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

William K. Agyebeng

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

William K. Agyebeng†

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Introduction

Throughout the evolution of international law governing the oceans, two theories have fought for mastery. The first theory is that all of humanity commonly owns the sea and therefore it is open to all for navigational and other uses. Thus, no person or nation can validly restrict other individuals or countries from such use, by laying a claim of proprietorship over the sea. This notion appears to be rooted in the belief that the geophysical nature of the ocean itself resists any ownership claims over it.¹ Freedom of navigation is the mantra of this doctrine. The second theory is based on

† LL.B. (Ghana); LL.M. candidate (Cornell Law School), expected 2006. This note is dedicated to Sefah Agyebeng and Akua Ntiriwaa—my parents; and also to Phinna Agoe-Sowah, for being an inspiration.

¹ See, e.g., Erik M. Limpitlaw, Is International Environmental Law Waterproof?, 29 SYR. J. INT'L L. & COM. 185, 205 (2002) (Hugo Grotius, a leading international maritime lawyer, believed that the ocean could not be divided by metes and bounds and any such attempt was a "physical impossibility."
the premise that the sea is amenable to ownership and whoever brings any part of it under his dominion can then validly restrict its use. The tension between these two theories has shaped, and continues to shape, the development of the law of the sea. Central to the debate is the recognition (historically and presently) of the importance of marine navigation as a vital link between nations in terms of trade, commerce, and communication.

The principle of innocent passage is a compromise between these two conflicting theories. After centuries of turbulent development, this principle appears to have crystallized through its codification in the Law of the Sea Convention (LOSC). The right of innocent passage is essential to 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, [and] the coastal States admit it as an unavoidable limitation to coastal State competence."

However, the exact scope and juridical nature of the right of innocent passage is uncertain given contemporary coastal state practice. This uncertainty is a reminder that treaty provisions are meaningless unless viewed in light of state practice. Moreover, even if a state considers adopted treaties to be binding, it is not uncommon for that state to ignore or violate their provisions when it is in its best interest to do so.

International law is a legal regime that governs states that regularly infringe its tenets and find disingenuous justifications for their self-serving acts. In the words of one author, "[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."

Therefore, notwithstanding the extent of codification of international law, it is ultimately accepted state practice that becomes instructive. The fluid nature of international law is pointedly stressed by international judicial dictum 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 achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

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3. See Limpitlaw, supra note 1, at 205 (describing the debate between freedom and ownership regarding the ocean).
Indeed, there is no impenetrable shield of codified international law rules and the law of the sea in particular.8

Justice Oliver Wendell Holmes Jr. told us that “[t]he life of the law has not been logic: it has been experience.”9 If these hallowed words have any persuasive force in the domestic law setting, then they must have greater force with respect to international law. The rules of international law develop from theoretical and normative indices that are recognized by a majority of states as valid bases for a course of action. Over time, the scope of these rules is defined through codification. The rules are then further expanded through interpretation and application. Therefore, the development of international law is cyclical. Theory begets practice; practice begets crystallized rules. As crystallized rules beget further practice, that practice begets further theory. Not infrequently, practice deviates from its parent theory, and the latter must of necessity mutate to incorporate the former.

Consequently, international law is not static. It progresses to resolve current challenges, while being constantly altered by state practice. The rules of international law change as the conditions that gave rise to them also change.10 Likewise, the law of the sea “remains an active and dynamic field, changing and growing as the interests of nations change.”11 This characteristic is most evident in regards to navigational rights, owing to commercial and military concerns of maritime states juxtaposed with security and other concerns of coastal states.12

This note examines the theoretical right of innocent passage in the territorial sea13 matched against contemporary state practice. The law of nations “rests on a general 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.”14 Consequently, this note seeks to match “logic” (codified international law right of innocent passage) against “experience” (contemporary state practice), to ascertain the extent to which the latter deviates from the former, and the implication of the deviation for the future development of this right.

