significant geostrategic importance[69] and the springboard for projecting power into the Middle East and the Mediterranean.[70] Since its illegal annexation of Crimea in 2014, Russia has steadily begun treating the Sea of Azov and the Black Sea as Russian lakes – or *de facto* closed seas where it is free to determine the legal regime.[71] In what follows, three specific case studies dealing with the free navigation of warships in innocent passage will be discussed: (1) the case concerning three Ukrainian Naval Vessels (2) the Russian closure areas and (3) the HMS Defender incident.[72]

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66 *Advantage at Sea: Prevailing with Integrated All-Domain Naval Power*, 2020 Tri-Service Maritime Strategy, December 2020, p. 6.

67 *See* however also I. Ralby and L. Zaliubovsky, 'New Heights of Russian Hypocrisy and "Unlawfare" in the Black Sea', *CIMSEC*, 25 March 2022, via <https://cimsec.org/new-heights-of-russian-hypocrisy-and-unlawfare-in-the-black-sea/>, visited on 30 September 2023; on Lawfare *see* C. J. Dunlap Jr., 'Lawfare Today: A Perspective', 148 *Yale Journal of International Affairs* 2008, p. 148.

68 Chiriac, *supra* note 10.

69 B. Siman, 'No Security for Ukraine or Europe without a Secure Black Sea and Mediterranean', *Egmont Royal Institute for International Relations*, 6 December 2022, <https://www.egmontinstitute.be/no-security-for-ukraine-or-europe-without-a-secure-black-sea-and-mediterranean/>, visited on 30 September 2023.

70 P. Stronski, 'What is Russia Doing in the Black Sea?', *Carnegie Endowment for International Peace*, 21 May 2021, <https://carnegieendowment.org/2021/ 05/20/what-is-russia-doing-in-black-sea-pub-84549>, visited on 30 September 2023.

71 B. Combes, 'The War at Sea', 6 *International Centre for Defence and Security Russia's War in Ukraine* (2022), p. 1.

72 Not treated in detail here are (1) Russia's attempts at bypassing the Montreux Convention, *see* A. Aliano, 'Is Russia Exploiting a Gap in the Montreux Convention?', *Lawfare*, 14 June 2022, <https://www.lawfareblog.com/russia-exploiting-gap-montreux-convention>,

FIGURE 8.1 The route of the three Ukrainian Navy vessels[a]
a Wikipedia, 13 October 2021.

A first Russian infringement concerns its attack and subsequent arrest of three Ukrainian naval vessels in the Kerch Strait on 25 November 2018. In this case, three Ukrainian Naval vessels had attempted to pass the Kerch Strait, only to be blocked by a large container ship under the Kerch Bridge. Russia accused the vessels of ignoring orders to leave the area.[73] When the vessels did turn around, however, and began navigating away from the Strait, they were pursued by Russian Coast Guard vessels ordering the Ukrainian ships to stop.

visited on 30 September 2023 (2) Russia's blockade of Ukrainian ports, *see* Combes, *supra* note 71 (3) Russia's attacks against civilian vessels, *see e.g.*, 'Ukraine: Estonian cargo ship sinks after blast in Black Sea', *BBC News*, 3 March 2022, <https://www.bbc.com/news/world-europe-60606515> visited on 30 September 2023 (4) Russia's violations since February 24th 2022, see R. Pedrozo, 'Russia-Ukraine Conflict: The War at Sea', 100 *International Law Studies* (2023), pp. 15–61; Furthermore, the limited space available in this article means the case studies will only be tackled briefly, while further references to deeper analyses will be provided.

73 Reuters Staff, 'Russia blocks Ukrainian navy from entering Sea of Azov – Russian state TV', *Reuters*, 25 November 2018, <https://www.reuters.com/article/uk-ukraine-crisis-russia-kerch/russia-blocks-ukrainian-navy-from-entering-sea-of-azov-russian-state-tv-idUKKCN1NU0LW>, visited on 30 September 2023.

