The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom

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THE INNOCENT PASSAGE OF WARSHIPS
IN FOREIGN TERRITORIAL SEAS:
A THREATENED FREEDOM

The 1958 Convention on the Territorial Sea and the Contiguous Zone was understood by many nations, including the United States, to have established a right of innocent passage through territorial waters for military vessels. Many loopholes, however, enabled a growing number of coastal States to derogate this right with the requirement of advance permission for warship passage. This Comment explores and criticizes the fundamental contentions of each camp regarding the disputed regime. The author relates the topic of warships to analogous problems involving innocent passage. This doctrine, he concludes, will be insufficient to guarantee the free deployment of military vessels in the territorial seas of the modern world.

INTRODUCTION

International law recognizes that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."1 But a coastal nation's right to control the passage of foreign ships through these waters has historically been a controversial issue.

The world community has always sought to preserve foreign shipping rights incident to ordinary navigation in the territorial sea. For purposes of regulating shipping in this area, however, coastal States have long distinguished foreign merchant vessels from vessels of war. Merchantmen are subject to minimal coastal regulation, whereas a right of passage for foreign warships through the territorial sea has been a source of friction among nations for centuries.

"Innocent passage" is a principle of international law of the sea which purports to allow the movement of all ships on peaceful missions through foreign territorial waters without restriction.2 At least this appears to be the meaning of the concept as described in the 1958

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2. See Convention on the Territorial Sea and the Contiguous Zone, supra note 1. Rules Applicable to All Ships, id., art. 14(1)(A), provides: "Subject to the provisions of these articles, ships of all States, whether coastal or not, shall
Geneva Convention on the Territorial Sea and the Contiguous Zone. However, the theory has been advanced by an increasing number of coastal States that warships should give prior notice and receive authorization before passage is allowed. To maintain this contention is to deny the right of innocent passage to military craft, and hence, to threaten the effectiveness of the world’s great naval powers.

How exactly do coastal States manifest in practice their desires to regulate the passage of warships through their territorial waters? Are such steps legally in accord with international custom? These controversial issues will be discussed in light of their historical background. Some current implications will also be explored. The conclusion reflects the fear of modern jurists that recent attempts to clarify the disputed regime will achieve little in saving the concept of the innocent passage of warships from ultimate extinction.

BACKGROUND

The Draft Articles on Innocent Passage

Prior to codification of the Law of the Sea, the primary sources of standards for coastal State regulation of foreign navigation were the views of jurists, theorists, and publicists. One such scholar asserted that a State’s sovereignty extended to its territorial sea only with regard to security, political and fiscal, and economic interests. Repugnant to this notion was the claim of “absolute sovereignty.” Still others had alluded to the coastal State’s possession of a “bundle of servitudes” in the territorial sea.

The need for clarity and consistency of these interests gave rise to a community effort to establish an international body of law. But the Draft Articles prepared for the 1958 Law of the Sea Conference clearly illustrate the confusion and disagreement over the regime of foreign warships. It is not surprising that the endless debate over their “right” of innocent passage has affected the consistency of legal development.

enjoy the right of innocent passage through the territorial sea.” See also 4 M. Whitman, Digest of International Law 350 (1965).


In 1929 the Committee of Experts for the Progressive Codification of International Law distributed internationally a questionnaire pertaining to warships in foreign territorial seas. The majority of governments which replied opined that military vessels possessed a right of innocent passage as did all other ships. Only three States denied the right—the United States, Bulgaria, and Poland.

A proposal drafted at the 1930 Hague Conference stated: “As a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial seas and will not require a previous authorisation or notification. The Coastal State has the right to regulate the conditions of such passage.” A reasonable regulation was deemed to be one which limited the number of foreign ships passing simultaneously.

Subsequently, in 1954, the International Law Commission (ILC) agreed “that passage should be granted to warships without prior authorization or notification.” In 1955, the ILC reversed itself, however, and established the right of a State to insist upon such requirements. The finished product of its negotiations was Draft Article 24: “The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage ...”

The commentary that followed is enlightening:

While it is true that a large number of States do not require previous authorization or notification, the Commission can only welcome this

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7. This committee was established by the Council of the League of Nations to codify the law of the sea. 4 M. Whitman, supra note 2, at 347-48, 358-59.
11. Id.
attitude, which displays a laudable respect for the principle of freedom of communications, but this does not mean that a State would not be entitled to require such notification or authorization if it deemed it necessary. . . . Since it admits that the passage of warships through the territorial sea of another State can be considered by a State as a threat to its security, and is aware of a number of States that do require previous notification or authorization, the Commission is not in a position to dispute the right . . . to take such a measure.14

Countries which denied to warships a fundamental right of innocent passage were no doubt pleased with this result. But the ILC did not have the final word. A changing world was to spawn major changes in ocean politics.

The Geneva Convention and the Emergence of United States Policy

Prior to 1945, United States policy was that warships did not possess a right of innocent passage. In 1912, a United States delegate, Elihu Root, stated that “[w]ar-ships may not pass without consent into this zone because they threaten. Merchant-ships may pass and repass, because they do not threaten.”15 The negative response of the United States to the 1929 Hague Questionnaire is additional evidence of this policy. After World War II, however, “[t]he United States emerged as the leading advocate of the right of innocent passage for warships and the Soviet Union as the leading opponent.”16

At the forty-second meeting of the ILC in 1956, the United States supported a German proposal to amend Draft Article 24 of the ILC to delete the word “authorization.”17 The proposal was the first sign of a feasible compromise. It would have left intact a simple “notice” standard. Hence, coastal States would not be empowered to deny passage but would be entitled to have notice of the presence of warships. Nevertheless, the proposal was defeated,18 and the Draft Article was adopted unchanged by the ILC for submission at the 1958 Conference.

In Geneva, the tables suddenly turned. The United States, within two years, was able to gain support in its resistance to the notice-authorization dictate of the ILC. Following a now-favorable vote on a Danish proposal to omit “authorization,” even this amended version of Draft Article 24 was struck down.19 Countries favoring re-

17. 4 M. WHITEMAN, supra note 2, at 415.
18. The proposal was defeated by a vote of 22-35-8. Id.
strictions on innocent passage failed to muster the necessary two-thirds majority. Neither notice nor authorization for warship passage was to be specifically required by international law.

Unfortunately, the victory of the United States was more illusory than real. The omission of the notice provision created a myriad of controversy. States seeking to relegate innocent passage of warships to a privilege pointed to the broad regulatory powers now granted to them in the new Convention. They asserted that the 1958 Convention allowed (or at least did not preclude) the imposition of a notice-authorization barrier.

Article 17

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law.

Article 23

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.

These provisions were vague and set the stage for a multitude of unilateral declarations by coastal States. Seven countries, following the lead of the Soviet Union, submitted reservations to Article 23 upon signing the Treaty. These proclamations asserted the right to demand notice-authorization. The proponents of the reservations argued that these requirements were necessary to dispel the ambiguities of the new Treaty and to embody the spirit of the ILC.