13. This right also exists in straits used for international navigation and what is known as archipelagic waters. J. Ashley Roach & Robert W. Smith, United States Responses to Excessive Maritime Claims 209, 281-90 (1996).
The 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."¹⁵ This note will explore this theme in three parts. Part I examines the history and evolution of the right of innocent passage in the territorial sea. Part II analyzes the regime of innocent passage under the LOSC. It especially considers the interpretation and implementation challenges posed by the LOSC provisions. Part III observes contemporary state practice as reflected mainly in national legislations.

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. For where no sovereignty is exercised over a body of water by any state, navigation in it would be passage simpliciter—without any consideration of its offensiveness or lack of it. For instance, the right of innocent passage has no usefulness with respect to navigation on the high seas since no state can validly claim jurisdiction over this body of water.¹⁶

The exercise of sovereign rights over portions of the sea, necessitating the notion of innocent passage, has been the most controversial area in the evolution of the law of the sea. One commentator pointedly remarked 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 sea.¹⁷

It appears that in antiquity, coastal states did not impose navigational restrictions on the sea. Dated writers such as Ulpian and Celsus supported this position. The former asserted mare quod natura omnibus patet—that the sea is open to everybody by nature, and the latter stressed maris communem usum omnibus hominibus ut aeria—that the sea, like the air, is com-

mon to all mankind. 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.

This point of view did not pass unchallenged. There has always been a counterclaim that individuals can appropriate the sea. The Glossators, who espoused Roman canon law, were perhaps the first to assert this position. They propounded this counter theory by which they sought to invest sovereign rights over the sea in the Roman Emperor. However, with the emergence of the ius gentium, or law of nations, the idea that the sea existed for humankind's free access reclaimed prominence. Justice Joseph Story summarized this point of view in the Marianna Flora case when he stated that "[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."

The Rhodians of the Hellinistic Age fought relentlessly on the side of freedom of navigation to protect their maritime interests and in opposition to a Mediterranean "hegemony." This led to the promulgation of the famous Rhodian Sea Law, which was enforced on the Island of Rhodes, and is one of the earliest known comprehensive codes of the law of the sea.

However, by the thirteenth century, the consensus among nations was that a state might exercise jurisdiction over the body of water adjacent to its shores. In addition, the practice of feudalism and 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 exer-

21. Id.
22. See id. at 466.
26. Florsheim, supra note 11, at 76.
27. RUTH LAPIDOOTH, FREEDOM OF NAVIGATION WITH SPECIAL REFERENCE TO INTERNATIONAL WATERWAYS IN THE MIDDLE EAST 14 (1975) [hereinafter FREEDOM OF NAVIGATION].
cised them," fostered the notion of restricted access to the sea.\textsuperscript{28} In fact, at different points in history, states have laid claim to vast expanses of the sea.\textsuperscript{29} For example, at the peak of their glory, Genoa and the Republic of Venice laid claim to the Ligurian and Adriatic Seas, respectively.\textsuperscript{30} Perhaps the most notorious pretensions of ownership of the seas were Spain and Portugal's fifteenth-century claims to almost the entirety of the oceans. Pope Alexander VI, through his \textit{donationis Pontificiae} (Papal bull) in 1493, donated the Western and Eastern Hemispheres to Spain and Portugal, respectively, by drawing an imaginary line from the Arctic Pole to the Antarctic Pole.\textsuperscript{31}

Naturally, such sweeping claims did not pass unnoticed. For instance, in response to a Spanish complaint against the voyage of Sir Francis Drake to the Pacific, Queen Elizabeth I remarked that "[t]he 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."\textsuperscript{32}

