

The *HMS Defender* Incident: Innocent Passage versus Belligerent Rights in the Black Sea

Introduction

On June 23, 2021, the United Kingdom Royal Navy destroyer *HMS Defender*, detached to the Black Sea on “its own [unspecified] set of missions” from a Carrier Strike Group (CSG) in the Mediterranean, was en route from Odessa, Ukraine, to Batumi, Georgia, when she passed approximately nine kilometres off Cape Fiolent on the southwest coast of Crimea. What happened next depends on which account one chooses to believe. According to the Russian Ministry of Defence, a “[Black Sea Fleet] border guard patrol ship conducted warning fire . . . [and] a Su-24M plane carried out preventing [*sic*] bombing (four OFAB-250 bombs) along the route of . . . Defender.”¹ In a written statement to the House of Commons the next day, the British Secretary of State for Defence specified that,

a Russian coastguard vessel warned that Russian units would shortly commence a live fire gunnery exercise . . . HMS Defender noted gunnery astern and out of range of her position. This posed no danger to HMS Defender. During her transit, HMS Defender was overflown by Russian combat aircraft at varying heights, the lowest of which was approximately 500 feet. These aircraft posed no immediate threat to HMS Defender²

These competing factual accounts have dominated most of the coverage of the incident, but there has been comparatively little reference to the territorial status of Crimea (which has been in dispute since 2014), and it is notable that the international law arguments used (explicitly or implicitly) differ markedly in doctrinal emphasis, even when one passes

over the rhetorical grandstanding. This short article evaluates the June 23 incident at the intersection of the two bodies of international law that are principally relevant: the international law of the sea and the international law of armed conflict.

Innocent Passage

The immediate point made by the UK was that *Defender* was exercising the right of innocent passage, “as is the right of the United Kingdom (and all nations) under international maritime law,”³ while the formal Russian statement averred that *Defender’s* actions had been “a blatant violation of the UN Convention on the Law of the Sea [UNCLOS III 1982],”⁴ without specifying which particular provisions had been violated. The right of innocent passage through foreign territorial waters, long recognised in customary international law,⁵ is codified in UNCLOS and had already previously been understood to extend to warships⁶ as a matter of *lex lata*, although state practice as to its pre-conditions (notably, whether warships require prior notification and authorisation) remains far from unanimous.

The Soviet Union conceded more than three decades ago that the right of innocent passage extended to warships,⁷ albeit not at that time in the Black Sea. A Notice to Mariners issued earlier in 2021 announced in relation to the Black Sea that, “[i]n the interests of the Russian Federation security the innocent passage of foreign warships and other government ships has been temporarily suspended through territorial sea of the Russian Federation until 2100 UTC 31 October 2021”⁸—a measure explicitly permitted under Article 25(3) of UNCLOS. Article 19(1) of UNCLOS specifies that passage is “innocent” only “for so long as it is not prejudicial to the peace, good order, or security of the coastal State”; Article 19(2) then defines such prejudice as being constituted by, *inter alia*, “any act of propaganda aimed at affecting the defence or security of the coastal State.” The British explanation of *Defender’s* role in the Black Sea as exemplifying the UK’s commitment to supporting Ukraine’s territorial integrity and sovereignty and “securing its security” (*sic*),⁹ however, implicitly disputes Russia’s standing even to invoke innocent passage in this instance.

Whose Territorial Sea, and Does It Matter?

In fact, the statement to Parliament explicitly referred to *Defender’s* “innocent passage through *Ukrainian* territorial waters” and specified that the UK “does not recognise any Russian claim to these waters.”¹⁰ Crimea, an Autonomous Republic within Ukraine since the latter’s 1991 independence from the USSR, purportedly “acceded” to the Russian Federation in March 2014 following a controversial referendum on the peninsula’s status

that had been unilaterally called by its secessionist Supreme Council. The consequent annexation, which has left Crimea under *de facto* Russian control ever since, has only been formally recognised by 8 states;¹¹ a UN General Assembly resolution condemning the referendum as invalid and calling on all states not to recognise any alteration to Crimea's status was supported by 100 states,¹² including the UK. The British argument is thus effectively that, Crimea not lawfully being within the jurisdiction of Russia, the latter has no territorial sea rights to claim in respect of Crimea under UNCLOS. However, as has been suggested elsewhere, this position would appear misguided as it does not assist Ukraine in any practical sense and could actually undermine the right of innocent passage if *Defender's* presence in the area is viewed as a provocation.¹³ UNCLOS does not, of course, make any stipulations as to the validity of title to littoral territory: it merely refers, in Article 2(1), to the "sovereignty of a coastal State" and, whilst it might be arguable that this implies that the sovereignty must be legitimate under international law, the point has not been conclusively determined in doctrine or jurisprudence. Moreover, the essence of innocent passage is that it is a right of all states to be exercised freely and without permission in all territorial seas: the fact that no permission is required makes the question of title to territory immaterial. In any event, as "sovereignty over the territorial sea is exercised subject to . . . other rules of international law,"¹⁴ and there are other rules of international law that are relevant as *lex specialis* in the case of Crimea, the focus of argument shifts from maritime law to international humanitarian law (IHL).