20. This proposal was defeated by a vote of 45-27-6. 4 M. Whiteman, supra note 2, at 416.


22. Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 17.

23. Id., art. 23. (emphasis added)


25. For example, see the reservation of the U.S.S.R. "The government of the Union of Soviet Socialist Republics considers that a coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters." Id., art. 23, reprinted in M. McDougal & W. Burke, supra note 24, at 1184.
Moreover, they believed that such “reservations” did not contravene the intentions of the Conference.\(^\text{26}\)

In resistance to notice-authorization, other readers of the Treaty agreed that “[its] silence . . . implies that the Conference did not approve of Article 24 of the Report of the International Law Commission . . . .”\(^\text{27}\) They feared that “an unlimited power of exclusion would subject a belligerent warship to intolerable interruption.”\(^\text{28}\) The United States, in particular, viewed the various “reservations” as attempts to create exceptions.\(^\text{29}\) Surely exceptions were not warranted unless the Convention did approve of a right of innocent passage for warships.\(^\text{30}\)

A RIGHT OR A PRIVILEGE: THE BATTLE RAGES ON

The ambiguities of the 1958 Convention persisted long after the initial disagreement. The consensus was that most ships of all nations had a right to traverse through or anchor in the territorial sea while navigating or in the event of distress or force majeure.\(^\text{31}\) Innocence was broadly defined in Article 14 of the Convention as “not prejudicial to the peace, good order or security of the coastal State.”\(^\text{32}\) But the degree to which the passage of warships was qualified by coastal State sovereignty was not settled. The formation of factions according to political ideologies was the logical result.

Western powers, including the United States, France, and Great Britain, argue that warships may pass innocently through foreign territorial waters at any time.\(^\text{33}\) Clearly, the naval strength of these nations and political commitment to the suppression of communism contribute greatly to this outlook. The right is supported, they say, by the fact that section III, subsection A, of the 1958 Convention explicitly applies to all ships.\(^\text{34}\) Article 14 therein states that “ships of all

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\(^{26}\) W. BUTLER, supra note 19, at 65-66.

\(^{27}\) J. COLOMOS, supra note 5, at 262. See generally Harlow, Legal Aspects of Claims to Jurisdiction in Coastal Waters, 23 NAVY JAG J. 81, 86 (Dec. 1969—Jan. 1969) (Commander Harlow reaches the same basic conclusion).

\(^{28}\) J. COLOMOS, supra note 5, at 260.

\(^{29}\) See W. BUTLER, supra note 19, at 65-66.

\(^{30}\) Id., at 65.

\(^{31}\) Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 14(3). Force majeure is defined as “an event or effect that cannot reasonably be anticipated or controlled.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 887 (1961).

\(^{32}\) Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 14(4).

\(^{33}\) I. CHUNG, LEGAL PROBLEMS INVOLVED IN THE CORFU CHANNEL INCIDENT 174 (1959); D. O’CONNELL, supra note 16, at 139-40; I V. SEBEK, supra note 21, at 298.

States, whether coastal or not, shall enjoy the right of innocent passage.\textsuperscript{35} Furthermore, "as Article 14, paragraph 6 . . . stipulates that 'submarines are required to navigate on the surface and to show their flag', it must be implied that they enjoy the right of innocent passage under this condition."\textsuperscript{36}

Jurists who support the above arguments frequently cite the Corfu Channel Case,\textsuperscript{37} in which the International Court of Justice recognized "that States in time of peace have a right to send their warships through [international straits]\textsuperscript{38} without previous authorization of a coastal State, provided the passage is innocent."\textsuperscript{39} The pleadings of the United Kingdom noted that "to demand notice of the passage of warships through territorial waters when used merely as a channel of navigation is contrary to the practice of civilized States."\textsuperscript{40} Accordingly, advocates of an unlimited right of innocent passage insist that prior notice-authorization is too great a concession.

The Soviet Union, however, and nations such as Yugoslavia, Bulgaria, Poland, East Germany, and Albania reject any claim of "right," contending that innocent passage is merely a "privilege" or "tolerance."\textsuperscript{41} These East European States have traditionally maintained small coastal navies and fishing fleets. Unlike their western adversaries, they have historically been incapable of deploying military vessels in foreign waters. They have therefore resented the presence of such ships in their own seas. Their rule appears to be that warships should not enjoy an absolute authority to pass through a

\begin{itemize}
\item \textsuperscript{35} Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 14(1).
\item \textsuperscript{36} 1 V. Sebek, supra note 21, at 298 (emphasis added).
\item \textsuperscript{37} Corfu Channel Case (United Kingdom v. Albania) (Merits), \textsuperscript{[1949]} I.C.J. 4. On October 22, 1946, British warships were passing through the Corfu Channel in Albanian territorial waters. Albania had earlier in that year fired on British ships. Two ships were destroyed in the October 22 incident when they struck mines secretly laid by the Albanian government. The lives of many British seamen were lost. Both nations sought a resolution of the controversy by the International Court of Justice. See 4 M. Whiteman, supra note 2, at 397, for an excellent synopsis of the facts of the case.
\item \textsuperscript{38} International straits are those which are "used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 16(4).
\item \textsuperscript{39} [1949] I.C.J. at 28 (emphasis original).
\item \textsuperscript{40} Memorial of United Kingdom, 1 Corfu Channel Case, I.C.J. Pleadings 45, para. 88 (1949).
\item \textsuperscript{41} W. Butler, supra note 19, at 66; L. Oppenheim, International Law 494, 853 (8th ed. H. Lauterpacht (1955); 1 V. Sebek, supra note 21, at 301.
\end{itemize}
State's territorial waters any more than an army could cross the land territory.\textsuperscript{42}

The East European bloc strongly criticizes western jurists' interpretation of the \textit{Corfu Channel Case}. After all, when the court said there was a "right to send warships . . . without previous authorization . . . ,"\textsuperscript{43} they were referring exclusively to the straits. There is quite a distinction between these narrow waters and the much broader territorial seas of which straits are a small part. The court concluded that "it is unnecessary to consider the more general question . . . whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait."\textsuperscript{44} But Judge Azevedo, dissenting in the \textit{Corfu Channel Case}, did consider this question. He noted that "all the arguments (in favor of a 'right' of innocent passage in the territorial sea) are clouded in confusion . . . sufficient to bar the recognition of a custom . . . ."\textsuperscript{45} He gave examples of nations which did require previous authorization and condoned their power to do so.\textsuperscript{46} He said that the International Court should be the authority of last resort for countries whose warships were the objects of abuse.\textsuperscript{47}

The East European bloc also argues that because the 1958 Convention requires all foreign ships to comply with the laws and regulations of the coastal State,\textsuperscript{48} a requirement of notice-authorization may legally be imposed. Where consent is not obtained, a State may justifiably refuse passage altogether.\textsuperscript{49}