During the pursuit, the Coast Guard fired at the Ukrainian ships, leading to three of its crew members being wounded and damaging one of the Ukrainian vessels. All three vessels and their 24 servicemen were detained by the FSB and taken to Russia.[74] In response, Ukraine initiated legal proceedings before the International Tribunal for the Law of the Sea (Prompt Release) and an Arbitral Tribunal.[75] While the latter case is still pending, in the former, Russia was ordered to release both crew and vessels – which it did not do unconditionally, but only as part of a prisoner exchange.[76]

Assuming Russia and Ukraine were not in open armed conflict yet,[77] Russia's actions clearly violate the LOSC as discussed in paras. 6–8. First, assuming the Kerch Strait is a strait used for international navigation,[78] it violated art. 38 LOSC and the provisions on transit passage – which the USSR helped negotiate. Second, even if the Strait does not qualify as such, a right of innocent passage would have still applied under arts. 17–19 LOSC. Finally, warships, as stated before, enjoy immunity under articles 32 and 95 LOSC.[79]

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74 D. Bilyk, '5 Things to Know About the Sea of Azov Conflict', *DW*, 26 November 2018, <https://www.dw.com/en/what-you-need-to-know-about-the-conflict-in-the-sea-of-azov/a-46461361>, visited on 30 September 2023.

75 *Detention of Three Ukrainian Naval Vessels* (Ukraine v. Russia), 25 May 2019, ITLOS, Provisional Measures, ITLOS Rep. 2019; *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. Russia), 27 June 2022, PCA, Preliminary Objections, PCA Case 2019–28.

76 B. Fisher, 'The Kremlin's Malign Legal Operations on the Black Sea: Analysing the Exploitation of Public International Law Against Ukraine', 5 *Kyiv-Mohyla Law & Politics Journal* (2019), p. 194; *also* Ministry of Foreign Affairs of the Russian Federation, *Note Verbale No. 7812*, 25 June 2019.

77 For a discussion which goes into this idea, see J. Kraska, 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?', *EJIL!Talk*, 3 December 2018, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>, visited on 20 November 2023; *see also* the interesting treatment of this gray zone in B. Kormych and T. Malyarenko, 'From Gray Zone to Convention Warfare: the Russia-Ukraine Conflict in the Black Sea', *Small Wars & Insurgencies*, 2022, <https://doi.org/10.1080/09592318.2022.2122278>.

78 Pedrozo, *supra* note 72, pp. 4–5; *see also infra* note 80.

79 Due to a lack of space the *Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait between Russia and Ukraine* of 24 December 2003 is not treated here; For a more significant discussion on the case concerning the three Ukrainian Naval vessels *see* V. Schatz and D. Koval, 'Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective', *Ocean Development & International Law*, 2019, 275–297; A. Lott, 'The Passage Regimes of the Kerch Strait – To Each Their Own?', *Ocean Development & International Law*, 2021, 64–92; S. Katuoka and S. Klumbyte, 'Kerch Strait Incident in the Light of UNCLOS', *Problems of Legality*, 2019, 225–243; N. Oral, 'Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty Under UNCLOS', *International Law Studies*, 2021, 478–508.