The seventeenth century witnessed substantial intellectual discourse on the issue through the legal expositions of a Dutchman, Hugo Grotius, fighting on the side of freedom of navigation, and an Englishman, John Selden, arguing for restricted sea access. In his treatise supporting Dutch trading interests in the East Indies, Grotius argued that it would be contrary to natural law to inhibit free navigation.\textsuperscript{33} He justified his position by noting that "the sea can 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 the private property of [anyone]."\textsuperscript{34} Therefore, he concluded that we should not prevent the free use of the oceans and that in fact we are "bound to assist such navigation in whatever way we can, when it can be done without any prejudice to ourselves."\textsuperscript{35} On the other side, Selden defended the British Monarch's proprietary claims to expanses of the sea around the British Isles. Inspired by previous claims made by the British and other states, he asserted "[t]hat the Law of God, or the divine Oracles of Holy Scripture, do allow a private Dominion of the Sea."\textsuperscript{36}

In the end, Grotius' open seas treatise appears to have triumphed over Selden's closed seas treatise. Coastal states have recognized the freedom of

\textsuperscript{28} Fenn, supra note 20, at 469.
\textsuperscript{29} See Freedom of Navigation— Its Legal History, supra note 18, at 261.
\textsuperscript{30} See Freedom of Navigation, supra note 27, at 14.
\textsuperscript{31} See id. For a brief background to this pretension to global sovereignty, see Edward Gaylord Bourne, \textit{The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries}, 1 Yale Rev. 35 (1892).
\textsuperscript{32} Freedom of Navigation, supra note 27, at 15.
\textsuperscript{33} Hugo Grotius, \textit{Mare Liberum Sive De Ivre Qvod Batavis Competit Ad Indicana Commercia} [The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade] 55 (Ralph Van Deman Magoffin trans., James Brown Scott ed., Oxford University Press 1916) (1608) [hereinafter \textit{Mare Liberum}].
\textsuperscript{34} Id. at 30.
\textsuperscript{35} Id. at 55.
the seas, with its necessary notion of freedom of navigation since the eighteenth century. In the colorful 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 of his English antagonist. If it cannot be said that Grotius wears his learning "lightly like a 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.

The debate between open seas and closed seas proponents has created two principles, namely, the concept of territorial sea and the right of innocent passage. Compromise, more than anything else, is the reason why these principles are now firmly recognized in international law. The former principle was recognized contemporaneously as the notion 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 and just what controls could be imposed continued to be debated.”

The concept of territorial sea arose out of the need to suppress piracy and to promote navigation and commerce among states. This principle permitted a state to extend 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." 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 them against attack threatening their peace, 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 zone that is recognized in the international law of today.

Conceptually, the territorial sea is an extension of the territorial land mass. It is a natural prolongation of the land subsumed under the superjacent waters. Thus, over the centuries, nations have conceded that “[e]very Prince, [whose] Country adjoyns to the Sea . . . has [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

38. James Brown Scott, Introduction to Mare Liberum, supra note 33, at ix.
40. Fenn, supra note 20, at 471.
Parts of the [same] Body." In fact, even Grotius, the champion of freedom of navigation, admitted that although the sea is common to all and cannot be appropriated by a person, "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."

The conceptual basis of the territorial sea appears to be a misnomer since the territorial sea seems not a natural projection of the territorial land mass but a body of water that is a natural landward flow of the open seas. However, O'Connell explains that with the development of the abstract theory of the state:

Territory ceased to be regarded as something owned, and 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 different premises. No longer was it necessary to regard the territorial sea as part of the national domain.

Thus, in recent times, proponents of the territorial sea doctrine have offered additional reasons to support the exercise of jurisdiction over the territorial sea. Nations have asserted this right for health, safety and welfare reasons, and concerns over pollution, customs control, and national security. These fears "reflect recognition that conduct in coastal waters is inextricably linked with the protection and promotion of societal values ashore."

From the 1930 Hague Codification Conference through the 1958 Territorial Sea Convention to the LOSC, coastal states have endorsed the notion that the territorial sea concept is an established tenet in the law of the sea. The LOSC permits the coastal state to exercise exclusive jurisdiction over the bed and subsoil of the sea up to a distance of twelve nautical miles, measured from baselines along the coast, encircling the state.