This position is somewhat anomalous because Article 17 calls for compliance only with regulations that are "in conformity with these articles and other rules of international law . . . ."\textsuperscript{50} A regulation which derogates the established principle of innocent passage may not satisfy this qualification. It also appears that the intent of Article 17 is primarily to allow the coastal State to control traffic safety. The

\textsuperscript{42} P. JESSUP, \textit{THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION} 120 (1927).
\textsuperscript{43} [1949] I.C.J. at 101.
\textsuperscript{44} Id. at 30.
\textsuperscript{45} Id. at 101.
\textsuperscript{46} I. CHUNG, \textit{LEGAL PROBLEMS INVOLVED IN THE CORFU CHANNEL INCIDENT} 183 (1959).
\textsuperscript{47} Id.
\textsuperscript{48} Convention on the Territorial Sea and the Contiguous Zone, supra note 1, arts. 17 & 23.
\textsuperscript{49} "Soviet legislation has the effect of denying rather than restricting the right of innocent passage." W. BUTLER, supra note 19, at 66. The requirement of 30 days notice in Article 16 of the Soviet Statute on the State Boundary and the discretion to withhold authorization "transforms the passage of warships . . . into a privilege." Id.
\textsuperscript{50} Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 17.
words "transport and navigation" are used to describe the rules a State may make. The ability of a State to exclude shipping completely requires an unduly broad reading of Article 17.

Strong adherence to the distinction between warships and merchant ships is found among the East European countries. The famous United States cliché that "warships threaten," now embarassing to western nations, is often cited as justification for the more severe regulation of warship passage. Unlike merchantmen, men-of-war are not directly connected with commerce. Hence, there is less reason for their presence in the territorial sea to be tolerated.

This distinction appears to lack merit. It assumes that the right of innocent passage through foreign territorial waters originated out of the necessity of trade. But in the Corfu Channel Case, for example, the British government emphasized that the right was "not merely for the purpose of trade but for communication or navigation." The court itself described innocent passage as "for the benefit of shipping in general" or to permit "the freedom of maritime communication without being limited to trade." Accordingly, because navigation is vital to merchantmen and warships alike, freedom of movement should be enjoyed by all.

Some East European writers even maintain that the passage of warships can never be innocent. Certainly, the transit of foreign military craft through territorial waters will to some degree affect the "peace, good order and security" of the littoral State. It is equally

51. Id. Contra the view that although a State should regulate traffic safety primarily, this limitation does not preclude a State from legally regulating other areas. Article 17 merely calls for compliance "in particular, with such laws and regulations relating to transport and navigation." Id. (emphasis added).
52. Statement of Elihu Root, United States delegate to the Atlantic Coast Fisheries Arbitration of 1912, 11 North Atlantic Coast Fisheries Arbitration (United States v. Great Britain) 2007 (Perm. Ct. Arb. 1912) (Gov't Printing Off.)
53. J. COLOMBS, supra note 5, at 261. The delegates to the 1958 Convention must be presumed also to have recognized the distinction when they enunciated separate rules to be applied to merchantmen and men-of-war. See Convention on the Territorial Sea and the Contiguous Zone, supra note 1, § III (B) & (D).
56. E.g., Vukas, Problem Neskodljivog Prolaska Ratnog Broda (The Problem of Innocent Passage of Warships), 1962 JUGOSLOVENSKA REVLEJA ZA MEDUNARODNO PRAVO 99, cited in V. SEBEK, supra note 21, at 300.
plausible to suggest that the presence of destroyers only three miles from shore will prove a serious threat to small nations.\footnote{37}

Notwithstanding these arguments, the International Court of Justice disagreed when it decided the \textit{Corfu Channel Case}. The passage of warships through Albanian waters was held to be innocent, even though political motives were present.\footnote{38} Generally, passage is not prejudicial simply by the decree of the coastal State.\footnote{39} If considerations of flag, destination, or cargo are recognized as relevant factors, the exercise of innocent passage would become a myth.\footnote{40}

All the above-mentioned arguments, though persuasive on both sides, appear to be immune to actual resolution. Unhappily, the conflict described between East and West is not harmlessly confined to the theoretical. There is also wide divergence in practice between those States which admit to the unrestricted passage of military vessels and those which do not.

\textbf{Unilateral Practices: The New Vogue}

Regardless of whether advance notice for the innocent passage of warships has become a precept of international law, a growing number of nations are unilaterally asserting the right to regulate such shipping. At first their notice-authorization regulations were not stringently enforced.\footnote{61} As of 1975, however, it has been increasingly

\footnote{37: J. Colombos, supra note 5, at 261.}

\footnote{38: [1949] I.C.J. at 30-31.}

\footnote{39: [1950] I.C.J. at 30-31.}


\footnote{59: Id. at 28-29. (iii) In particular, passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State. (iv) Where a right of passage exists, States are not bound to refrain from exercising it because it is disputed and may be challenged or even resisted by the coastal State. Id. at 29.}

\footnote{60: Harlow, \textit{Legal Aspects of Claims to Jurisdiction in Coastal Waters}, 23 NAVY JAG J. 81, 87 (Dec. 1968-Jan. 1969).}

\footnote{61: See generally 1 L. Oppenheim, \textit{International Law} 494 (8th ed. H. Lauterpacht 1955). The author remarks that as a practical matter, no State in peacetime "normally opposes the passage of foreign naval vessels through its maritime belt." This observation would be considered outdated today.}
common for coastal States to demand compliance. In that year, naval vessels were forbidden to traverse the territorial waters without express authorization in a number of jurisdictions, including: Albania, Algeria, Brazil, Bulgaria, German Democratic Republic, People's Democratic Republic of Yemen, Poland, Somalia, Soviet Union, Spain, Sudan and Syria.\footnote{62}

Although prior notice-authorization has been the established principle in these jurisdictions, in practice the demand has been met by "notification at a low level."\footnote{63} This practice is not universal, however, and the possibility remains that a military incident could arise due to the adamant positions of some of the more powerful States.\footnote{64}


[Low-level notification] means the naval attaché telephoning a lieutenant commander at the local Navy Office to say, "Oh, by the way, H.M.S. So-and-so will be passing . . . " and giving details. On the whole, most coastal States have been cautious about striking attitudes on the question, and those that have, like Somalia or Bangladesh, which have solemnly proclaimed . . . that warships shall not pass without permission, are imitating their mentors and have been loftily ignored by others. After all, even a half a dozen swallows do not make a summer.

64. 1 V. Sebek, supra note 21, at 303-04.

[Their] attitude[s] [are] understandable in view of numerous incidents which were provoked by the presence of foreign warships in [their] territorial seas. . . . Albania has never forgotten the bitter lesson of the Corfu Channel Case. The U.S.S.R. also had unpleasant memories of the activities of foreign naval vessels which supported in the Baltic and the Black Sea, the counterrevolutionary forces during the Soviet civil war. The presence of foreign warships in the Adriatic during the Trieste crisis was also resented in Yugoslavia, and those memories were revived during the most recent tension between Yugoslavia and Italy because of the border dispute in March 1974. Incidents . . . have also taken place in the territorial seas of Bulgaria and the GDR.