Belligerent Occupation and the Territorial Sea

The circumstances of Russia's seizure of Crimea mean that since 2014 the peninsula has been under belligerent occupation in terms of IHL.¹⁵ Although the relevant provisions of The Hague Regulations (1907) and Geneva Convention IV focus on occupation of land territory, there are clear and cogent arguments for the regime of belligerent occupation to be applied equally to maritime areas immediately adjacent to an occupied area of land.¹⁶ Russia's *de facto* control of Crimea as an Occupying Power means that it is entitled to enact provisions and take measures for the protection of its own security,¹⁷ and the Notice to Mariners restricting the right of innocent passage in the Black Sea explicitly claimed it to be necessary for security reasons. It is internally inconsistent for the UN on the one hand to demand that Russia uphold its obligations as an Occupying Power under IHL, while simultaneously denying it the rights that come with that status in relation to maritime activity. Moreover, there are modern precedents for an Occupying Power suspending innocent passage in territorial waters of occupied territory, as the U.S. did in the vicinity of Iraqi oil terminals in the Persian Gulf during the Coalition's belligerent occupation of Iraq in 2004;¹⁸ and from 1968, Israel declared the occupied Gaza Strip to be a "closed area," to which access by sea (inter alia) was subject to permission for security reasons.¹⁹

Conclusion

As is all too often the case in such situations, there are some elements of right and wrong on both sides. Although *prima facie* the U.K. was certainly entitled to send *Defender* through the waters off Cape Fiolent in exercise of the right of innocent passage under international maritime law, Russia was equally within its rights under IHL to promulgate temporary restrictions on innocent passage, as long as they were not discriminatory between ships of different nationalities (as opposed to different types of ships); the restrictions to navigation in the Black Sea were announced more than three weeks before the Carrier Strike Group even left Portsmouth Harbour. As has been persuasively argued at greater length elsewhere: “During the ongoing armed conflict between Russia and Ukraine the law of the sea is at least partly supplanted by the law of armed conflict and, in particular, the law of occupation.”²⁰

The existence of the armed conflict between Russia and Ukraine—not that the former cares to acknowledge it as such, but that does not matter under IHL—and the proximity of *Defender’s* course to the major Russian Black Sea Fleet base at Sevastopol doubtless account for the rapidity and ferocity of Russia’s reaction to the alleged “border violation” by a foreign naval surface unit. There have been close encounters with NATO warships in the Black Sea on many occasions since at least the later stages of the Cold War, and the recent incident off Cape Fiolent has been characterised by the Russian side as a pre-planned provocation and escalation. Already the rhetoric has been ramped up in Moscow, with an implicit threat that force could be used on a self-defence argument.²¹ In London, Foreign Secretary Dominic Raab emphasized that British warships will continue to “exercise and defend the rights under UNCLOS . . . from the Ukrainian territorial sea to the South China [S]ea.”²² Russia and the U.K. have not even attempted to engage substantively with each other’s legal arguments, but have remained in separate sea lanes, metaphorically speaking, intersecting only on the point—largely irrelevant, as this piece argues—of territorial sovereignty.

Beijing, meanwhile, watched and waited as the CSG drew ever closer to waters that it considers its exclusive preserve. China is perhaps the world’s most notable exponent of the view that only merchant vessels can benefit from the right of innocent passage.²³ Of particular note in this context is that the CSG’s ultimate destination was publicly stated to be the Indo-Pacific and Japan, via the Strait of Malacca;²⁴ Foreign Secretary Raab even

hinted more explicitly that one of its destinations was the South China Sea.²⁵ China's well-known sensitivity to any perceived challenge to its hegemony has recently been re-emphasized by the China Coast Guard (CCG) Law of January 22, 2021, which refers to the area self-delimited by the "nine-dash line" as "sea areas under the jurisdiction of the People's Republic of China" and stipulates that CCG vessels will take enforcement measures up to and including the use of force against foreign warships or government vessels violating these waters.²⁶ In line with its previous statements, China would doubtless characterise the use of force in such circumstances as an exercise of its right to self-defence.²⁷ Although in the event the new British naval presence in the region has passed with nothing more dangerous than rhetorical warnings from China, the conditions for an armed confrontation in the future are present; and the legal questions raised by the *HMS Defender* incident will have done nothing to lessen the risk.

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¹ *Russian Navy, border guards halt state border violation by UK warship off Crimea*, TASS (Jun. 23, 2021), <https://tass.com/defense/1306303>.

