10-31-2005

Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea

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Abstract

The evolution of the law of the sea has been shaped largely by two notions, namely, freedom of navigation on the one hand, and restricted access on the other hand. The interaction between these two opposing notions has led to the acceptance of two compromise concepts, namely, the territorial sea and the right of innocent passage. These concepts have now been codified in the 1982 United Nations Convention on the Law of the Sea. This paper examines the right of innocent passage in the territorial sea under the Law of the Sea Convention regime as matched against contemporary state practice. It would appear that many coastal states prefer the restriction of this right – seemingly infringing what the Convention stands for. It is submitted that states should restructure their policies and regulations to conform to their assumed obligations under the Convention.

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Introduction

Throughout the evolution of international law governing the oceans, two theories have fought for mastery. The first is the notion that the sea is common to all humankind and open to navigational uses by all. Therefore, no person or nation may validly seek to restrict others from such use by laying a claim of proprietorship over the sea. This notion is borne out by the belief that the geophysical nature of the ocean itself resists any claim of ownership over it. Freedom of navigation is the mantra of this notion.

The second notion seeks to restrict the use of the sea by positing that the sea is amenable to ownership by persons or states. Thus, whoever may bring any part of the oceans under his dominion may validly restrict its use by others. The friction between these two notions has, over the years been, the shaping rod of the law of the sea.

The importance of marine navigation over the centuries and at present cannot be understated. The oceans serve as a vital link between nations in terms of trade, commerce and communication. These concerns are the mainstay of the world economy and they have been the push-and-pull factors in the line of the cross fire between the opposing forces of freedom of navigation on the one hand, and restricted access on the other hand.

The middle path of the interaction between these two forces is the principle of innocent passage. After centuries of turbulent evolution, this principle now appears to have crystallized with its codification in the Law of the Sea Convention.[1] The right of innocent

[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1883 U.N.T.S. 397 [Hereafter referred to as the LOSC].

passage is the essence of marine navigation and at present "[n]o one would seem to disclaim it. The maritime States cherish it as one of the cornerstones of the law of the sea, the coastal states admit it as an unavoidable limitation to coastal State competence."[2]

However, the exact scope and juridical nature of the right of innocent passage appears to be far from certain when viewed in the light of contemporary state practice. This is a sharp reminder that treaty provisions have no independent life of their own except viewed against prevalent state practice. Though states adopt treaties and normally consider such treaties as binding, it is not uncommon for these same states to derogate from the treaty provisions when it is in their interest to do so.

For all intends and purposes, international law appears to be a legal regime governing state subjects that infringe its tenets only to find justification clothed in self-interest for the acts which are called in question. In the words of one text writer, "[t]he function of international law is not to invest States with legal regimes but to secure recognition of regimes contrived by action of individual members of the community of nations."[3] Therefore, notwithstanding the extent of codification of international law, it is ultimately accepted state practice, which becomes instructive. The fluid nature of the law of nations finds revelation in international judicial recognition that:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the

[2] K. Hakapää and E.J. Molenaar, *Innocent Passage – Past and Present,* 23 MARINE POLICY 131 (1999).
[3] D.P. O'Connell, *The Juridical Nature of the Territorial Sea*, 45 BYIL 303, 304 (1971) [Hereafter cited as O'Connell, *Territorial Sea*].

> achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[4]

Indeed, there appears to be no impenetrable shield of codified international law rules and the law of the sea for that matter.[5]

The great American judge, Oliver Wendell Holmes Jr., told us that "[t]he life of the law has not been logic: it has been experience."[6] If these hallowed words have any force with respect to domestic law, they find even more potent expression with respect to international law. The rules of international law develop from theoretical and normative indices of what is recognized by a majority of states as forming the basis of a valid course of action. Over time, these rules receive definitive expression of their scope through codification. However, the interpretation and application of these rules by states become the path for the further development of these rules.

Therefore, the development of international law is cyclical. Theory begets practice; practice begets crystallized rules; crystallized rules beget practice, which in turn begets further theory. Not infrequently, practice deviates from its parent theory and the latter must of necessity, mutate to espouse the latter.

International law is, therefore, not static. It evolves to meet the challenges of the time while its path is carved by state practice. Its rules change as long as the conditions that

[4] The Steamship Lotus, 1927 P.C.I.J., ser. A, No 10, 18.
[5] Charles E. Pirtle, *Military Uses of Ocean Space and the Law of the Sea in the New Millennium,* 31 OCEAN DEVEL. & INT'L L. 7, 10 (2000) [Hereafter cited as Pirtle, *Military Uses of Ocean Space*].
[6] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown & Co. 1881).

gave rise to them change.[7] The law of the sea in particular "remains an active and dynamic field, changing and growing as the interests of nations change."[8] This observation applies forcefully to navigational rights, owing to the commercial and military concerns of maritime states juxtaposed with security and other concerns of coastal states.

This paper examines the international law right of innocent passage in the territorial sea,[9] matched against contemporary state practice. As we have pointed out earlier, the law of nations "rests on consensus of opinion [and it] may be gradually modified, altered or extended, in accordance with the views of a considerable majority of…States, as the consensus of opinion develops."[10] Our aim, therefore, is to match logic with experience to ascertain the extent to which the latter departs from the former and the implication of the deviation for the future development of the right of innocent passage in the territorial sea.

It is important to stress that "[t]he right of innocent passage deserves study from both historical and contemporary perspectives because of its fundamental importance as the residual legal regime for securing transit of ships through sovereign seas."[11] The paper is divided into 3 parts. Part I looks at the history and evolution of the right of innocent

[7] John Wilkinson, *The First Declaration of the Freedom of the Seas: The Rhodian Sea Law*, in 2 OCEAN YEARBOOK, 89, 90 (Borgese and Guinsburg eds., 1980) [Hereafter cited as Wilkinson, *The Rhodian Sea Law*].
[8] Bowen L. Florsheim, *Territorial Sea, 3000 – Year Old Question*, 36 J. AIR L. & COM. 73, 75 (1970) [Hereinafter cited as Florsheim, *3000-Year Old Question*].
[9] This right also exists in straits used for international navigation and what is known as archipelagic waters.
[10] The Lotus Case, *supra* note 4 at 34.
[11] David Froman, *Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 628 (1984) [Hereinafter cited as Froman, *Uncharted Waters*].

passage in the territorial sea. Part II is a descriptive analysis of the regime of innocent passage under the LOSC. Attention is drawn to the interpretation and implementation challenges posed by the provisions of the LOSC. Part III examines contemporary state practice as reflected mainly in national legislations. This is followed by concluding remarks.

Part I – Innocent Passage in the Territorial Sea – Down Memory Lane

Innocent passage implies that such passage is at the sufferance of the state through whose coastal waters the right is exercised. It may also be said that there can be no talk of innocence if passage is not subject to the sovereignty of the state whose shores are adjacent to the body of water in which the right is exercised. For where no sovereignty is exercised by any state over the body of water in question, passage through same would be passage simpliciter, with no consideration of its (in)offensiveness. For instance, there is nothing like innocent passage on the high seas since no state may validly claim to exercise jurisdiction over this body of water.

The exercise of sovereign rights over portions of the sea necessitating the notion of innocent passage in it has been the most turbulent area in the evolution of the law of the sea. One author pointedly remarks that:

> The history of the Law of the Sea has been dominated by a central and persistent theme – the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas. The tension between these has waxed and waned through the centuries, and has reflected the political, strategic and economic circumstances of each particular age. When one or two great commercial powers have been dominant or have achieved parity of power, the emphasis has lain upon the liberty of navigation and the immunity of shipping from local

> control…When, on the other hand, great powers have been in decline or have been unable to impose their wills upon smaller states, or when an equilibrium of power has been attained between a multiplicity of States, the emphasis has lain upon the protection and reservation of maritime resources, and consequently upon the assertion of local authority over the seas.[12]

It appears that in antiquity the sea was open to all for the purpose of navigation. Dated writers like Ulpian and Celsus had no inhibition on this point. While the former asserted *mare quod naturia omnibus patet* – the sea is open to everybody by nature, the latter affirmed *maris communem usum omnibus ut aeria* – the sea, like the air, is common to all mankind.[13] More recently, Vattel observed that:

> It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is, he who navigates, or fishes in it, does no injury to any one, and that the sea, in these two respects, is sufficient for all mankind; since, every one being able to find in their state of communion what was sufficient to supply their wants, to undertake to render themselves sole masters of them, and exclude all others, would be to deprive them, without reason, of the benefits of nature.[14]

These claims have not gone without challenge, for a counterclaim has been maintained of the possibility of appropriation of portions of the sea and hence its uncommonness. The origins of this opposing view may be traced to the theory of the Glossators who espoused the canon law of Rome.[15] They founded a theoretical basis upon which they vested sovereign rights over the sea in the Roman Emperor.[16] However, with the emergence of the *ius gentium* – law of nations, it was reasserted that the sea existed for free access to

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[12] D.P. O'Connell, *Transit Rights and Maritime Strategy*, 123 RUSI II (1978), quoted in Pirtle, *Military Uses of Ocean Space*, *supra* note 5 at 36.
[13] Cited in Ruth Lapidoth, *Freedom of Navigation – Its Legal History and its Normative Basis*, 6 J. MAR. L. & COM. 259, 261 (1975) [Hereafter cited as Lapidoth, *Freedom of Navigation*].
[14] M.D. VATTEL, THE LAW OF NATIONS – Book I Ch. XXIII Sec. 281, 185 (P.H. Nicklin & T. Johnson 1829) [Hereafter cited as VATTEL, THE LAW OF NATIONS].
[15] Percy Thomas Fenn, Jr., *Origins of the Theory of Territorial Waters*, 20 AJIL 465, 465 (1926) [Hereafter cited as Fenn, *Origins]*.
[16] *Ibid.*

all men.[17] In the words of Judge Story in the *Marianna Flora*, "[u]pon the ocean, in time of peace, all possess an entire equity. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there."[18] Thus, the battle line was drawn between the proponents of freedom of navigation and those of restricted and regulated access.