Id. (footnotes omitted).
Other nations, some of which do not yet insist upon advance warning of the passage of warships, strongly endorse the requirement. For instance, Cyprus, Greece, Indonesia, Malaysia, Morocco, the Philippines, Spain and Jordan submitted to the United Nations subcommittee II of the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor in 1973 Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation. The relevant provisions are as follows:

Article 15

1. The coastal State may require prior notification to or authorization by its competent authorities for the passage through its territorial sea of foreign nuclear-powered ships or ships carrying nuclear weapons, in conformity with regulations in force in such a State.

Article 21

The coastal State may require prior notification to or authorization by its competent authorities for the passage of foreign warships through its territorial sea . . .

Article 22

1. Foreign warships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law.

2. Foreign warships . . . shall not perform any activity which does not have a direct bearing with the passage, such as:

(a) Carrying out any exercise or practice with weapons of any kind;
(b) Assuming combat position by the crew;
(c) Flying their aircraft;
(d) Intimidation or displaying of force;
(e) Carrying out any research operations of any kind.

3. Foreign warships . . . may be required to pass through certain sea lanes as may be designated for this purpose by the coastal State.

The Draft Articles are illustrative of some important trends. In general, the issue of warship passage, which was thought to be relatively simple in 1958, has become more complex. The onslaught of nuclear-powered vessels and other technological advancements in the building of military craft demand new rules. Moreover, the increasing tension and near xenophobia of coastal States over the “free” passage of warships is readily apparent. The limitations imposed by these articles would tend to prohibit warship transit. This possibility is by no means unintended, nor is it the result of sloppy draftsmanship. One might cynically suggest that the mere passage of warships, on its face, is an “[i]ntimidation or displaying of force.”

67. Id., art. 22(2)(d), reprinted in 12 INT’L LEGAL MATERIALS 573, 580.
But others would argue that there is a pressing need to curb harassment by the world's superpowers.

The unilateral practices of many States, although extreme, reveal the dire need for a compromise or balance between exclusive coastal interests and the community goal of free navigation. But the probability that such a balance will be achieved has been overshadowed by more recent developments. In fact, the right of warship passage is seriously threatened by coastal claims to wider territorial seas.

**The Expanding Territorial Seas and the Plight of Innocent Passage**

*Territorial Seas and International Traffic: Two Incompatible Concepts?*

In 1958 nations customarily claimed jurisdiction over a three-mile territorial sea. Hence, the controversy over innocent passage was geographically confined to a relatively small area. However, the modern trend to expand the breadth of the territorial sea presents a direct threat to the "rights" the United States believes were recognized by the 1958 Convention.

The regime of territorial waters is sovereignty-based. It is not inconceivable, therefore, that extensive claims will be formulated by the coastal State to regulate or exclude shipping completely. "It is a short step from excluding fishing vessels [for pollution and conservation purposes] to excluding all ships, even without any reformulation of the nature of the exclusive claim." Several developments illuminate this point.

Peru, in 1952, claimed exclusive fisheries jurisdiction in a 200-mile offshore zone. This claim unjustly became the purported basis for

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68. A.M. Whitman, supra note 2, at 1-18.
71. Id.
72. After meeting with other Latin American States at Santiago to enter into a multilateral agreement, Peru enacted her own internal legislation. See 1952
the later arrest of the Onassis Whaling Fleet. The vessels were simply engaged in transit to whaling grounds located outside Peruvian waters. In reality, the arrest had nothing whatever to do with fishing, and there was no identifiable violation of Peruvian law.

Canada, in 1970, purported through internal legislation to subject 100 miles of coastal sea to pollution control. American jurists and politicians feared that such a unilateral declaration would create unwarranted interference with the right of innocent passage.

Similarly, the United States is alarmed by the restrictions of Malaysia and Indonesia on shipping in their territorial waters on the grounds of pollution control. Warships, because of their excessive weight, are to be excluded completely.

Declaration on the Maritime Zone, Res. Leg. No. 12305 (Nov. 1952), reprinted in 12 Revista Peruana de Derecho Internacional 244-46 (1952). Chile, Ecuador and Peru asserted "sovereignty and exclusive jurisdiction to a minimum distance of 200 nautical miles . . . . " Id. 73. J. Colombos, supra note 5, at 98.

The claim of Peru to this extended sovereignty of waters was enforced in November 1954 when Peruvian naval and air units seized Mr. Onassis's five whaling vessels led by The Olympic Challenger and flying the Panamanian flag. Two of these ships were captured at a distance of approximately 160 miles off the Peruvian coast; whilst the remaining three . . . were attacked 300 and 364 miles respectively off the coast. Id. 74. Id. "The Peruvian Court . . . supported the validity of these seizures under the Peruvian decrees of 1952 and [demanded] . . . a fine of three million dollars within five days." Id. See also Warbrick, The Regulation of Navigation, in III New Directions in the Law of the Sea 137, 146 (R. Churchill, K. Simmonds, & J. Welch eds. 1973).

55. See Arctic Waters Pollution Prevention Act, Can. Rev. Stat., c. 2 (1st Supp. 1970); Canada Shipping Act, id., c. 38; Territorial Sea and Fishing Zones Amendment Act, id., c. 45.


Within these zones, Canada would assert the right to control all shipping, to prescribe standards of vessel construction, navigation and operation, and to prohibit, if Canada deemed it necessary, the free passage of vessels in those waters. . . . [The United States is] concerned that this action by Canada if not opposed by us would be taken as precedent in other parts of the world for other unilateral infringements on the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction in the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law.

77. Warbrick, The Regulation of Navigation, in III New Directions in the Law of the Sea 137, 146 (R. Churchill, K. Simmonds, & J. Welch eds. 1973). These restrictions only apply, however, in the Straits of Malacca. Id.

78. Id. The author notes that "[a]n alternative passage for very deep-draught vessels would be allowed through the Straits of Maccassar, but there would be no right of . . . passage here either, because this involves crossing the waters of the Indonesian archipelago, which Indonesia regards as internal waters." Id.
Not all the claims to extend maritime jurisdiction involve necessary interference with shipping, as do those of Canada, Malaysia and Indonesia. But the tendency of these other claims is toward the same result. South American countries have been notorious for declarations of vaguely unlimited jurisdiction in 200 miles of coastal waters.\textsuperscript{79} As of September 1, 1977, 31 out of 129 independent coastal States had claimed territorial seas in excess of twelve nautical miles.\textsuperscript{80} Fourteen States now claim jurisdictional competence 200 nautical miles from shore.\textsuperscript{81} Sixty States have established the moderate maximum of twelve nautical miles.\textsuperscript{82}

These statistics certainly contravene the three-mile territorial sea limit which was customary in 1958. In addition, States are seeking to increase their sovereignty over broad seas they have already claimed. The emerging infringements upon worldwide navigation were suggested by Secretary of State Henry Kissinger:

\begin{quote}
We will not join in an agreement which leaves any uncertainty about the right to use world communication routes without interference.