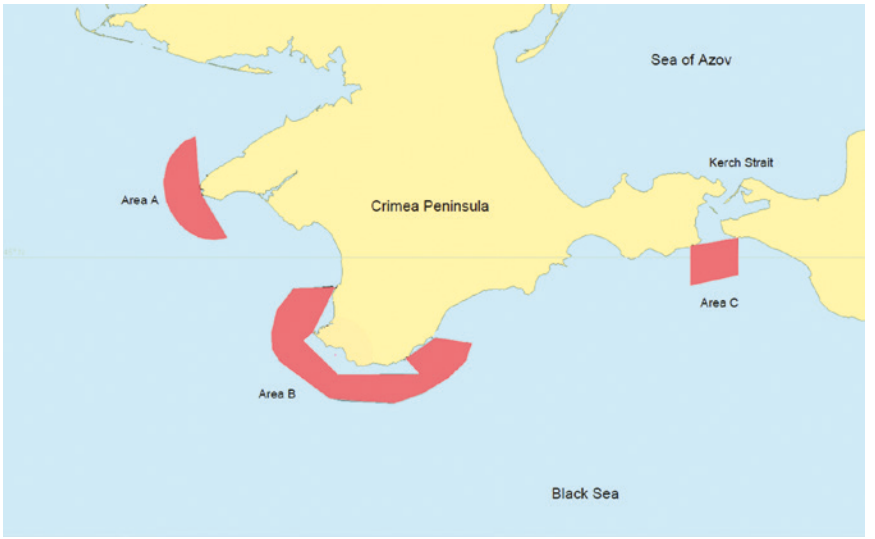

FIGURE 8.2 The areas of suspended innocent passage for warships[a]
a Stefan Talmon, GPIL, 4 May 2021.

In a second Russian infringement, the latter temporarily closed off certain parts of the Black Sea to other ships – albeit the term "temporarily" was interpreted rather broadly. According to its announcement, waters surrounding the Crimean Peninsula and the Kerch Strait would be closed from 24 April 2021 until 31 October 2021.[80] During the suspension, navigation by all foreign warships, but not civilian ships, was prohibited.[81]

As stated above, under art. 18 LOSC, ships of all States enjoy the right of innocent passage within the territorial sea of another State. However, art. 25 (3) LOSC permits a coastal State to temporarily suspend innocent passage in the territorial sea, though only under very select circumstances: (1) allowing no discrimination in form or fact, (2) lasting only temporarily, (3) if essential for the protection of its security and (4) after having been duly published.[82]

80 *See also* A. Klymenko and O. Korbut, 'Closure of the Azov-Black Sea Region in November-December 2021', *Black Sea News*, 16 December 2021, <https://www.blackseanews.net/en/read/182714>, visited on 30 September 2023.

81 'Russia's Plan to Restrict Foreign Warships Near Crimea will Keep Kerch Strait Open – RIA', *Reuters*, 16 April 2021, <https://www.reuters.com/world/europe/russias-plan-restrict-foreign-warships-near-crimea-will-keep-kerch-strait-open-2021-04-16/>, visited on 30 September 2023.

82 Art. 58 (3) LOSC.

As may already be clear, the Russian Federation fails in at least one of these requirements. First, by prohibiting only foreign warships from navigating, it is discriminating as to the type of ship which is permitted to pass.[83] Second, Russia has not clarified why it was necessary to close off portions of its claimed territorial waters, making it impossible for other States to consider the legality of the closing.[84] Third, suspension of innocent passage can only serve as a temporary measure, with doctrine generally considering a period of months as taking the meaning behind the provision too far.[85]

A final case study concerns the HMS Defender incident, dating from 23 June 2021.[86] In this case, a British destroyer was transiting Crimean waters off Cape Fiolent, during the abovementioned suspension of innocent passage, spending a little over 20 minutes in Russia's claimed territorial sea,[87] on route to Georgia. During the transit, a Su-24M aircraft allegedly dropped four fragmentation bombs near it, as a warning to leave Russia's claimed territorial sea. The British Government contested these facts however, while an onboard BBC journalist claimed that the Russian navy had 'harassed' the British destroyer, but that actual firing was heard only in the distance.[88] The Kremlin claimed it had warned the destroyer to leave and that it was prepared to bomb the ship itself should it attempt another passing.[89]

Regardless of whether Russia fired on HMS Defender, the question remains whether the British destroyer had the right to be there. As mentioned above,

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83 Even if not all authors share this idea, believing discrimination being only prohibited as between countries, not between types of ship, *see* Talmon, *supra* note 81; Pedrozo on the other hand believes discrimination as to the type of ship (government v. civilian) is equally prohibited and based on the text of the Convention, the current author is inclined to follow the latter view, *see* Pedrozo, *supra* note 72, p. 9.