These two loggerhead positions were carried down the course of history. The Rhodians of the Hellinistic age fought unrelentlessly on the side of freedom of navigation to protect their maritime interests and to oppose Mediterranean power hegemony.[19] This led to the famous Rhodian Sea Law which was applied on the Island of Rhodes,[20] and which is said to be the earliest known comprehensive code of the law of the sea.[21]

By the 13th century, it had been recognized that a state may exercise jurisdiction over the body of water adjacent to its shores.[22] The notion of restricted access to the sea was also engendered by feudalism, the immense "rights and powers [of which] would naturally produce in the mind of the ruler possessing them a sense of proprietorship of the things over which he exercised them."[23]

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[17] *Ibid.*
[18] Quoted in Pirtle, *Military Uses of Ocean Space*, *supra* note 5 at 13.
[19] Wilkinson, *The Rhodian Sea Law*, *supra* note 7 at 91.
[20] William Tetley, *The General Maritime Law – The Lex Maritima*, 20 SYRACUSE J. INT'L L. & COM. 105, 109 (1994).
[21] Florsheim, *3000-Year Old Question*, *supra* note 8 at 76.
[22] RUTH LAPIDOTH, FREEDOM OF NAVIGATION WITH SPECIAL REFERENCE TO INTERNATIONAL WATERWAYS IN THE MIDDLE EAST 14 (Jerusalem Post Press 1975) [Hereafter cited as LAPIDOTH, INTERNATIONAL WATERWAYS].
[23] Fenn, *Origins*, *supra* note 15 at 469.

Over the ages, several states have laid claim to vast expanses of the sea.[24] The Republic of Venice, at the peak of its glory, laid claim to the Adriatic Sea while Genoa laid claim to the Ligurian Sea.[25] Perhaps the most notorious pretensions of ownership of the seas were the 15th century claims by Spain and Portugal to almost the entirety of the oceans. These claims were based on a *donationis Pontificiae* (Papal bull) decreed by Pope Alexander VI on 4 May 1493, by which he purported to donate the Western and Eastern Hemispheres to Spain and Portugal respectively, by drawing an imaginary line from the Artic pole to the Antarctic pole![26]

Such sweeping claims, of course, did not pass without opposition and challenge. For instance, in response to a Spanish complaint against the voyage of Sir Francis Drake to the Pacific, Queen Elizabeth I remarked: "The use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, for as much as neither nature nor regard of the public use permitteth any possession thereof."[27]

Intellectual discourse on the issue came to a head in the 17th century by virtue of the legal expositions of the Dutchman, Hugo Grotius, fighting on the side of freedom of navigation, and the Englishman, John Selden, holding the fort for restricted sea access. In his treatise in support of Dutch trading interests in the East Indies, Grotius argued that it would be contrary to natural law to inhibit free navigation.[28] This is because, "the sea can

[24] Lapidoth, *Freedom of Navigation*, *supra* note 13 at 261.
[25] *Ibid.*
[26] E.G. Bourne, *The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries*, in YALE REVIEW 35, 35 (1892-93).
[27] Quoted in LAPIDOTH, INTERNATIONAL WATER WAYS, *supra* note 22 at 15.
[28] HUGO GROTIUS, *MARE LIBERUM SIVE DE LURE QUOD BATAVIS COMPETIT AD INDICANA COMERCIA, DISSERTATO* – THE FREEDOM OF THE HIGH SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO

in no way become the private property of any one, because nature not only allows but enjoins its common use. Neither can the shore become private property of anyone."[29] Therefore, he concludes that not only are we not to prevent the free use of the oceans, but we are indeed "bound to assist navigation in whatever way we can, when it can be done without any prejudice to ourselves."[30]

Selden took issue with Grotius by writing in defence of the British Monarch's proprietary claims to expanses of the sea around the British Isles. He drew inspiration from similar claims made previously by the British and other states through the course of history. He asserted that the "Law of God, or the divine Oracles of Holy Scripture, do allow a Dominion of the Sea."[31]

Freedom of the seas, with its necessary notion of freedom of navigation has been recognized since the 18th century.[32] Since then it appears that Grotius' open seas has triumphed over Selden's closed seas. In the colourful words of James Brown Scott:

> In this battle of books, to use the happy expression of Professor Nys, the Dutch Scholar has had the better part of his English antagonist. If it cannot be said that Grotius wears his learning "lightly like flower" the treatise of Selden is, in comparison, over-freighted with it; the *Mare Liberum* is still an open book, the *Mare Clausum* is indeed a closed one, and as flotsam or jetsam on troubled waters [the former] rides the waves, whereas its rival, heavy and water-logged, has gone under.[33]

TAKE PART IN THE EAST INDIAN TRADE 55 (Oxford University Press 1916) (1608) [Hereafter cited as GROTIUS, *MARE LIBERUM*].

[29] *Ibid.* at 30.

[30] *Ibid.*

[31] JOHN SELDEN, *MARE CLAUSUM SEU DE DOMINIO MARIS* – OF THE DOMINION, OR, OWNERSHIP OF THE SEA 99 (Arno Press, 1972) (1652) [Hereafter cited as SELDEN, *MARE CLAUSUM*].

[32] Lapidoth, *Freedom of Navigation*, *supra* note 13 at 268.

[33] James Brown Scott, Introductory Note to *GROTIUS, MARE LIBERUM*, *supra* note 28 at ix.

Two principles, standing side-by-side, emerged from the contest between open seas and closed seas proponents. The results of compromise more than any other consideration, these principles are now firmly recognized in the law of the sea. The first is the principle of territorial sea, which was accepted at the time of the recognition of freedom of the seas, but "[f]or nearly two centuries following the acceptance of freedom of the seas, the questions of what areas of the sea were in fact subject to national control continued to be debated."[34]

The principle of territorial sea arose out of the need to suppress piracy and to promote navigation and commerce between states.[35] Most importantly, a state extended its jurisdiction over the marginal waters abutting its coastline for security reasons – "as a safety perimeter since it was preferable to keep attacking enemies at sea rather than suffer an invasion on land."[36] In the words of Elihu Root:

> The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial sea.[37]

The territorial sea was conceptually regarded as an extension of the territorial land mass – a natural prolongation of the land subsumed under the superjacent waters. It has been asserted over the centuries that "[e]very Prince, whose Country adjoins to the Sea…has

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[34] Florsheim, *3000-Year Old Question*, *supra* note 8 at 79, citing Heizen, *Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 597 (1959).
[35] Fenn, *Origins*, *supra* note 15 at 471.
[36] W. L. Schacte, Jr., *The History of the Territorial Sea from a National Security Perspective*, 1 TERRITORIAL SEA J. 143, 148 (1990) [Hereafter cited as Schacte, *History of the Territorial Sea*].
[37] Oral arguments in the XI Proceedings of the North Atlantic Fisheries Case Arbitration, 1910 (Great Britain v. United States of America), U.N. Rep. Vol XI, p.67, quoted in Schacte*, History of the Territorial Sea*, *ibid.* at 14.

some portion of the Sea belonging to him in property, as an accession of the Land, or appendant to it, or rather incorporated with it, like Veins and Arteries, integral Parts of the same Body."[38]

Indeed, Grotius, the champion of freedom of navigation himself, admits that though the sea is common to all and cannot be appropriated by a person or a people, "[t]he following qualification, however, must be made. If any part of [the sea] is by nature susceptible of occupation, it may become the property of the one who occupies it only so far as such occupation does not affect its common use."[39]

The territorial sea seems to be a misnomer since, rather than being a natural prolongation of the land mass, the body of water the term refers to appears to be a natural landward flow of the open seas. However, other grounds, other than it being a natural projection of the territorial land mass and hence susceptible to ownership, have been found to buttress the exercise of jurisdiction over the territorial sea.