Within two hundred miles of the shore are some of the world’s most important fishing grounds as well as substantial deposits of petroleum, natural gas, and minerals. This has led some coastal states to seek full sovereignty over this zone. These claims . . . are unacceptable to the United States. To accept them would bring 30 percent of the oceans under national territorial control—in the very areas through which most of the world’s shipping travels.\textsuperscript{83}
\end{quote}

Attempts to exclude shipping from wide territorial seas, either through strict pollution standards or through requirements of notice-authorization, necessarily portend a loss of communication and transit. These traditional freedoms are vital to the peaceful existence of the civilized world. Even the earlier publicists recognized that “such use should not be denied in time of peace when the territorial waters are so placed that passage through them is necessary for international traffic.”\textsuperscript{84} If international sea lanes fall under the aus-


\textsuperscript{81}. Id.

\textsuperscript{82}. Id.

\textsuperscript{83}. Address to the American Bar Association in Montreal, Canada (Aug. 11, 1975), reprinted in McDowell, Contemporary Practice of the United States Relating to International Law, 70 AM. J. INT’L L. 113, 118 (1976).

pices of coastal regulation, and the concept of innocent passage is narrowly applied, warship mobility throughout the world will be adversely affected.

**Submarines: An Example of Overt Restrictions on Mobility**

The development of the law relating to the innocent passage of submarines clearly illustrates the present danger to international warship traffic. The 1958 Convention states that "[s]ubmarines are required to navigate on the surface and to show their flag."\(^{57}\) There were ample reasons for this provision when the three-mile territorial sea limit prevailed. Submerged transit would mean that the coastal State had no notice or knowledge of a presence of these vessels in the territorial sea.\(^{56}\) As a result, submarines could be stationed within territorial waters and could conceivably use the area for espionage, reconnaissance, and for moving between external points.\(^{57}\) Little justification existed for submarines insisting upon submerged passage. The security interests of the coastal State greatly outweighed any prejudice to foreign powers.

Today the rule is the object of much criticism. Where States now claim 200-mile territorial seas, they also assert the right to forbid submerged passage.\(^{58}\) The United States Navy is alerted and somewhat alarmed:

> The vastness of the areas in which global deployment of submarines can be affected has scarcely been realized. All the access routes to Cape Horn are covered by 200-mile claims, and the South American navies, with the latest detection equipment, the Ikara anti-submarine missile system and the predisposition to use force against unidentified submerged contacts, can only complicate the naval planning of the Great Powers who may use this route.\(^{59}\)

The necessity to destroy a submerged submarine up to 200 miles from shore is an unwarranted exaggeration of a State's security needs. Yet, violation of the surface navigation requirement today is deemed a grave infringement upon a State's sovereignty and international custom.\(^{56}\) The measures of enforcement are disconcertingly strict and include the right to destroy a submerged vessel upon contact.\(^{59}\) Nations with this attitude assume that disregard of the rule

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86. W. Burke, *supra* note 69, at 12.
87. Id. See also W. Butler, *supra* note 19, at 65.
89. Id. at 142.
91. 1 V. Sebek, *supra* note 21, at 308. "In accordance with Article 8, paragraph 3 of the Romanian Decree No. 39, Article 10, paragraph 2 of the Bulgarian 1951 Decree, and an Instruction by the Soviet Ministry of Defense, reported in *Prav-
against submerged transit a fortiori renders passage not innocent. But when speaking of a 200-mile territorial sea, this assumption is analogous to the idea that "excessive speed on the road makes the journey illegal." 92

Certainly, the likelihood of submerged passage being non-innocent was greater when territorial seas were narrow. Indeed, shallow coastal waters are far more hazardous and submerged transit would imply ulterior motives. 93 But far out at sea, submerged passage may be more convenient, and in adverse weather, entirely necessary to avoid damage. 94

Perhaps this concern for submarine safety can be satisfied in "ways more consonant with coastal interests than simply providing for unannounced submerged passage by large nuclear powered vessels carrying nuclear weapons." 95 Again, a balancing of coastal security and international navigational needs is most desirable. The policies of the Soviet Union and the United States have become similar in this regard. 96 Unfortunately, the argument of the superpowers in favor of submerged passage has been prejudiced by their past suspicious activities. 97

A Suggested Solution: The Lesson to be Learned from Straits

As States claim broader territorial seas, it will be necessary for more foreign vessels to pass through sovereign waters. In many in-

das of August 29, 1961, submarines which violate this rule are to be pursued and destroyed without liability." 92
93. Id. at 143.
94. Id. at 142-43. See also W. Burke, supra note 69, at 12.
95. W. Burke, supra note 69, at 12.
96. See generally D. O'Connell, supra note 16, at 140, 142.
97. According to recent reports, U.S. submarines are employed for missions which call for stations within claimed twelve-mile territorial seas, but beyond three miles. The New York Times report by Seymour M. Hersch described these missions as follows: "The Holystone operation, which more recently has carried the code names Pinnacle and Bollard, involves the use of specifically equipped, electronic submarines to spy inside the waters of the Soviet Union and other nations. The intelligence gathering operation was initiated in the early nineteen-sixties." N.Y. Times July 6, 1975.


In November, 1969, the submarine USS Gato collided with a Soviet Submarine in an area 15 to 25 miles off the entrance to the White Sea. . . . [T]his incident occurred only one mile from the [Soviet] Shore. The U.S. Navy . . . falsified [the reports] to show that the damage was caused by a propeller shaft malfunction.

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stances the territorial seas of coastal States now overlap international high seas transit routes. Few waters may remain in the world which have not yet been appropriated by coastal States and which can still be transited as operational seas. Hence, a growing analogy between the use of international straits and territorial waters has emerged.

Traditionally a State has been forbidden to refuse passage through an international strait within its domain. The Report of the Second Commission (Territorial Sea) of the 1930 Hague Conference included the provision that “under no pretext . . . may there be any interference with the passage of warships through straits constituting a route for international maritime traffic between two parts of the high seas.” The Corfu Channel Case was a further indication that the right to send warships through such waterways is paramount to restrictions imposed by the local sovereignty. In addition, the 1958 Convention provides that “[t]here shall be no suspension of the innocent passage of foreign ships through [international straits] . . . .”

A major policy underlying these limits on State jurisdiction in straits is freedom of navigation. Because warship transit through coastal territorial waters a mere three miles from shore was not normally “necessary,” the freedom of navigation argument would not apply in that zone.