84 Pedrozo, *supra* note 72, pp. 9–10.

85 K. Hakapää, 'Innocent Passage', Max Planck Encyclopedia of Public International Law, May 2013, <https://opil.ouplaw.com/display/10.1093/law: epil/9780199231690/law-9780199231690-e1178>, last visited on 23 November 2023, para. 12.

86 *E.g.,* A. Stent, 'Russia's Battle for the Black Sea: Why Moscow's Moves Could Determine the Future of Navigation', *Foreign Affairs*, 16 August 2021.

87 'Russian Military, Border Guards Fire Warning Shots as British Destroyer Enters Russian Territorial Waters in Black Sea', *Interfax*, 23 June 2021, <https://interfax.com/newsroom/top-stories/72104/>, visited on 30 September 2023.

88 D. Sabbagh, 'Royal Navy Ship Off Crimea Sparks Diplomatic Row Between Russia and UK', *The Guardian*, 23 June 2021, <https://www.theguardian.com /world/2021/jun/23/russian-ship-fired-warning-shots-at-royal-navy-destroyer-hms-defender-moscow-says>, visited on 30 September 2023.

89 'Russian and British Forces Square off in the Black Sea', *The Economist*, 24 June 2021, <https://www.economist.com/europe/2021/06/24/russian-and-british-forces-square-off-in-the-black-sea>, visited on 30 September 2023.

FIGURE 8.3 The route followed by the HMS Defender through the restricted area[a]
a Louis Martin-Vézian, CIMSEC, 1 August 2021.

all ships possess the right of innocent passage through the territorial sea of another State,[90] so long as this transit is continuous and expeditious,[91] and as long as it is not prejudicial to the peace, good order or security of the coastal State.[92] Art. 19 (2) LOSC sums up a number of actions that would violate the latter, such as the testing of weapons or the launching of aircraft. There is nothing to suggest the HMS Defender engaged in any of the prohibited activities listed, and neither has Russia accused the UK of such.[93] Russia's claim can be brought back to the abovementioned suspension of innocent passage off Crimea.

However, even if such suspension had been legal – *quod non*[94] – warships still possess immunity from the jurisdiction and interference of other States under arts. 32 and 95 LOSC. Art. 30 LOSC further clarifies that in relation to a warship that does not comply with a coastal State's regulations, a State may only require it to leave the territorial sea. Doctrine and state practice are divided on how this may be enforced, however. Mahmoudi utilizes the example of the Swedish Navy[95] as a way of proving that force may be used if the general rules of necessity and proportionality are followed, and if preceded by a request to leave.[96] Kraska on the other hand, believes coastal States lack the competence to impose coercive measures against foreign warships.[97] He supports his view by referring to the views of the US Government during the 1968 Pueblo incident[98] and the Code for Unplanned Encounters at Sea which

90 Art. 17 LOSC.

91 Art. 18 (2) LOSC.

92 Art. 19 (1) LOSC.

93 *Joint Statement, supra* note 60, para. 2; *see also* A. Serdy, 'HMS Defender Incident: What the Law of the Sea Says', *The Conversation*, 24 June 2021, <https://theconversation.com/hms-defender-incident-what-the-law-of-the-sea-says-163389>, visited on 30 September 2023.

94 *See* paras.23 and 24 above.

95 The Swedish Navy would use depth charges close to underwater submarines to force them to the surface or to leave the territorial sea, *see* S. Mahmoudi, 'Use of Armed Force against Suspected Foreign Submarines in the Swedish Internal Waters and Territorial Sea', *International Journal of Marine and Coastal Law*, 2018, p. 585.

96 *Ibid.* pp. 590–599; this view is also shared by J. Astley II. and M. N. Schmitt, 'The Law of the Sea and Naval Operations, *Air Force Law Review*, 1997, p. 130.

97 J. Kraska, 'Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters', *Columbia Journal of Transnational Law*, 2015, p. 229.