O'Connell explains that with the development of the abstract theory of the state:

> Territory ceased to be regarded as something owned, and it came to be regarded as a spatial area within which the faculties of sovereignty could be exercised. Police powers could be exercised outside this spatial area to the extent that international law permitted, and hence jurisdiction ceased to be spatially coterminous with territory…The philosophy that had initially legitimized exclusive rights to the sea had been sapped, and it had left as a residue the territorial sea, which was now explicable on quite

[38] MEDOWS, OBSERVATION CONCERNING THE DOMINION AND SOVEREIGNTY OF THE SEAS 42 (1689), quoted in O'Connell, *Territorial Sea*, *supra* note 3 at 309.
[39] GROTIUS, *MARE LIBERUM*, *supra* note 28 at 30.

> different premises. No longer was it necessary to regard the territorial sea as part of the national domain.[40]

In recent times jurisdiction over the territorial sea has been asserted for health, safety and welfare reasons,[41] together with concerns of pollution and customs control and national security.[42] These concerns are said to "reflect recognition that conduct in coastal waters is inextricably linked with the protection and promotion of societal values ashore."[43]

From the 1930 Hague Codification Conference[44] through the 1958 Territorial Sea Convention[45] to the LOSC, the territorial sea has now become firmly established in the law of the sea, as a belt of sea up to a limit not exceeding 12 nautical miles, measured from baselines along the coast of a state.[46] The coastal state exercises exclusive sovereignty over its bed and subsoil.[47]

The second principle that emerged from the friction between open seas and closed seas is that of the right of innocent passage. It is "a development concomitant to the emergence of coastal state sovereign control over the territorial sea"[48] arising "from the dialectic of claim and counterclaim in a world of few powerful actors and infinite resources."[49]

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[40] O'Connell, *Territorial Sea*, *supra* note 3 at 325.
[41] Schacte, *History of the Territorial Sea*, *supra* note 36 at 147.
[42] *Ibid.* at 143.
[43] *Ibid.* at 147.
[44] L of N. Doc.C. 74, M.39.1929 V.
[45] Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.
[46] LOSC, *supra* note 1, article 3.
[47] *Ibid.* article 2.
[48] Zou Keyuan, *Innocent Passage for Warships: The Chinese Doctrine and Practice*, 29 OCEAN DEVEL. & INT'L L. J. 195, 197 (1998).
[49] Froman, *Uncharted Waters*, *supra* note 11 at 689.

The right of innocent passage owes its true basis to the promotion of trade, commerce and communication between states. Therefore, even though the coastal state exercises juridical rights over its territorial sea, ships of foreign nations may navigate through such sovereign waters as long as navigation is non-provocative. The normative basis of this right is explained through the inter-dependence between states and the undisputable fact that no single nation can claim to be so self-sufficient as not to need input from other states – input which is mostly carried aboard ships across the oceans. In the words of Phillip Medows:

> As it is a way, it is common to the peaceable traders of all nations. And this is so far from being a damage to any, that is highly beneficial to all, for there is no man so self sufficient as not to need the continual help of another, so neither is there any country which does not at some time or other need the growth and productions of another.[50]

The development of the right of innocent passage was largely influenced by Grotius' *Mare Liberum*. According to him the right is an "unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it."[51]

This passionate defence of the right of innocent passage was only a foretaste of his later justification of the slaying of the Amorites by the Israelites of the Mosaic era, for the denial by the former of the latter of innocent passage through their land! This is because

[50] Quoted in C.J. COLUMBUS, INTERNATIONAL LAW OF THE SEA, 6th ed., 63 (Longmans 1967).
[51] GROTIUS, *MARE LIBERUM*, *supra* note 28 at 7.

in that case, innocent passage was "a right which according to the Law of Human Society ought in all justice to have been allowed."[52]

It is instructive to note that Selden, the champion of closed seas, admitted expressly the existence of the right of innocent passage in the words, "the offices of humanity require, that entertainment be given to Strangers, and that inoffensive passage be not denied them." [53]

Indeed, the recognition of the right of innocent passage is self-evident in common sense and practicality. Aside of the fact that inter-dependence between states makes it an imperative, the right must of necessity exist in the territorial sea because "[t]hough freedom of navigation applies on the high seas, it would have been useless and ineffectual if a right of access to and from the open sea and between different parts of it had not been recognized as well."[54]

The right of innocent passage is in effect a balance of the interest of maritime states on the one hand and that of coastal states on the other hand. The interests of the former lie in the preservation of navigational freedoms while those of the latter lie in the preservation of security interests. In the words of one author, this "delicate balance between the security and other interests of the coastal state, and the interest of the international community in free and unimpeded navigation is therefore the backbone of the right of

[52] *Ibid.* at 9.
[53] SELDEN, *MARE CLAUSUM*, *supra* note 31 at 123.
[54] Lapidoth, *Freedom of Navigation*, *supra* note 13 at 259.

innocent passage."[55] But it must be borne in mind that depending on the circumstances, a maritime state may be a coastal state while a coastal may be a maritime state.[56] This probable twist-of-fate factor fosters the compromise of the recognition of the right of innocent passage.

The right of innocent passage, therefore, exists as a limitation on and as an exception to absolute coastal state sovereignty in the territorial sea. It is "the only exception of any importance"[57] and it "is not a "gift" of the coastal state to passing vessels but a limitation on its sovereignty in the interests of international intercourse."[58] The interaction of the forces of closed seas and open seas has, in sum, produced the following result:

> Those parts of the sea, thus subject to [the coastal] state, are comprehended in its territory; no one can navigate in them in spite of that nation. But it cannot refuse access to vessels not suspected, for uses, without violating its duty; every proprietor being obliged to grant a passage to strangers, even by land.[59]

We have attempted a consideration of the historical antecedents and the theoretical basis of the right of innocent passage. In the next part we will examine its juridical scope as codified in the LOSC.

Part II – Innocent Passage in the Territorial Sea under the LOSC

The LOSC is largely touted as the constitution of the oceans. It is intended to settle all issues relating to the law of the sea. An attempt is made in the LOSC to regulate the right

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[55] FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE LAW OF THE SEA 2 (Pinter Publishers 1990).
[56] *Ibid.* at 199.
[57] Tullio Treves, *Navigation*, in A HANDBOOK ON THE NEW LAW OF THE SEA, vol 2 835, 906 (Dupuy and Vignes, eds., 1991) [Hereafter cited as Treves*, Navigation*].
[58] W.E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AJIL 331, 331 (1987).
[59] VATTEL, THE LAW OF NATIONS, *supra* note 14 at 188.

of innocent passage in the territorial sea *vis-à-vis* the interests and sovereignty of the coastal state.

Like all human creations, the provisions of the LOSC on innocent passage are not without blemish. Inexactness and imperfection of language often render the provisions vague or ambiguous. It also seems that the draftsman sometimes find virtue in vagueness and ambiguity. Then again, even where the provisions are manifestly clear, states have shown themselves capable of creating ambiguity where none exists. As a result, several issues are left hanging without definite answers – issues for which contemporary state practice would undoubtedly help to shape.

a) The Regime

i) General Rules

Innocent passage implies that navigation through coastal waters of a state by a foreign ship is peaceful and not offensive. In the territorial sea, "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage."[60] The definition of passage poses no difficulty. The focus is on the purpose of navigation through the territorial sea more than anything else. Thus, a ship may pass through the territorial sea without entering internal waters or call at a port facility outside such waters. Conversely, a ship may enter or proceed from internal waters or call at a port facility outside such waters.[61]

[60] LOSC, *supra* note 1, article 17.
[61] Article 18(1).

However, "ships are not allowed to 'hover' or cruise around in the territorial sea, because, regardless of whether or not they are 'innocent', they would not be engaged in passage."[62] Therefore, passage is required to be continuous and expeditious.[63] However, ships are permitted to "hover" in the territorial sea for the purpose of stoppage or anchorage incidental to ordinary navigation, or when rendered necessary by *force majeure*, distress or for rendering assistance to persons or crafts in danger.[64]

Innocence is negatively defined as passage that is not prejudicial to the peace, good order or security of the coastal state.[65] Bearing in mind that these indices are highly subjective, an attempt is made to enhance objectivity by providing a laundry list under article 19(2), the engagement in which would render passage non-innocent.[66] It is arguable that the use of words like 'propaganda' and the open-ended formulation in sub-paragraph (l) suggest that what constitutes innocent passage is at once objective and subjective.

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[62] R.R. CHURCHILL and A.V. LOWE, THE LAW OF THE SEA, 3d ed., 82 (Manchester University Press, 1998) (Hereafter cited as CHURCHILL and LOWE, THE LAW OF THE SEA).
[63] Article 18(2).
[64] *Ibid.*
[65] Article19 (1).
[66] Article 19(2) states as follows:
Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(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;
(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 loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of willful and serious pollution contrary to this 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 no having a direct bearing on passage.