² *Hansard* Vol. 697, HCWS122 (June 24, 2021), <https://hansard.parliament.uk/commons/2021-06-24/debates/21062452000011/ExercisesInTheBlackSea>.

³ *Id.*

⁴ *Russia views HMS Defender's actions as violation of UN Sea Law Convention – statement*, TASS (Jun. 23, 2021), <https://tass.com/defense/1306375>.

⁵ See Kari Hakapää, *Innocent Passage*, §§1-2, M.P.E.P.I.L. (2013), <http://opil.ouplaw.com>.

⁶ *The Corfu Channel Case (UK v. Albania)*, I.C.J. REP. 1949, p. 28. Although this case specifically concerned innocent passage through international straits, which was not the case in the Black Sea incident, the principle applies to territorial waters generally. See also Lawrence Wayne Kaye, *The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom*, 15 SAN DIEGO L.R. 573 (1978).

⁷ *U.S.-Soviet Uniform Interpretation of the Rules of International Law Governing Innocent Passage*, §2 (Sep. 23, 1989), 28 I.L.M. 144 (1989).

⁸ Russian Ministry of Defence, Department of Navigation and Oceanography, *From Notices to Mariners: Edition No 18/2021* (undated), https://structure.mil.ru/files/morf/military/files/ENGV_2118.pdf. (The original Russian-language version is dated May 1, 2021.)

⁹ Press Release, U.K. Ministry of Defence, UK signs agreement to support enhancement of Ukrainian naval capabilities (June 23, 2021), <https://www.gov.uk/government/news/uk-signs-agreement-to-support-enhancement-of-ukrainian-naval-capabilities>.

¹⁰ *Hansard*, *supra* note 2 (emphasis added).

¹¹ Afghanistan, Cuba, North Korea, Kyrgyzstan, Nicaragua, Sudan, Syria, and Zimbabwe.

¹² U.N. Doc. A/RES/68/262 (Apr. 1, 2014).

¹³ Andrew Serdy, *HMS Defender incident: what the law of the sea says*, THE CONVERSATION (June 24, 2021), <https://theconversation.com/hms-defender-incident-what-the-law-of-the-sea-says-163389>.

¹⁴ UNCLOS, art. 2(3).

¹⁵ Geneva Convention IV (1949), art. 2 (GC IV); U.N. Doc. A/RES/73/194 (Dec. 17, 2018). The position of the U.K. and most other states, as reflected in this and other UNGA resolutions, is that Russia illegally seized Crimea from Ukraine by force, in violation of the latter's sovereignty and territorial integrity, after an invalid secession referendum unapproved by the Ukrainian Government. Russia rejects this view and insists that Crimea voluntarily applied to accede to the Russian Federation as an exercise of the right of self-determination.

¹⁶ See Marco Longobardo, *The Occupation of Maritime Territory under International Humanitarian Law*, 95 INT'L L. STUD. 322 (2019).

¹⁷ Geneva Convention IV, art. 64.

¹⁸ See Stefan Talmon, *Germany mistakenly considers Russia's restrictions on navigation of warships in the Black Sea to be "very problematic" and, in part, "contrary to international law"*, GPIL – German Practice in International Law (May 4, 2021), <https://gpil.jura.uni-bonn.de/2021/05/germany-mistakenly-considers-russias-restrictions-on-navigation-of-warships-in-the-black-sea-to-be-very-problematic-and-in-part-contrary-to-international-law/>.

¹⁹ See *The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission)*, Report – Part one, §§20-23 (Jan. 23, 2011), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf.

²⁰ *Supra* note 18.

²¹ *Russia warns provocateurs might 'get clocked in the nose' over 'games' in the Black Sea*, TASS (July 5, 2021), <https://tass.com/politics/1311003>.

²² U.K. Parliament, Foreign Affairs Committee, *Oral evidence: Work of the Foreign, Commonwealth and Development Office*, HC 518, Q556 (July 6, 2021), <https://committees.parliament.uk/oralevidence/2494/pdf/>.

²³ UNCLOS, *Declaration of China*, §4, (Aug. 25, 2006), https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en#EndDec.

²⁴ *HMS Queen Elizabeth passes through Suez Canal as the UK Carrier Strike Group heads east*, ROYAL NAVY (July 7, 2021), <https://www.royalnavy.mod.uk/news-and-latest-activity/news/2021/july/07/210707-carrier-and-suez-canal>.

²⁵ *Supra* note 22.

²⁶ Wataru Okada, *China's Coast Guard Law Challenges Rule-Based Order*, THE DIPLOMAT (Apr. 28, 2021), <https://thediplomat.com/2021/04/chinas-coast-guard-law-challenges-rule-based-order/>.

²⁷ See Chinese Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference (Feb. 22, 2016), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1342276.shtml.