98 *Ibid*. p. 232; Following the Pueblo's capture, the US Government responded: *"In the absence of an immediate threat of armed attack, the strongest action a coastal State may take is to escort foreign warships out of its territorial waters"*, for a deeper discussion of the Pueblo incident, *see* J. Kraska and R. Pedrozo, *The Free Sea: The American Fight for the Freedom of Navigation*, Naval Institute Press, Annapolis, 2018, pp. 124–152 Chapter 6: 'False Sense of Security: The USS Pueblo Incident (1968)'.

repeats art. 30 LOSC in stricter terms.[99] Considering this uncertainty, the fact that Russia would be willing to use force to drive a foreign military vessel out of its claimed territorial sea, rather than merely escorting it, is further proof of its ever more restrictive views on the right of innocent passage for warships.

4.2 *The Russian Arctic*

Russia's restrictive turn is not limited to the Black Sea, however, but also extends to the Arctic,[100] which its 2022 Maritime Doctrine seeks to monopolize for military use,[101] whilst developing it into a trade route to rival the Suez Canal.[102] While these elements are, without a doubt, of importance to Russian lawfare specialists,[103] the Northern Sea Route is more than an important strategic route. It is an inherent part of Russia's history dating back to Ivan the Terrible's claims in the 14th century.[104]

While the route itself only opened to foreign shipping in 1991,[105] the first Russian claims to its waters were already made in the 1920s.[106] Viewed from today, for a long time, one of the most important documents on the Northern Sea Route was Decree 4450 of 15 January 1985 of the Council of Ministers of the

99 Kraska, *supra* note 100, pp. 233–243; Para. 2.6 CUES states that *"The only sanction against a warship or public vessel that can be imposed by a coastal State is to require that it depart internal waters or the territorial sea."*

100 Not treated here due to reduced concern for the rights of navigation are the *Recommendations Of The Commission On The Limits Of The Continental Shelf In Regard To The Partial Revised Submission Made By The Russian Federation In Respect Of The Arctic Ocean On 3 August 2015 With Addenda Submitted On 31 March 2021*, 6 February 2022.

101 Para. 50 2022 Maritime Doctrine, also Rakov, *supra* note 9.

102 Reuters Staff, 'Suez Canal debacle shows value of Northern Sea Route, Russia says', *Reuters*, 29 March 2021, <https://www.reuters.com/article/us-egypt-suezcanal-russia-arctic-idUSKBN2BL0X0>, visited on 30 July 2023; *also* M. Humpert, 'Russia's Northern Sea Route Sees More Traffic Despite War and Sanctions', *High North News*, 18 January 2023, <https://www.highnorthnews.com/en/russias-northern-sea-route-sees-more-traffic-despite-war-and-sanctions>, visited on 30 September 2023.

103 A. B. Munoz Mosquera and S. Dov Bachmann, 'Russia's Lawfare in the Arctic', 17:1 *The Operational Law Quarterly* (2016), p. 1.

104 I. Nossova, 'Russia's Strive from the Land to the Sea Based on International Law and the Doctrine of Sovereignty', *University of Tartu Centre for EU-Russia Studies*, 2014, p. 3.

105 E. Molenaar *et. al*, *Legal Aspects of Arctic Shipping: Summary Report*, European Commission Directorate-General of Maritime Affairs and Fisheries, 2010, 16; It was opened for a brief time in 1967 and closed again in the wake of the Suez Canal crisis so as not to upset Arab allies, *see* E. Franckx, 'The Legal Regime of Navigation in the Russian Arctic', 18:2 *Journal of Transnational Law & Policy* (2009), pp. 328–329.

106 These claims – like the Canadian ones – utilized the sector theory, via which every polar state was entitled to a specific piece of the North Pole in the extension of one's claims on land, *see* Nossova, *supra* note 107, p. 3.