Article 19 also suggests that there is a presumption of innocence until the opposite is established by whoever asserts it. This is because there is no requirement in the tenor of this article for ships to show that their passage is innocent before being allowed through the territorial sea. It also appears that whether or not a ship is in innocent passage is to be objectively determined from the manner and objects appertaining to such passage.

However, it is not clear whether it is factual non-innocence alone which suffices or whether notional non-innocence would also do. For this purpose, factual non-innocence is where a ship actually engages in any of the proscribed activities under article 19(2). Notional non-innocence, on the other hand, is where a ship is reasonably suspected of future commission of any of the proscribed acts.

The options of counter actions available to states would depend on how states interpret article 19. Where factual non-innocence alone is favoured, states would have to adopt a 'wait-and-see' approach to preventing non-innocent passage. On the other hand, where notional non-innocence is also entertained, states may resort to preemptive action to prevent reasonably suspected non-innocent passage. But the *chapeau* of article 19(2) tends to favour factual non-innocence. However, in these uncertain days of terrorist attacks and counter-terrorist measures, it would be naive to assume that notional non-innocence would not be favoured by states to buttress their taking of preemptive measures.[67]

[67] Indeed, in one reported incident, the Indonesian Government turned away the *Lusitania Expresso*, a Portuguese registered ferry, from its territorial waters in 1992. This was because the ferry, carrying human

ii) Coastal States' Legislative Powers

There has never been absolute freedom of navigation through the territorial sea. Selden pointedly remarked that "it is most evident from the [c]ustoms of all times, that free passage (as they call it) is wont ever to be so limited by Princes in their [t]erritories, that it is permitted or prohibited according to the various concernments of the public good."[68] Today the right of innocent passage exists not at the pleasure of princes. It is restricted by the LOSC, which vests in the coastal state the right of regulation.

Through laws and regulations, the coastal state may protect its interests in the territorial sea.[69] Such interests include the safety of navigation and regulation of maritime traffic; protection of cables, pipelines and navigational aids; the conservation and preservation of marine environment and its living resources; and the prevention, reduction and control of pollution; marine scientific research and hydrographic surveys; and customs, fiscal, immigration or sanitary concerns.[70]

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rights activists, was headed to East Timor to protest against human rights violations in the region and to highlight the question of self-determination for the East Timorese people. See Donald R. Rothwell, *Coastal State Soveregnty and Innocent Passage: The Voyage of the Lusitania Expresso*, 16 MARINE POLICY 427 (1992) [Hereinafter cited as Rothwell, *Lusitania Expresso*]. It is instructive to note that the acts in question had not yet been engaged in at the time the ship was turned away by the Indonesian authorities. The engagement in the acts which were declared to be the purpose of the voyage would have been in violation of article 19(2)(d). Although, this was not a threat of terror, the incident shows the willingness of states to take preemptive measures to prevent the future occurrence of non-innocent passage.

[68] SELDEN, *MARE CLAUSUM*, *supra* note 31 at 124.

[69] Article 21.

[70] *Ibid.* paragraph 1.

Regulatory measures are not to apply to the design, construction, manning or equipment of ships, other than in accordance with international standards.[71] However, foreign ships exercising the right of innocent passage are obliged to comply with the laws and regulations of the coastal state.[72]

The right of innocent passage appears not to be exercisable in all parts of the territorial sea. The coastal state is mandated to require foreign ships passing through its territorial sea to use sea lanes and to observe any traffic separation scheme in force.[73] The designation of such schemes must, however, take into consideration the recommendations of the International Maritime Organization (IMO), together with density of traffic, special characteristics of ships, and any channels customarily used for international navigation.[74]

The legislative powers of the coastal state introduces a doubt as to whether a violation by a ship of the coastal state's laws or regulations of itself would render passage non-innocent. By defining non-innocent passage with reference to the interests of the coastal state, it would appear that violations of coastal state laws and regulations may be held to render passage non-innocent since such violations would be clearly provocative.

Whatever be the case, it is not in doubt that article 19(2)(1) and article 21 gives the coastal state a wide latitude to characterize passage as non-innocent based on its caprices.

[71] *Ibid.* paragraph 2.
[72] *Ibid.* paragraph 4.
[73] Article 22(1).
[74] Article 22(3).

Terms like ‘peace’, ‘good order’ and ‘security’ are highly fluid and susceptible to varying interpretations despite the attempt to inject objectivity in their interpretation.

iii) Rights and Duties of the Coastal State

If power is vested in the coastal state to regulate innocent passage, then the right of enforcement of the rules must of necessity be reserved in the coastal state. The one implies the other. For this cause, the police powers of the coastal state are called into force by article 25, which permits it to take the necessary steps to prevent non-innocent passage in the territorial sea. In particular, the coastal state may take necessary steps to prevent breaches of conditions attached to the admissions of ships to internal waters or call at a port facility outside internal waters.

Article 25 strongly suggests that the violation by a ship of the rules and regulations of the coastal state simpliciter would render its passage through the territorial sea non-innocent. What is of more concern here is that, there appears to be no guiding rule regarding the steps that may be taken by the coastal state to prevent non-innocent passage. Preventive measures are placed in the singular bossom of the coastal state. Perhaps the only definitive limitation on the enforcement powers of the coastal state is the prohibition of the levying of charges upon foreign ships by reason only of their presence in the territorial sea.[75] Even then, the use of the hortatory ‘may’ in that article, instead of the mandatory ‘shall’, suggests that the coastal state may levy charges upon foreign ships passing through its territorial sea for no service provided.

[75] Article 26.

Power is also reposed in the coastal state to suspend innocent passage in specified areas of the territorial sea.[76] Such suspension must be in pursuance of the protection of the coastal state's security and it must not be discriminatory among foreign ships in form or in fact.[77] This provision does not mandate the suspension of innocent passage by the coastal state in the entirety of its territorial sea. However, the maximum duration of such suspension is open to debate since no upper limit is specified. Consequently, it is possible that in practice, temporary suspension of innocent passage in parts of the territorial sea will easily have the effect of permanence since the coastal state cannot be challenged with respect to the duration.

However, the legislative and enforcement powers of the coastal state are not writ large. The traditional delicate balance between freedom of navigation and restricted access is preserved by the LOSC. Thus however extensive its regulatory rules may be, the coastal state is precluded from adopting measures which have the practical effect of denying or impairing the right of innocent passage through its territorial sea.[78] A negative duty is also placed upon the coastal state not to discriminate between ships on the basis of nationality or cargo.[79] Then again, a positive duty exists for coastal states to "give appropriate publicity to any danger to navigation within its territory, of which it has knowledge."[80]

[76] Article 25(3).
[77] *Ibid.*
[78] Article 24(1)(a).
[79] Article 24(1)(b).
[80] Article 24(2).

It is not clear from the LOSC whether this duty arises only in respect of actual knowledge of the existence of any danger to navigation or whether the duty also arises in respect of imputed or constructive knowledge – that is so say, where the coastal state in question would be deemed to know of the existence to impediments to navigation. On this point, we may take inspiration from the *Corfu Channel Case*,[81] where it was held in effect that a state may be held liable for damage arising from a danger in its territorial waters and the existence of which it ought reasonably to have known. The proof of such knowledge "may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt."[82]

However, in the absence of any enforcement mechanism in the LOSC, it is doubtful whether the coastal state may be made to pay reparation to a foreign shipping interest that has suffered damage resulting from a default of the latter in warning the shipping public of the existence of mortal dangers to navigation in its territorial waters.

b) Innocent Passage of Different Types of Ships

i) Ships with Special Characteristics

Certain ships, including nuclear-powered ships and ships carrying nuclear and other ultra hazardous substances, by nature, pose grave environmental concerns to the states in whose waters they traverse. Such ships are required to carry documents and observe special precautionary measures to be established by international agreements.[83] Thus, the true scope of the regime of innocent passage for such ships has been pushed into the

[81] Corfu Channel Case (United Kingdom v. Albania), I.C.J. Rep., 1949, p.4.
[82] *Ibid.* at 18 [original emphasis].
[83] Article 23.

future. Perhaps the only determinate rule with respect to such ships, including tankers, is that, they may be required by the coastal state to confine their passage to designated sea lanes.[84]

ii) Merchant Ships

The coastal state may assume civil or criminal jurisdiction over foreign merchant ships, and government ships operated for commercial purposes, in its territorial waters, under prescribed circumstances. It must be pointed out at the onset that the general rule is that the flag state has exclusive jurisdiction with respect to occurrences on board a ship. However, the coastal state reserves the right to arrest or levy execution upon foreign merchant vessels in its territorial waters for the purposes of civil proceedings.[85] Such execution may only be in respect of obligations or liabilities assumed or incurred by the ship while passing through the territorial waters.[86] So for instance, execution may be levied for services rendered to the ship in the territorial sea, like pilotage or for damage to say, navigational aids or cables.