But the interest of a State in denying transit freedom to warships up to 200 miles from its coast is highly questionable. The fact that warship passage through a three-mile coastal zone was rarely a necessity should not provide license for States to apply the same restrictions today, when asserting larger boundaries. Although “freedom of navigation” in narrow territorial seas may have sounded

98. See D. O’Connell, supra note 16, at 142.
99. Id., at 141.

[T]ry as one may to distinguish the case of straits and the territorial sea, the one persists in remaining an analogue of the other, and in the sea lanes of south-east Asia they shade into each other so that they virtually overlap. The proliferation of broad claims to the sea portends the exclusion of warships from enormous operational areas. Admiral Gorshkov [Soviet Red Fleet] himself has calculated that if all countries declared a 200-mile territorial sea, then of the 360 million square kilometers of water on our planet about 140-150 million would be appropriated by the coastal states . . . .

Id.

100. For a definition of an international strait, see note 38 supra.
102. Convention on the Territorial Sea and the Contiguous Zone, supra note 1, art. 16(4).
103. See text accompanying notes 104 & 106 infra.
contrived, the doctrine should apply with full vigor in areas traditionally designated as high seas.104

The United States has recently proposed a new theory to protect navigation through international straits:105

We believe the right to transit straits should be regarded in law for what it is in fact: an inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves. Without such a right of transit, these high seas freedoms would lose much of their meaning if an expansion of the territorial sea to 12 miles is to be recognized and agreed.106

The United States delegate to the Third Conference on the Law of the Sea has not seized upon the analogy between territorial waters and straits. In its obsession over straits, the United States has tended to ignore the preservation of innocent passage for warships in foreign territorial seas. Accurately stated, the argument is that "[i]f warships have such rights generally they have them specifically in straits . . . ".107 However, the issue could not popularly be presented in the United Nations in this way due to the ambiguous history of warships and because innocent passage through the territorial sea is not a sufficient guarantee of freedom of naval deployment through


106. Id., reprinted in 10 INT'L LEGAL MATERIALS 1013, 1014 (1971) (statement of John R. Stevenson, legal advisor of the Department of State and United States representative to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction). The "right of unimpeded transit" to which Mr. Stevenson alluded is an entirely new concept which would, according to the United States, avoid the limitations of the present concept of innocent passage. The right implies that ships passing through international straits would have the same rights of navigation as they do on the high seas. The proposal "is notable for being the first attempt to extend rather than merely resist encroachment upon, the right of [freedom] of navigation . . . ." since the 1958 Convention. Warbrick, The Regulation of Navigation, in III NEW DIRECTIONS IN THE LAW OF THE SEA 137, 146 (R. Churchill, K. Simmonds, & J. Welch eds. 1973) (emphasis original). Unfortunately, the proposal only directs itself to passage through straits. There are no United States proposals concerning transit rights in the territorial seas.

straits. The tendency therefore has been to view the problem of straits as having a special character and "to suppress the question of the territorial sea as likely only to compound the controversy." Nevertheless, it must be realized that if the United States continues to ignore the subtle harassment of its warships far out at sea, the effect will be tantamount to a denial of transit through straits. The great naval power may also forever forfeit the "right" of innocent passage in the territorial sea by inadvertent acquiescence.

Implications for United States Defense Tactics

Freedom to transit the world's waterways is not the sole justification for United States ocean policy. "[M]any nations, including the United States, depend upon air and sea mobility in order to guarantee . . . individual and collective self-defense. To contemplate changes in the law of the sea that might reduce that mobility is to contemplate changes affecting fundamental security interests . . . ." No country wishes to subject its defense status and sea communication to the consent or political good will of another State. Although the United States recognizes that the peace, good order, and security of coastal States is to be preserved, these interests must be balanced against every nation's right to maintain a naval fleet and a system of defense. The United States is adamant in suppressing purported interference with its role as guardian of world peace.

Sea power means more than just ships and aircraft deployed across the seas—it means the ability, vital to the United States and our allies, to use the seas to the best interests of the free world, while denying their use to any potential enemy.

The freedom to navigate upon the high seas is an essential presupposition to the fulfillment of the U.S. Navy's mission . . . .

108. Id.
109. Id.
112. See Hearings on National Marine Sciences Program Before the Subcomm. on Oceanography, House Comm. on Merchant Marine and Fisheries, 90th Cong., 1st Sess. 345 (1967) (testimony of Dr. A. Frosch, Assistant Secretary of the Navy (Research and Development)).
Integrally related to the effectiveness of a defense program is the United States' need for secrecy as to the location of vessels of war. The importance of secrecy of the location of missile-carrying submarines, for example, has increased since the arms-limitation agreements with the Soviet Union. American naval officials fear that with the emergence of Russian military strength on the seas, there is a danger that prior notice-authorization restrictions will destroy our strategic advantage.

Clearly, the trend toward territorial sea expansion also has an impact on United States defense tactics because it is an even more onerous restriction on naval deployment. Rear Admiral Wilfred A. Hearn, former Judge Advocate General of the Navy and Department of Defense Representative on the Law of the Sea, definitively expressed the view of the military in this regard:

We consider it imperative from the standpoint of security to preserve the right of freedom of navigation on the high seas for warships and aircraft. We believe that our security interests are best served when nations are limited to narrow territorial seas which interfere only slightly with this freedom of navigation.

Finally, an inability to remain mobile on the seas would be injurious and impractical to the United States. Serious restrictions would ultimately result in even more intimidation for other nations. Mobility prevents the necessity of having to post large forces for extended periods near potential trouble spots.

117. See generally Burke, Defense Problems Start with the Threat We Face, 1960 NAVY JAG J. 20 (May 1960). Admiral Burke comments:

Thus our desires are not their desires; our needs are not their needs and our military requirements are not their military requirements. . . . [B]allistic missiles can hit anything that stays in one place, once its location is known. On the other hand, ballistic missiles cannot hit anything that keeps moving or whose location is unknown. When the location of anything is known, its address can be put into a ballistic missile.

Id.

A CRITICISM OF THE UNITED STATES’ POSITION:
“DO WHAT I SAY, NOT WHAT I DO”

The arguments propounded by the United States urging removal of restrictions on innocent passage are weakened by their visible hypocracies. Nations with newfound voices point to the embarrassing discrepancy between enunciated American policy and actual practice. For instance, following the United States’ condemnation of Canada’s Pollution Act the Canadian government noted that:

The position of the United States Government is that waters beyond a three-mile limit are high seas and that no state has a right to exercise jurisdiction beyond a three-mile territorial sea. The United States itself does not adhere to (this view) in practice. For example, as early as 1790, at a time when the international norm for the breadth of the territorial sea was without question three miles, the United States claimed jurisdiction up to twelve miles for customs purposes and enacted appropriate enforcement legislation, which is still in force. Since 1935 the United States has claimed the authority to extend customs enforcement activities as far out to sea as 62 miles, in clear contradiction of applicable international law. In 1966, the United States established exclusive fisheries jurisdiction beyond its three-mile territorial sea extending out to twelve miles from shore."