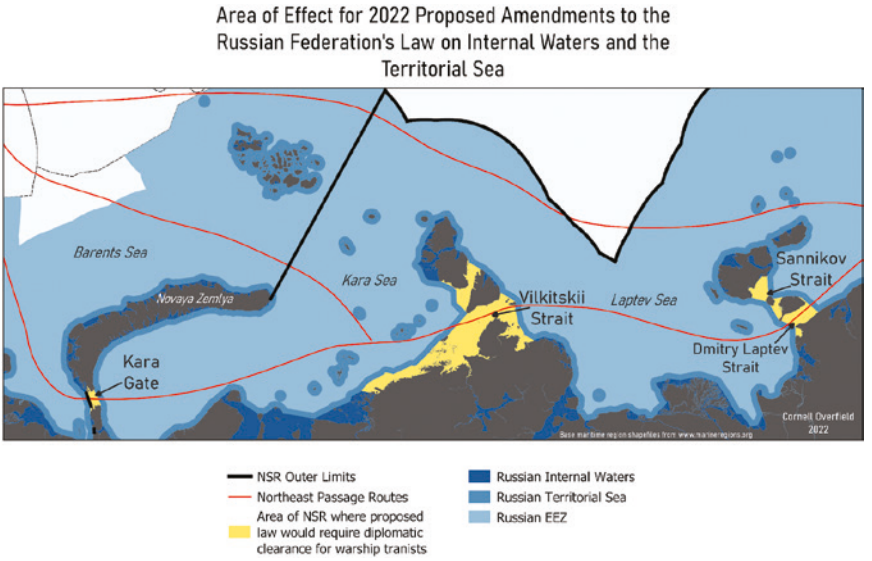

FIGURE 8.4 Effect of the 2022 amendments in the Arctic[a]
a Cornell Overfield, Lawfare, 17 October 2022.

Soviet Union. By this, it established straight baselines along its Arctic coast, including a number of archipelagos such as Novaya Zemlya, the Severnaya Zemlya and most of the islands of the archipelago of Novaya Sibir. This had the effect of including the Kara Gate, the Vilkitskii Strait and the Dmitry Laptev and Sannikov Straits within the Union's internal waters.[107] On November 2021, the Soviet law was replaced by Decree 1959 of the Government of the Russian Federation of 16 November 2021, which maintains the straight baselines enclosing the straits.[108]

107 T. Scovazzi, 'Sovereignty Over Land and Sea in the Arctic Area', 34 *Agenda International* (2016), p. 176.

108 *Decree 1959 On Approving the List of Geographic Coordinates of Points Determining the Position of Baselines for measuring the breadth of the territorial sea, contiguous zone, exclusive economic zone and continental shelf of the Russian Federation off the mainland coast and islands of the Russian Federation in the Arctic Ocean and on declaring invalid on the territory of the Russian Federation the section "Arctic Ocean" of the list of Geographic Coordinates of Points Determining the Position of Baselines for measuring the breadth of the territorial sea, contiguous zone, exclusive economic zone and continental shelf of the USSR off the mainland coast and islands of the Arctic Ocean, the Baltic and Black Seas, approved by the decision of the Council of Ministers of the USSR, 15 January 1985, No. 56–22*, 16 November 2021.

While Russia's straight baselines in the Arctic might be a cause for concern in their own right, what concerns the author are the amendments to the 1998 Federal Act, signed by President Putin on 5 December 2022,[109] altering arts. 12 (2) and 14 (3). The former now allows for the suspension of innocent passage upon the mere transmission of a navigational warning. The latter sets out an authorization procedure for foreign warships' access to the internal waters of the Northern Sea Route.[110]

While these amendments can be expected to elicit a response from Western Naval Powers,[111] a State is sovereign in its internal waters, seemingly giving Russia the power to adopt stringent regulations for the passage of foreign warships there.[112] In reality, Russia's actions are highly questionable. First, art. 234 LOSC on increased coastal State rights in ice-covered areas does not apply to warships by virtue of art. 236 LOSC. Second, as discussed before, within straits used for international navigation, art. 38 LOSC awards users a right of non-suspendable transit passage. Third, art. 8 (2) awards a right of non-suspendable innocent passage in internal waters that became so due to the effect of straight baselines under art. 7 LOSC. The crux of the question at hand is, thus, the status of the straits in question. While this article does not offer room to discuss this matter in detail, some points may be mentioned. First, Thévenin has argued that a customary legal regime treating the Arctic straits as historical waters cannot exist as the USSR has never sufficiently and unambiguously defended such a right.[113] Second, Solski has emphasized that while both Soviet and Russian