The exercise of civil jurisdiction by the coastal state over foreign vessels in its territorial sea appears to be focused on *in rem* maritime claims and not on *in personam* causes. This is because the coastal state is precluded from stopping or diverting a ship in its territorial sea for the purpose of exercising civil jurisdiction in relation to persons on board the ship.[87] Moreover, if we step out of the LOSC, article 2(2) of the Convention on the Arrest

[84] Article 22(2).
[85] Article 28(3).
[86] Article 28(2).
[87] Article 28(1).

of Ships[88] states that "[a] ship may only be arrested in respect of a maritime claim but in respect of no other claim." However, the 'without prejudice' formulation in paragraph 3 of article 28 of the LOSC, suggests that the coastal state may arrest or levy execution upon foreign ships in its territorial waters for other civil claims also.

With respect to criminal jurisdiction, it seems that the coastal state may exercise it fully upon foreign merchant ships proceeding from its internal waters to its territorial sea.[89] However, the coastal state's criminal jurisdiction is restricted where a ship is only passing through the territorial sea without entering internal waters or calling at a port facility. Here the coastal state may assume jurisdiction where the consequences of the crime extend to the coastal state; or it is of such a kind as to disturb its peace or good order of the territorial sea; or if the exercise of jurisdiction has been requested by the master of the ship or operatives of the flag state; or if it is necessary for the suppression of illicit drug trafficking.[90]

It appears that there is very little restriction on the exercise of jurisdiction by the coastal state in respect of crimes committed on board foreign merchant ships passing through its territorial waters. This is because article 27(1) leaves a wide door open for the coastal state to assume such jurisdiction at the least opportunity. This stems from the fact that it is only the coastal state which can determine whether or not the consequences of a crime extends to it, or is of a kind as to disturb its peace or good order, not to mention the

[88] International Convention on the Arrest of Ships, 12 Mar. 12, 1999, UN/IMO Doc. A/CONF.188/6 p.8.
[89] LOSC, article 27(2).
[90] Article 27(1).

nebulous nature of these formulations. This feature engenders a high degree of subjectivity and unilateral action.

Thus, in principle the coastal state is restricted from assuming jurisdiction over every crime committed on board foreign merchant ships in the territorial waters. However, the coastal state may not feel that restricted owing to the wide latitude in the tenor of the relevant provisions. But where the crime is committed before the ship enters the territorial sea, paragraph 5 of article 27 exhorts the coastal state not to intervene, except where the crime is in violation of rules regarding its exclusive economic zone (EEZ), or rules for the protection and preservation of the marine environment.

iii) Warships

Special provisions apply to warships and other government ships operated for non-commercial purposes, owing to the traditional immunity such ships enjoy and affirmed to that effect by article 32. Warship, under the LOSC, is a term of art. It is defined in article 29 as:

> a ship belonging to the armed forces of a state bearing the external marks, distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

This implies that a ship belonging to an insurgent, nationalist or rebel movement and used for the purposes of warfare, does not qualify as a warship under the LOSC. This is because such a movement is not a state and, therefore, a ship belonging to it neither belongs to a state nor is it manned by a crew under regular armed forces discipline. Also

such a ship would not be under the command of a duly commissioned officer whose name appears on the service list.

The rule with respect to submarines is that they must navigate on the surface in the territorial sea while showing their flag.[91]

Since the coastal state cannot assume jurisdiction, civil or criminal, over foreign warships, it may only require such ships to leave the territorial sea, where they engage in non-innocent passage or refuse to comply with its laws and regulations concerning innocent passage therein.[92]

It is expected that in principle the foreign warship in question would leave the territorial sea of the coastal state after having been asked to leave under such circumstances. But if the warship in question lingers on in the territorial sea after being asked to leave, the result would be anybody's guess. The flag state is obliged to make good any loss or damage to the coastal state, which is attributable to a warship, or other ship operated for non-commercial purposes belonging to it.[93]

The foregoing shows that the right of innocent passage does not apply equally to all ships. The incidents (rights and responsibilities) of this right are determined by the nature of the ship in question and the purpose of its use. It also shows that the LOSC "seeks to maintain a balance between the right of a coastal state to enact appropriate laws and

[91] Article 20.
[92] Article 30.
[93] Article 31.

regulations dealing with innocent passage and the maintenance of the right in instances of overbearing coastal State laws."[94] However, the pendulum appears to swing in favour of coastal state regulation, when viewed against the reality that the existence of innocent passage invariably connotes the danger of non-innocent passage,[95] thereby requiring extensive regulation.

c) Hanging Issues

There are several open textured provisions on the issue of innocent passage that lend themselves to varying interpretation and, therefore, leave several questions without definite answers. The main provision on what constitutes non-innocent passage – article 19(1) – is fluid enough to admit the incorporation of several activities not listed in article 19(2). For instance, subparagraph (h) of envisages non-innocent passage resulting from the engagement in "willful and serious pollution". Willful speaks of volition. However, the gravity of the pollution which would render passage non-innocent is far from clear. The word "serious" is coloured by relativity and would always depend, for its meaning, on the singular interpretation of the coastal state.

Another nagging issue related to the above is that though the coastal state is obliged not to hamper innocent passage, it is also obliged to protect and preserve the marine environment and its resources.[96] The concern here is the extent to which the coastal state may restrict innocent passage for environment-based reasons. This concern is especially pressing for states with ecologically sensitive marine environments and who have set up

[94] Rothwell, *Lusitania Expresso*, *supra* note 67 at 433.
[95] Froman, *Uncharted Waters*, *supra* note 11 at 657.
[96] Part XII of LOSC.

marine protected areas[97] in their territorial waters. It has been suggested that the preferred solution may be to regulate speed, anchorage and the imposition of routing measures in such areas.[98] Nevertheless, the seeming absence of a true guidance on this issue is a cause for concern.

Aside from actual pollution, a related question is whether the mere presence of certain ships in the territorial sea renders their passage therein non-innocent. Nuclear-powered ships and ships carrying nuclear or other ultra hazardous substances fall into this category. This issue arises from the practical consideration that the cargo carried by such ships constitutes grave environmental danger to coastal states since they are capable of producing almost permanent radioactive contamination of the marine environment.[99] Indeed, there are no salvage measures in existence in the event of a spill of these noxious substances.[100]

Ships carrying casks of plutonium are of the greatest concern. It is known that "[a] minuscule amount will cause fatal cancer, and if a transport accident occurred, plutonium could be released to the environment and would remain a deadly contaminant for tens of thousands of years."[101] On another level, there is the environmental damage risk posed by

[97] Defined as: "Any area of intertidal or subtidal terrain, together with its overylying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment." – IUCN General Assembly Resolution GA17.38.
[98] Fabio Spadi, *Navigation in Maritime Protected Areas: National and International Law*, 31 OCEAN DEVEL. & INT'L L.285, 289 (2000).
[99] Jon Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEVEL. & INT'L L. 77, 78 (2002).
[100] *Ibid.*
[101] Jon Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 OCEAN DEVEL. & INT'L L. 399, 399 (1993).

"leper" ships, that is, ships that are so unseaworthy that they pose substantial threat of pollution by their mere presence in the territorial sea.

All such ships are considered by coastal states as security threats and, therefore, they seek to characterize their mere presence in the territorial waters as non-innocent passage. This appears to be very controversial since the LOSC innocent passage provisions concerning such ships do not lend themselves to any such interpretation. However, it is arguable that non-innocent passage would arise if the sole purpose of the ship is to wander about in the ocean looking for a dumpsite.[102]

There is also the hanging issue of whether the coastal state may validly require foreign ships passing through its territorial sea to carry equipment that would enable it to monitor their movement therein. Some writers are of the opinion that nothing prevents the coastal state from imposing such a measure if it so desires.[103] However, it appears that the coastal would be in violation of the LOSC if it were to turn away foreign ships from its territorial waters by reason only of their failure to carry monitoring-enhancing implements.

It seems to be settled that submarines in innocent passage must navigate on the surface. Indeed, "[t]his rule has been accepted for as long as submarines have been used as naval vessels."[104] But the question has been asked whether submerged navigation of foreign

[102] See Elaine Weinstein, *The Impact of Regulation of Transport of Hazardous Waste on Freedom of Navigation*, 9 INT'L J. MAR. & COASTAL L. 135, 141(1994) [Hereafter cited as Weinstein, *Transport of Hazardous Waste*].
[103] See John A. Knauss & Lewis M. Alexander, *The Ability and Right of Coastal States to Monitor Ship Movement: A Note*, 31 OCEAN DEVEL. & INT'L L. 377 (2000).
[104] CHURCHILL and LOWE, THE LAW OF THE SEA, *supra* note 62 at 90-91.

submarines in the territorial sea of itself deprives such passage of innocence. Several writers have argued that since the rule on submarines is contained in a separate article other than article 19 which lists non-innocent activities, submerged navigation of foreign submarines in the territorial sea, only amounts to an infringement of the coastal state's laws and regulations, and does not constitute non-innocent passage.[105] According to Froman:

> The drafters could easily have included [the submarine] provision in the [article 19] list of non-innocent activities. The failure to do so indicates the drafters' intention not to make surface operation a requirement of innocence for submarines.[106]

This conclusion is perplexing. The incorporation of the rule in another article does not of itself make such navigation innocent. Froman's observation tends to uphold absolute formalism devoid of reality and without regard to the purpose of the rule. Submarines are by their nature crafts of stealth. They are designed to navigate undetected. They are used mainly for military purposes to collect intelligence. Submerged navigation bears the mark of secrecy and carries with it the attribute of high suspicion, hence the rule. If these indices informing the rule do not speak of non-innocence, then nothing else would seem good enough.