The United States continues to impose a variety of complicated restrictions on the passage of foreign ships, while contesting the legality of a notice-authorization restriction on warships. Does the United States believe that it is the only country which can extend its territorial sea in “good faith”?

Mr. Kissinger gracefully admitted that the United States has now joined the ranks of countries urging agreement on a 200-mile offshore economic zone. He assures us that “under this proposal . . . freedom of navigation and other rights of the international community would be preserved.” However, the United States has always condemned these kinds of proposals because of the fear of greater coastal State interference with shipping. This history is

When international tensions mount we get an even greater number of carriers, more aircraft and other ships to sea. We keep them moving, thus low in vulnerability. These forces stress mobility. They stress it because mobility allows us to get adequate military strength where needed, when needed.

Id.


clearly inconsistent with our own present policy. What assurances do Third World nations have that the United States will not derogate the right of innocent passage in its own territorial waters based on an extension of sovereignty?

Moreover, no guarantee exists that the "right" of innocent passage will not be utilized by great naval powers to intimidate and dominate the globe. The purported defense motives of the United States for preserving such a right have been severely criticized.123

In light of such hostile attitudes, it will be virtually impossible to reach unanimous agreement on the question of innocent passage. Conflicting ideologies appear to doom recent attempts to reformulate the law of the sea.

THE EMERGING REGIME: UNCLOS III

Delegates from 147 nations have convened at the Third United Nations Conference (UNCLOS III) to clarify and codify the law of the sea.124 The principal result of the second substantive conference, held at Geneva, was the production of the Informal Single Negotiated Text (ISNT).125 This document was the forerunner to the

123. See, e.g., Speech by An Chin-Yuan, Representative of the People's Republic of China, at the U.N. Committee on Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (Mar. 3, 1972), reprinted in 11 INT'L LEGAL MATERIALS 654, 655-57 (1972). An Chin-Yuan, speaking on behalf of the People's Republic of China, vehemently attacked American ocean politics which he claimed were symptomatic of imperialism:

After World War II, the United States attempted to dominate the world and increasingly extended its activities from the sea surface to the seabed and carried out expansion over vast areas. . . . It dispatched its warships and vessels everywhere to intrude into the territorial seas and plunder the sea-bed resources of other countries and even commit outright armed intervention and aggression. . . . [O]nly the superpowers have the final say, while the other one hundred and scores of countries in the world can only submissively obey. . . . Can this be "international law!" It is a crude violation of the principle of state sovereignty. It is imperialistic logic, pure and simple.

Id.


Revised Single Negotiated Text (RSNT). The most recent source for progress on a new Law of the Sea is the Informal Composite Negotiating Text (ICNT). These texts have no official status other than "serving as a basis for continued negotiation without prejudice to the right of any delegation to move any amendments or to introduce any new proposals."  

Although not binding, the texts are clear indications of growing international custom. They are in form strikingly similar to the 1958 Convention and are therefore easily compared.

Initially important is the fact that the ICNT, at least with regard to innocent passage, is a verbatim reiteration of the RSNT, which was substantially identical to the earlier ISNT. This observation lends credence to the idea that nations will eventually agree on the provisions embodied in these draft treaties. To find many of the provisions of these texts in the eventual treaty would not be surprising.

A summary of the multitude of proposals submitted prior to the compilation of the negotiated texts is not the goal of this Comment. Overall dissatisfaction with the 1958 regime on innocent passage is evident, and a myriad of draft articles call for a new conception of this term. The primary thrust for revision is to specifically enumerate those activities in the territorial sea which prejudice the interests of the coastal State.

Every provision of the 1958 Convention concerning innocent passage also appears in the ICNT. The change has been to redefine the concept at length in clear and seemingly unambiguous language. The new text provides in Article 19 that passage shall not be innocent where a foreign vessel engages in:

(a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) Any exercise or practice with weapons of any kind;

127. ICNT, note 124 supra.
129. The ICNT is divided into three parts, Part II of which deals with the territorial sea and contiguous zone. This part was originally drafted by the President of the Second Subcommittee of the Conference as requested by the Conference President. See id..
132. Id.
(c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) Any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) The launching, landing or taking on board of any aircraft;

(f) The launching, landing or taking on board of any military device;

(g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;

(h) Any act of wilful and serious pollution, contrary to the present Convention;

(i) Any fishing activities;

(j) The carrying out of research or survey activities;

(k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) Any other activity not having a direct bearing on passage.  

Military security of the coastal State is the principal emphasis in this “open-ended” list of prejudicial activities. Although it is certainly desirable to obtain a clear definition of “innocence,” these provisions arguably increase the ability of coastal States to produce grounds for denying passage. “Any other activity not having a direct bearing on passage” under category I would certainly be simple for such nations to manufacture. In this sense, warship passage may be in serious peril. Consequently, criticism has been aimed at deleting category I for purposes of specificity and protection of the right.

Another field in which the ICNT elaborates on the 1958 Convention is a State’s ability to prescribe laws and regulations in its territorial sea. The broad regulatory powers of the 1958 Convention,

133. ICNT, supra note 124, art. 19(2).
135. Dissatisfaction with the 1958 definition of innocent passage appears sufficiently widespread to assure that a new law of the sea convention will effect some improvement. The direction is toward a more explicit understanding of what constitutes passage that is prejudicial to coastal interests and accordingly what passage is innocent and also toward a more precise identification of coastal competence to legislate for events in the territorial sea. On the former point the Single Text would be measurably improved by removing the catch-all category of “any other activity not having a direct bearing on passage.” W. Burke, supra note 69, at 21. Conversely, it may be argued that category I of the ICNT is not harmful. After giving an extensive list of non-innocent activities, the ICNT leaves little room, if any, for a coastal State to use category I to the disadvantage of warships.
Article 23, were cause for much controversy over the legality of notice-authorization. Today, a State is deemed competent to enact rules under Article 21 of the ICNT relating particularly to:

(a) The safety of navigation and the regulation of marine traffic;
(b) The protection of navigational aids and facilities and other facilities or installations;
(c) The protection of cables and pipelines;
(d) The conservation of the living resources of the sea;
(e) The prevention of infringement of the fisheries regulations of the coastal State;
(f) The preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
(g) Marine scientific research and hydrographic surveys;
(h) The prevention of infringement of the customs, fiscal, immigration, or sanitary regulations of the coastal State.¹³⁶

In addition, the State is required to “give due publicity to all such laws and regulations” made by it.¹³⁷

These provisions do not specifically license a State to impose a notice-authorization prerequisite to innocent passage. Furthermore, unlike Article 19, the list in Article 21 is exhaustive and exclusive. States may enact only those laws which are within the ambit of the listed categories. Thus, there is a strong argument that henceforth prior notice-authorization should not be required of foreign vessels by the coastal State.¹³⁸