109 Anna Davis, 'Federal Law of 31 July 1998 N 155-FZ On Internal Sea Waters, Territorial Sea, and Contiguous Zone of the Russian Federation: Complete Text of the Articles with Amendments approved and signed into law by President Putin on 28 June 2022 and 05 December 2022', *Russia Maritime Studies Institute*, 1 February 2023.

110 A. Todorov, 'New Russian Law on Northern Sea Route Navigation: Gathering Arctic Storm or Tempest in a Teapot?', *Belfer Center for Science and International Affairs, Harvard Kennedy School*, 9 March 2023; *also* on bureaucratic limitations *see* M. Boulègue, *The militarization of Russian polar politics*, Chatham House Research Paper, 2022, p. 16.

111 C. Overfield, 'Russia's Arctic Claims Are on Thin Ice', *Foreign Policy*, 20 December 2022, <https://foreignpolicy.com/2022/12/20/russia-arctic-claims-territorial-internal-waters/>, visited on 30 September 2023; So far, only a French support vessel has navigated through the Northern Sea Route, *see* 'Arctique: le passage du Nord-Est franchi pour la première fois par un navire de la marine française', *Franceinfo*, 2 October 2018 <https://www.francetvinfo.fr/ meteo/climat/arctique-le-passage-nord-est-franchi-pour-la-premiere-fois-par-la-marine_2966665.html>, visited on 30 September 2023.

112 Art. 2 (1) LOSC.

113 P. Thévenin, 'Back to the USSR: The Consequences of the 1965 Soviet Decree No. 331–112 "On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route" on Today's Navigation Through the Russian Arctic Straits', *Ocean Development and International Law*, 2023, pp. 65–68; potential exceptions are the Laptev

practice has always sought to keep the Arctic under national control,[114] a right of innocent passage at minimum applies to all Russian Arctic Straits[115] while Russia's current practice is unlikely to impede an emerging regime of transit passage in the future.[116]

5 Conclusion

Russia's approach to the freedom of navigation and to the right of innocent passage of warships, specifically, has evolved considerably over its history. Different directions were taken, guided by historical context, its territorial claims, its military goals and its economic interests. Overall, Gregorii Tunkin's statement that Russia's [at the time the USSR's] approach to international law was determined by the basic principles of its foreign policy,[117] seems to still hold considerable truth today, at least as concerns the right of innocent passage for foreign warships. While Russia does not strictly adhere to a form of 'closed seas' doctrine as the Soviet-Union did following WW2, its navy's fall from blue water status to green water, has given greater impetus to certain *Mare Clausum* reflexes which are especially noticeable in the Black Sea and in the Arctic. For now, it remains to be seen, whether these are a knee-jerk reaction to its aggression in Ukraine and fall-out with, and isolation from the West, or whether its shifting opinion is linked to a greater change in approach to the freedom of navigation, more in line with the views of the Chinese People's Republic. If so, the concept of free navigation for warships, no doubt, faces a major challenge in the future.

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and Sannikov Straits, *see ibid*. 70–72; in this regard *see also* Frankx views on Russia's use of "creative ambiguity" as regard the NSR, *see* E. Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives*, Martinus Nijhoff Publishers, Dordrecht 1993, p. 193.

114 J.J. Solski, 'New Russian Legislative Approaches and Navigational Rights within the Northern Sea Route (NSR), *Yearbook of Polar Law*, 2020, <https://munin.uit.no/handle/10037/20171>, in particular p. 11.

115 *Ibid*. pp. 26–27.

116 *Ibid*. pp. 29–33.

117 Darby, *supra* note 1.