These hanging issues may be traced to the nature of the negotiations that preceded the adoption of the LOSC. The negotiations were characterized largely by the patronization of polarized interests between the maritime powers and coastal states. While the former

[105] Treves, *Navigation*, *supra* note 57 at 927-29; and Froman, *Uncharted Waters*, *supra* note 11 at 663.
[106] *Ibid.*

pushed for greater navigation freedoms, the latter advocated for restricted access.[107] The quest for unrestricted freedom of navigation by the maritime powers resided in their desire to control the seas to carry out their military operations and to enhance the lot of their merchant fleets.[108]

Freedom of navigation in theory protects the rights of all states to the equal use of the seas. But in practice it favours, to a great extent, the interests of the maritime powers, especially with respect to military uses of the ocean.[109] With this in mind, the coastal states revolted against the old regime of freedom of navigation which was marked by little restriction.[110] In the words of Pirtle:

> A combination of scientific discoveries of new oceanic resources and rapid technological developments that enhanced capabilities for exploitation of those resources…operated to weaken and eventually invalidate the assumption that ocean resources were a "collective good". In consequence, the classical regime of freedom of the seas, which was rooted in this ancient assumption, ceased to be viewed by coastal states as being natural, equitable, or immutable.[111]

The protection of interests by both maritime powers on the one hand and coastal states on the other hand feeds the most controversial issue on the subject, to wit, the innocent passage of warships in the territorial sea. The controversy, as we will see shortly in the next part, turns on whether such ships must notify the coastal state prior to passage and whether such ships require the prior authorization of the coastal state for its passage in

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[107] Yann-Huei (Billy) Song, *China and the Military Use of the Ocean*, 20 OCEAN DEVEL. & INT'L L. 213, 215 (1989) [Hereafter cited as Song, *China*].
[108] Jens Evensen, *UNCLOS: Origin and Process of Negotiation*, in Finn Laursen, ed., TOWARD A NEW INTERNATIONAL MARITIME ORDER 1, 3 (Finn Laursen ed., 1982).
[109] Pirtle, *Military Uses of the Ocean*, *supra* note 5 at 8.
[110] Barry Buzan, *The Coastal State Movement*, in Finn Laursen ed., TOWARD A NEW INTERNATIONAL MARINE ORDER 15, 16 (Finn Laursen ed., 1982).
[111] Pirtle, *Military Uses of the Ocean*, *supra* note 5 at 29.

the territorial sea. No such requirements can be read into the clear wording of the provisions of the LOSC. Therefore, the insistence on any such requirement would be in violation of the LOSC. At this point, it is sufficient to say that prior notification is less objectionable than prior authorization because the latter implies that there is nothing like innocent passage for warships in the territorial zone.

However, warships, as the name implies, connote the presence of weapons and ammunition aboard, and by reason of which the coastal state considers their presence in the territorial sea as discomforting and a threat to its security. As Florsheim points out, "[u]nlike the situation of merchant vessels, [in the case of warships] there is no commercial interest involved and there may be danger at times to the nation whose waters are being used."[112] The warship issue heavily dominated the negotiations leading to the adoption of the LOSC. One author sums it up that:

> Many delegates were engaged on both sides of this issue during the general debates. All the debates proved that there was no middle ground between the antagonists. For that reason, no accommodation of views was possible through the medium of negotiation. In the closing days of the Conference, Gabon offered a formal amendment to Article 21 to allow coastal states to require prior authorization or notification for passage of warships through the territorial sea. This proposal, of course, was tenaciously opposed by the maritime states, and in the end, the amendment was withdrawn (partially in response to a plea by the Conference President for the withdrawal of all formal amendments to better enhance consensus) in favour of a proposal to add a reference to "security" to the provision in Article 21(1)(h), which gives coastal states the authority to enact laws regarding customs, fiscal, immigration, or sanitary measures. To permit a coastal state to enact laws preventing infringement of security regulations would give such states extremely broad regulatory powers in the territorial sea – not necessarily limited even to warships. This proposal was even more strongly resisted. It therefore appeared imminent that the issue would go to a vote in the plenary. At the last minute, however, the sponsors of the proposal agreed to withdraw it in favour of a statement by

[112] Florsheim, *3000-Year Old Question*, *supra* note 8 at 92.

> the President of the Conference, on the record, that its withdrawal was "without prejudice to the rights of the coastal states to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of this Convention."[113]

Taken out of context, the statement of the President of the Conference appears to suggest that he was stating his legal opinion on the effect of the withdrawal of the proposed amendment in question. But in fact he was only stating the resolve of the sponsors of the proposal.[114] In any case, his statement cannot be taken as an invitation to restrict innocent passage of warships in the territorial sea because it does not have the force of law.[115]

Both articles alluded to by the sponsors of that proposed amendment, do not in any way support any preconditions for the innocent passage of warships. It is only when such ships engage in any of the proscribed activities in article 19 that their passage may be called into question. On the other hand, article 25 only envisages temporal suspension of the right for security reasons and not the requisition of notification or the prior authorization by the coastal state for the passage of such ships. To hold otherwise will be giving effect to the notion that the mere presence of foreign warships in the territorial sea is an offensive conduct. As it stands, the allusion to articles 19 and 25 to buttress the

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[113] Thomas A. Clingan, Jr., *Freedom of Navigation in a Post – UNCLOS III Environment*, 46 LAW & CONTEMP. PROBS. 107, 112 (1983).

[114] To put matters in perspective the relevant statement of the President of the Conference is reproduced below. He announced that:

> Although the sponsors of the amendment …had proposed [it] with a view to clarifying the text of the draft convention, in response to the President's appeal…they have agreed not to press it to a vote. They would, however, like to reaffirm that their decision is without prejudice to the rights of coastal states to adopt measures to safeguard their interests, in accordance with articles 19 and 25 of the draft convention.
>
> - President T.T.B. Koh in plenary session on April 24 1982, U.N. Doc. A/CONF. 61/SR.176 (1982).

[115] Indeed, we are told that "President Koh has since stated in public that, in his view, the right of innocent passage was confirmed by the Conference." – Thomas A. Clingan, Jr., *An Overview of Second Committee Negotiations in the Law of the Sea Conference*, 63 OREGON L. REV. 53, 64-5 (1984).

requirement of prior notification or authorization is "valid only for those states whose opinion it expresses."[116]

However, the circumstances under which the issue of innocent passage of warships was negotiated suggest that the final provisions do not reflect the achievement of real consensus. Therefore, it seems that many coastal states do not consider themselves bound by the provisions of the LOSC on this issue. This is inherent in the resolve of the sponsors of the Gabon proposal upon its withdrawal. Consequently, the matter appears to be far from settled, having received no clear-cut answer[117] and as "there seems to be a general sense that the question is, for all practical purposes, best left without a clear answer."[118] Having examined the innocent passage regime under the LOSC, we will next turn our attention to contemporary state practice in its light.

Part III – Innocent Passage outside the Book

Whether owing to the wide and often inconclusive provisions of the LOSC on innocent passage, or carry forward of pre-UNCLOS III ideological divide fever, there has not been a uniform interpretation and application of the innocent passage provisions of the LOSC by states.[119]

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[116] Treves, *Navigation*, *supra* note 57 at 934.
[117] Erik Franckx, *Innocent Passage of Warships: Recent Developments in US – Soviet Relations*, 14 MARINE POLICY 484 (1990).
[118] CHURCHILL and LOWE, THE LAW OF THE SEA, *supra* note 62 at 90.
[119] State practice forming the basis of the discussion in this part is based on declarations made by states upon signature or ratification of the LOSC and national legislation published in UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS, LAW OF THE SEA BULLETIN [hereafter cited as LOSB], and UNITED STATES DEPARTMENT OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS (Hereafter cited as LIMITS IN THE SEAS). The caveat is that some of these laws may have been amended or even repealed at the blind side of the present writer. Our limitation has been the difficulty of ascertaining the most current state of the cited national legislations. But we take

We will commence our discussion with the practice of the United States and the Russian Federation. The former being the only super-power and the latter being a recently retired super-power. After years of inconsistent practice adopted by both states,[120] sometimes marked by open confrontation between them,[121] these two nations finally adopted a Uniform Interpretation[122] of the innocent passage regime of the LOSC in 1989. Though these rules are primarily intended to settle questions regarding innocent passage between the two states, there is a veiled attempt at passing it off as a blue print to be followed by the rest of the world.