A State can easily restrict or refuse, however, the innocent passage of warships on other grounds. The claimed right of Malaysia and Indonesia to exclude warships because of “excessive weight” would clearly be cognizable under Article 21(1)(f). Prior notice-authorization might also be required as a component to other competent regulations. Permission to pass could be incident, for example, to the “safety of navigation and the regulation of marine traffic.”¹³⁹ Much like Article 19, Article 21 contains the potential for abuse by States opposed to the passage of warships. Little is achieved, therefore,

¹³⁶. ICNT, supra note 124, art. 21(1).
¹³⁷. Id., art. 21(3).
¹³⁸. It should keep in mind that these provisions apply to “all ships,” as designated in the title to subsection A of § 3 of the ICNT.
¹³⁹. ICNT, supra note 124, art. 21(1)(a). A State may even have the right to exclude warship passage completely on this ground alone. Article 22(2) provides that “nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage . . .” as the coastal State “may designate or prescribe . . .” Id., art. 22(1). There is nothing to prevent a State from claiming that no safe route for such vessels exists. Likewise, a sea lane maybe designated which is so utterly inconvenient that the request to use it would be tantamount to a refusal of passage.
beyond the provisions of the 1958 Convention. Many of the old ambiguities, and unfortunately some new ones, inhere in a discussion of the coastal State's authority to regulate innocent passage.

Article 23 of the ICNT singles out "[f]oreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances" for special treatment. These vessels must "carry documents and observe special precautionary measures established for such ships by international agreements."\(^{140}\) This provision does not merely facilitate the imposition of notice-authorization; it also tends to apply particularly to military vessels.

The sole provision of the ICNT which attempts to safeguard the interests of the international community is Article 24:

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the present Convention. In particular, in the application of the present Convention or of any laws or regulations made under the present Convention, the coastal State shall not:

   (a) Impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

   (b) Discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.\(^{141}\)

A requirement of prior notice-authorization, because it impedes the exercise of innocent passage, would have the "practical effect" of "denying" or "impairing" this right.\(^{142}\) And for countries, such as the United States, which rely on secrecy of naval deployment, that reasoning is persuasive. Hopefully, Article 24 will become a useful tool with which to balance coastal and community interests while curbing abuse in the regulation of innocent passage.

One of the greatest benefits of the ICNT is that "[e]very State [now] has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles . . . .\(^{143}\) Because unilateral claims to extend territorial seas and to impose strict shipping regulations have posed major threats to warship traffic, western jurists were obviously pleased with this limitation. Indeed, "[a] twelve-mile territorial

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\(^{140}\) Id., art. 23.

\(^{141}\) Id., art. 24(1).

\(^{142}\) This argument assumes that warships do possess a fundamental right of innocent passage. Section 3, subsection A of the ICNT applies to "all ships," and Article 17 thereunder clearly bestows the "right of innocent passage through the territorial sea."

\(^{143}\) ICNT, supra note 124, art. 3.
sea and transit passage rights through the straits [continue] to receive broad support from the delegates.”

**AN IMPASSE ON WARSHIP PASSAGE**

In recent years, the Soviet Union, which had been the leading opponent of the right of warship passage, has gradually “defected” from this camp. The emergence of the Red Fleet as a superpower has no doubt influenced Soviet ocean politics. In fact, the Soviet Union has become a major naval, merchant marine and fishing nation. With this new status there has evolved the realization of the need to protect traditional high seas freedoms. The political split which was the downfall of the 1958 Convention is not present at the new Law of the Sea Conference.

Russia has no desire to have the Red Fleet “landlocked” between foreign jurisdictional boundaries. The Soviet bloc has therefore resisted territorial sea claims exceeding twelve miles. But because this resistance might prove ineffective, “it is logical to suppose that the Soviet navy has gone cold on the notion that warships may not transit the territorial sea without previous permission.”

At the same time, the positions of the Latin American States have become steadfast and have broadened in scope. China, too, adheres vehemently to the proposition that warships have no right of innocent passage. The world’s most populous nation has proclaimed that “[a] coastal State may, in accordance with its laws and regulations, require military ships of foreign States to tender prior notification to, or seek prior approval from, its competent authorities before passing through its territorial sea.

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146. *Id.*
147. *Id.*
151. Note by the Chairman of UNCLOS III: Texts of Proposals Which Particular Delegations Consider Should be Included in Document
In short, an impasse has evolved from the tactics at the 1958 Convention and the ongoing negotiations. The crux of the difficulty is that coastal nations have habitually permitted foreign warships to transit their territorial seas, yet at the same time they have reserved the right to prohibit such passage.\footnote{152} Western powers have always discreetly complied with notice-authorization dictates, but where an alternative was tenable, foreign nations have not sent their men-of-war through such waters and have avoided the issue.\footnote{153} In the few jurisdictions which could not be so avoided, diplomacy has prevented major obstacles from arising.\footnote{154}

**CONCLUSION**

The theory of innocent passage for warships presents a complex and demanding issue for modern jurists. There are persuasive arguments in favor of and opposed to a fundamental right of military vessels to transit sovereign waterways. In short, the regime of warship passage through territorial waters is a precarious one, subject to reasonable modification by the coastal State.\footnote{155}

No clear synthesis of law has emerged, nor is there presently a norm regarding prior notification or authorization. The conflict between East and West on the issue is not one which lends itself well to a compromise satisfactory to all.

As nations both powerful and weak continually restructure themselves politically, their roles in the international community change. The unilateral declarations of many Third World nations clearly illustrate this point. And the retraction by the Soviet Union of its earlier position on the innocent passage of warships, along with other instability in ocean politics, renders the future of that doctrine uncertain.

\begin{footnotes}
\item[153] Id.
\item[154] \textit{Id.} “Where they have found it necessary, mainly in the sea lanes of Indonesia and the Philippines, they handled the matter by diplomatic modalities, which again have kept the problem confined to the theoretical.” \textit{Id.}
\end{footnotes}
The key to understanding the issues of innocent passage is in the "attitudes" of individual States. States with a view toward freedom of naval deployment for defense purposes will be compelled to reconcile this goal with the security needs of their neighbors. Hopefully, a balance of interests can be struck.

Unfortunately for the United States, the arguments in favor of free transit passage through straits have not been extended to preserve freedom of movement in other territorial seas. This is not to say, however, that the major naval powers are the sole arbitrators of the law of the sea. Indeed, the texts of UNCLOS III have proved otherwise.

Upon examining the positions of various nations, one senses an ever-increasing hostility toward the deployment of foreign warships. Arguably, the future is gloomy for the principle of innocent passage as applied to these vessels.

The heroic struggle of Latin American countries to safeguard their rights over their territorial seas has won the sympathy, admiration and support of the peoples of Asia, Africa and Latin America and the rest of the world. It has proved once again that so long as small and weak countries in the world raise their vigilance, persist in struggle, strengthen their unity and support one another, they will surely win victory and that the super powers, though looking monstrous, are nothing terrible and can surely be defeated.156

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