Section 2 of the Uniform Interpretation seeks to put it beyond doubt that all ships, including warships, enjoy the right of innocent passage in the territorial sea, without prior notification or authorization. There is an attempt at reducing opportunity for confrontation by requiring in section 8 that differences arising with respect to passage of ships through the territorial sea should be settled by diplomatic means. Section 4 also requires the coastal state to offer an opportunity to the ship (whose passage it questions) to clarify its intentions or correct its conduct in a reasonably short time.

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full responsibility for any error on our part arising out of an amendment or repeal which we are not aware of.

[120] Through the course of history, both nations have tended to favour either freedom of navigation especially for warships or restricted access, based on the prevailing interests at a moment in time. See Franckx, *supra* note 117 at 484.

[121] On two occasions, the first on 13 March 1986 and the second on 12 February 1988, the then USSR reacted sharply to the presence of two US navy ships, the *USS Yorktown* and the *USS Caron*, in its territorial sea. On the second occasion the two ships were "bumped" off from these waters. See Franckx, *ibid*. at 485.

[122] United States and Russia, Uniform Interpretation of Rules of International Law Governing Innocent Passage, 1989, published in LOSB, *supra* note 119, vol 14 at 13.

This agreement appears to be keeping the peace between the two states with respect to innocent passage. However, it is doubtful whether it has had any impact (as the two states appear to hope for) on the rest of the world, especially on coastal states that seek to unduly restrict innocent passage. For as one author observes, "[a]s state practice evidences, this position of the major powers could be regarded as reflecting wishful thinking rather than existing customary international law."[123] This is because many coastal states place restrictions, seemingly unwarranted by the LOSC, on innocent passage of ships in their territorial waters. What follows is an examination of some these restrictions.

i) Restriction on Innocent Passage in General

It is now established beyond doubt that there exists the right of innocent passage by foreign ships in the territorial waters of coastal states. However, in at least one case, this assertion appears not to hold sway. By section 13 of Act No. 6169[124] of the Republic of Maldives, "save such vessels engaged in innocent passage compatible with international laws, no vessel shall enter the territorial sea except in accordance with the laws and regulations of Maldives." This provision does not pose much difficulty. However, immediately after this, section 14 sounds the knell that:

> no foreign vessel shall enter the EEZ of Maldives except with prior authorization from the Government of Maldives in accordance with the laws of Maldives.

It is very difficult to reconcile these two provisions. It appears that the purpose of section 14 is to prevent unauthorized fishing in the EEZ. But its formulation is no doubt

[123] Barbara Kwiatkowska, *Innocent Passage by Warships: A Reply to Professor Juda*, 21 OCEAN DEVEL. & INT'L L. 447, 477 (1990).
[124] LOSB, *supra* note 119, vol 41 at 16.

unpalatable since it has the effect of denying the existence of freedom of navigation in the EEZ, which includes the territorial sea. Even if we are to stretch language and assert that section 14 does not apply to the territorial sea, the geophysical nature of Maldives (an archipelago) dictates that one can only access its territorial sea via the EEZ. The restriction on passage through the EEZ (which is itself in violation of the LOSC, but not the subject matter of this paper) extends inevitably to the territorial sea. It is submitted that section 14 is objectionable on every ground since it is against all tenets of freedom of navigation.

Another restriction of concern here is the declaration by the Kingdom of Saudi Arabia that innocent passage does not apply in its territorial waters where there is a route to the high seas or an EEZ that is equally suitable as regards navigational and hydrographic features.[125]

ii) Environment Based Restriction

As should be expected, many coastal states have passed legislations concerning the preservation of the marine environment which inevitably impact on the right of innocent passage. A few of these legislations deserve our comment.

It may be recalled that engaging in an act of willful and serious pollution would render passage non-innocent under article 19(2)(h). We have pointed out the unsatisfactory state of this provision owing to the relativity of the word "serious" though it clearly points to the fact that the pollution in question must be of a grave magnitude. However, several

[125] Instrument of Ratification of the LOSC, in LOSB, *ibid.* vol 31 at 8.

states have dropped the requirement of "serious" altogether in their domestic laws and regulations. For instance, under Polish[126] and Croat[127] laws, an act of deliberate or willful pollution of the marine environment simpliciter would render passage non-innocent. Therefore, under these two laws the gravity of the pollution is inconsequential.

In the case of Bahamas[128] and Belize,[129] passage is non-innocent if the polluting act in question is calculated to or is likely to cause damage to the state, its resources or marine environment. In these instances, the overriding consideration is simply the mere likelihood of damage. Iranian law[130] is even more restrictive. It goes further to drop the *mens rea* requirement by stipulating that passage is non-innocent if a ship passing through its territorial waters engages simply in any act of pollution of the marine environment contrary to the laws of Iran. There is no requirement that the pollution be willful.

Nuclear-powered ships and ships carrying nuclear or other ultra hazardous substances have borne the brunt of unwarranted restrictions by many coastal states. Djibouti,[131] Pakistan,[132] Malta,[133] UAE,[134] and South Korea[135] all require prior notification from such ships before they may be allowed passage through the territorial sea. On the other hand,

[126] Act of March 21 1991, in LOSB, *ibid.* vol 21 at 24.
[127] Maritime Code, 27 January 1994, in LOSB, *ibid.* vol 42 at 26.
[128] Act No 37 of 1993, in LOSB, *ibid.* vol 31 at 31.
[129] Act of 24 January 1992 in LOSB, *ibid.* vol 21 at 3.
[130] Marine Areas Act, 1993, in LOSB, *ibid.* vol 24 at 10.
[131] Article VII of law No 52/AN/78 of 9 January 1979. See J. ASHLEY ROACH AND ROBERT W. SMITH, UNITED NATIONS RESPONSES TO EXCESSIVE MARITIME CLAIMS, 2d ed., 273 (Martinus Nijhoff Publishers, 1996) [Hereafter cited as ROACH AND SMITH, US RESPONSES].
[132] Territorial Waters and Maritime Zones Act, art. 3(3), 1976, United States Legislative Series, B/19 at 86.
[133] Instrument of Ratification of the LOSC, in LOSB, *supra* note 119, vol 26 at 6.
[134] Federal Law No 19, 17 October 1993, in LOSB, *ibid.* vol 25 at 94.
[135] Law No 3037, 31 December 1977, as am. by Law No 4986, 6 December 1995, in LOSB, *ibid.* vol 33 at 45.

Egypt,[136] Oman,[137] Iran,[138] Yemen,[139] Saudi Arabia,[140] Malaysia,[141] Maldives[142] and Seychelles[143] require permission or authorization for the passage of such ships in their territorial waters. Romania[144] and Lithuania[145] prohibit the passage through their territorial waters, of ships carrying nuclear and other weapons of mass destruction.

The transboundary transport of hazardous waste has generated interesting responses from some coastal states. A good example is Haiti. On September 5 1986, the *Khian Sea*, a Liberian registered vessel, set sail from Philadelphia, wandering the oceans in search of a dump site for its cargo of approximately 14,000 tons of incinerator trash. After being turned away from Bahamas, Bermuda, Dominican Republic, Honduras, Guinea-Bissau, and the Netherlands Antilles, it called at Gonaives, Haiti in December 1987. It convinced the Haitian authorities that it was carrying fertilizer. After unleashing 4,000 tons of the ash on a Gonaives beach, it was ordered to reload and leave. The *Khian Sea* left but without its noxious cargo that remained where it fell.[146]

In apparent response to the *Khian Sea* incident, Haiti has strictly prohibited the passage through its territorial sea of vessels transporting wastes, refuse, residues, or any other materials likely to endanger the health of its population and to pollute the marine, air and

[136] Instrument of Ratification of the LOSC, in LOSB, *ibid.* vol 3 at 13.
[137] Instrument of Ratification of the LOSC, in LOSB, *ibid.* vol 14 at 8.
[138] *Supra* note 130.
[139] Instrument of Ratification of the LOSC, in LOSB, *supra* note 119, vol 25 at 20.
[140] *Supra* note 125.
[141] Instrument of Ratification of the LOSC, in LOSB, *supra* note 119, vol 33 at 8.
[142] *Supra* note 124.
[143] Maritime Zones Act, 1999, in LOSB, *supra* note 119, vol 48 at 18.
[144] Article 10 of Act concerning the Legal Regime of Internal Waters, Territorial Waters and the Contiguous Zone, in LOSB, *ibid.* vol 19 at 9.
[145] Legislation on the Territorial Sea, in LOSB, *ibid.* vol 25 at 75.
[146] See Weinstein, *Transport of Hazardous Waste*, *supra* note 102.

land environment.[147] To underline the seriousness it attaches to this prohibition, it added that it will use all means within its power to prevent any attempt to dump wastes (toxic or non-toxic) in any part of Haiti.

It may also be recalled that in November 1992 Japan embarked upon plutonium shipments from France to Japan. The coastal states along the possible routes of these shipments, protested angrily and some openly declared that they would prevent such shipments through their territorial seas and EZZs.[148]

The above legislations, declarations, claims and measures are clearly not mandated by the LOSC. However, the grave risk of environmental degradation posed by the ships that are the subject of the undue restrictions would seem to suggest that these coastal states are acting in a responsible manner to protect their legitimate interests. This is so when viewed against the fact that the coastal states in most instances derive no benefit (direct or indirect) from the passage of such ships in their territorial waters.

iii) Restriction on Innocent Passage of Warships

The saga of innocent passage of warships through the territorial sea continues unabated. Many coastal states have taken a negative stance on the issue by stipulating restrictions in violation of the LOSC. These range from the requirement of prior notification, prior

[147] *Note Verbale* of 18 February 1988, in LOSB, *supra* note 119, vol 11 at 13.
[148] Van Dyke, *supra* note 101.

permission or authorization to the specification of the maximum permitted number of warships.[149]

It appears that at present Croatia,[150] Egypt,[151] Finland,[152] Guyana,[153] India,[154] South Korea,[155] Libya,[156] Malta,[157] Mauritius,[158] and the former Yugoslavia (now Serbia and Montenegro)[159] require prior notification for the passage of foreign warships through their territorial waters. Most of these states do not specify the time requirements for such notification. It may, therefore, be assumed that a foreign warship desirous of passing through their territorial waters may communicate its desire to the coastal state in question moments before actual passage. Croatia and the former Yugoslavia require not less than 24 hours prior notice while South Korea requires a much longer period of 3 days prior notification.

It also appears that at present Algeria,[160] Antigua and Barbuda,[161] Bangladesh,[162] Barbados,[163] Burma,[164] Cambodia,[165] Cape Verde,[166] China,[167] Congo (Brazzaville),[168]

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[149] LIMITS IN THE SEAS, *supra* note 119.
[150] *Supra* note 127.
[151] *Supra* note 136.
[152] See ROACH and SMITH, US RESPONSES, *supra* note 131 at 267.
[153] *Ibid.*
[154] *Ibid.*
[155] Article 4 of Enforcement Decree of Territorial Sea and Contiguous Zone Act, Presidential Decree No 91662, 20 September 1978, as am. by Presidential Decree No 13463,7, 7 September 1991, Presidential Decree No 15133,31, 31 July 1996 and Presidential Decree No. 17803, 18 December 2002, in LOSB, *supra* note 119, vol 51 at 88.
[156] ROACH and SMITH, US RESPONSES, *supra* note 131 at 267.
[157] *Supra* note 133.
[158] ROACH and SMITH, US RESPONSES, *supra* note 131 at 267.
[159] Article 17 of Act concerning the Coastal Sea and the Continental Shelf, 23 July 1987 in LOSB, *supra* note 119, vol 18 at 9.
[160] Instrument of Ratification of the LOSC, in LOSB, *ibid.* vol 31 at 7.
[161] Territorial Waters Act, 1982, Act No 18, in LOSB, *ibid.* vol 2 at 1.
[162] Instrument of Ratification of the LOSC, in LOSB, *ibid.* vol 46 at 14.
[163] ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 266.

Grenada,[169] Iran,[170] Maldives,[171] Oman,[172] Pakistan,[173] Philippines,[174] Romania,[175] St Vincent and the Grenadines,[176] Seychelles,[177] Somalia,[178] Sri Lanka,[179] Sudan,[180] Syria,[181] UAE,[182] Vietnam[183] and Yemen[184] all require prior permission or authorization for the passage of foreign warships in their territorial waters. Albania requires special authorization for the passage of such ships, except in the circumstances of *force majeure*.[185] The former Yugoslavia restricts the number of foreign warships of the same nationality passing through its territorial sea at a time to a maximum of 3. Denmark also stipulates that simultaneous passage through the Great Belt or the Sound of more than 3 warships of the same nationality is subject to prior notification through diplomatic channels.[186]

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[164] Territorial Sea and Maritime Zones Law, 1977, Law No 3 of 9 April 1977, in LOSB, *supra* note 119, vol 2 at 9.
[165] ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 266.
[166] Instrument of Ratification of the LOSC, in LOSB, *supra* note 119, vol 1 at 17.
[167] Article 6 of Law on the Territorial Sea and the Contiguous Zone, 25 February 1992, in LOSB, *ibid.* vol 21 at 24.
[168] ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 267.
[169] *Ibid.*
[170] *Supra* note 130.
[171] *Supra* note 124.
[172] Instrument of Ratification of the LOSC, in LOSB, *supra* note 119, vol 14 at 8.
[173] ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 267.
[174] *Ibid.*
[175] *Supra* note 144, article 21.
[176] ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 267.
[177] *Supra* note 143.
[178] ROACH and SMITH, U.S. RESPONSES, *supra* note 137 at 267.
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Supra* note 134.
[183] ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 267.
[184] Instrument of Ratification of the LOSC, in LOSB, *supra* note 119, vol 25 at 20.
[185] LIMITS IN THE SEAS*, supra* note 119, No 116, 1994 at 16.
[186] Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, 16 April 1999, in LOSB, *supra* note 119, vol 44 at 52.

Few of these coastal state legislations define what is meant by warship. Therefore, it may safely be assumed that they refer to the LOSC definition. The cited legislations of the former Yugoslavia and Croatia contain definitions of warship that are not dissimilar to that of the LOSC. The Republic of Maldives defines warships as "naval vessels of such description that could be engaged in warfare due to the weapons on board such vessels."[187] The express reference in this definition to weapons suggests that ships that fit the LOSC definition but not actually fitted with weapons on board are not covered. If that is the case then the Maldivian definition is narrower in scope than that of the LOSC.

Apart from these definitions of warship, the cited legislations, claims, and declarations of the various coastal states point to the irresistible conclusion that these states do not recognize innocent passage with respect to warships. The various restrictions undoubtedly violate the LOSC since it admits of no such restrictions in its provisions. However, there is no sign that these states would roll back their claims and restrictions.[188] Indeed, in the case of Seychelles, it has actually tightened its 1977 requirement of prior notification to prior authorization.[189]

The restrictions placed on innocent passage of warships in the territorial sea by so many coastal states are excused on the ground of fighting "maritime hegemony"[190] by the maritime states. The United States has been challenging these excessive restrictions

[187] *Supra* note 124, section 18.
[188] However, it must be noted that some coastal states, including, Brazil, Bulgaria, Denmark, Indonesia, Poland, Sweden, and Turkey have rolled back former restrictive laws and declarations on innocent passage of warships.
[189] For the 1977 requirement see ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 267; for the 1999 requirement see *supra* note 143.
[190] Song, *China*, *supra* note 107 at 217.

through its Freedom of Navigation (FON) program established in 1979 by the Carter Administration. This program is intended to emphasize the freedom of navigation provisions of the LOSC.[191] It is maintained that "[u]nless these excessive claims are actively opposed, the challenged rights will be effectively lost."[192] True it is that acquiescence in the face of these restrictions has the effect of opening "the door for ever-increasing restrictions."[193] Moreover, the United States at the moment appears to be the state possessing the capability to effectively challenge these restrictions. However, its persistent refusal to ratify the LOSC robs it of the moral backing for this cause.

Conclusion

The exact scope of the right of innocent passage has, over the years, been reflected in accepted state practice. Though steeped in antiquity, the concept is as relevant today as it was some centuries ago. There has been a brave and commendable attempt by the international community to settle finally the juridical nature of the concept. However, the nature of this right appears to defy permanent answers to its myriad riddles. As we have seen, many coastal states are placing excessive limitations on this right while conveniently shutting their minds to the time honored *pacta sunt servanda* principle.[194]

One thing is clear. The strife for mastery between *mare liberum* and *mare clausum* continues unabated. This friction will forever be the main factor that will shape the

[191] See ROACH and SMITH, U.S. RESPONSES, *supra* note 131 at 5.
[192] *Ibid.*
[193] Weinstein, *The Transport of Hazardous Waste*, *supra* note 102 at 139.
[194] See Vienna Convention on the Law of Treaties, art. 27, May 22, 1969, 1155 U.N.T.S. 331, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.

development of the law of the sea in general and the right of innocent passage in particular. If, heavy and water logged, it sank in troubled waters during the time of James Brown Scott,[195] recent state practice appears to suggest that John Selden's *Mare Clausum* is riding buoyantly on the waves – side by side Grotius' *Mare Liberum*.

However, it is submitted that freedom of navigation must prevail. Our world of interdependence would have it no other way. States must streamline their domestic laws with the view of making them LOSC compliant. We must strife for uniformity in state practice in this vein - if for nothing, at least to reduce the opportunity for violent confrontation. Unilateral action only breeds instability and sour international relations. Reciprocity should inform the actions of states. Perhaps the biblical injunction that we should love our neighbors as ourselves, finds no better expression than in this.

[195] *Supra* note 33.