44. Mare Liberum, supra note 33, at 30.
45. O'Connell, supra note 6, at 325.
46. Schachte, supra note 41, at 147.
47. Id. at 143.
48. Id. at 147.
51. LOSC, supra note 4, art. 3.
The second principle that emerged from the friction between open seas and closed seas doctrines is the right of innocent passage. It is "a development concomitant to the emergence of coastal state sovereign control over the territorial sea"\(^{52}\) arising "from the dialectic of claim and counterclaim in a world of few powerful actors and infinite resources."\(^{53}\)

The right of innocent passage promotes trade, commerce, and communication among nations. Accordingly, even though a coastal state can exercise juridical rights over its territorial sea, ships of foreign nations can navigate through such sovereign waters as long as such navigation is non-provocative. A state cannot deny this right because of interdependence among countries and because a lot of states still continue to transport their exports aboard ships. No single nation can claim to be so self-sufficient as not to need resources from other states. In the words of Sir Philip Medows:

\[\text{[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 it is highly beneficial to all; for as 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.}\(^{54}\)

Grotius' \textit{Mare Liberum} was instrumental in the development of the right of innocent passage. He stated that this 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."\(^{55}\) This passionate defense of the right of innocent passage foreshadowed his later justification of the slaying of the Amorites by the Israelites of the Mosaic Era. The Amorites denied innocent passage through their land to the Israelites.\(^{56}\) Grotius argued that innocent passage was "a right which according to the Law of Human Society ought in all justice to have been allowed."\(^{57}\)

Moreover, even Selden, an adamant supporter of the closed seas doctrine, conceded to the existence of the right of innocent passage: "[T]he Offices of [humanity] require, that entertainment [be] given to Strangers, and that [inoffensive passage be] not denied them."\(^{58}\)

Indeed, the recognition of the right of innocent passage is self-evident both in common sense and in practicality. Aside from the fact that interdependence among states makes the right of innocent passage imperative, this right must exist because "[t]hough freedom of navigation applies primarily to shipping 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


\(^{53}\) Froman, \textit{supra} note 15, at 689.

\(^{54}\) MEDOWS, \textit{supra} note 43, at 6-7.

\(^{55}\) MARE LIBERVM, \textit{supra} note 33, at 7.

\(^{56}\) \textit{Id.} at 9.

\(^{57}\) \textit{Id.}

\(^{58}\) Selden, \textit{supra} note 36, at 123.
parts of it had not been recognized as well.  

The right of innocent passage is in effect a balance between the interests of maritime states and the interests of coastal states. The former lies in the preservation of navigational freedoms while the latter resides in the preservation of security interests. In the words of Cameroonian Minister Counselor Francis Ngantcha, 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 in coastal waters, is therefore the backbone of the right of innocent passage." It must be borne in mind that depending on the circumstances, a maritime state may be a coastal state, and a coastal state may be a maritime state, pursuing interests associated with such states. This probable twist-of-fate factor fosters the recognition of the right of innocent passage.

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

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

We have considered the historical antecedents and the theoretical basis of the right of innocent passage. Part II will now examine the juridical scope of the right of innocent passage as codified in the LOSC.

II. Innocent Passage in the Territorial Sea as Codified in the LOSC

Most nations recognize the LOSC as the "constitution" of the oceans. The LOSC is meant to settle all issues relating to the law of the sea. It

60. See id.
62. Id. at 198.
65. VATTEL, supra note 19, at 118.
attempts to regulate the right of innocent passage in the territorial sea vis-à-vis the interests and sovereignty of the coastal state.

However, the provisions of the LOSC on innocent passage are not flawless. Inexact and imperfect language often renders the provisions vague or ambiguous. Moreover, even where the provisions are manifestly clear, states will create ambiguity to suit their purposes. As a result, several issues, which contemporary state practice would help to shape, have no definite answers.

A. The Regime

1. General Rules

The right of innocent passage permits a ship of a foreign nation to enter the coastal waters of another state if the navigation is peaceful and not offensive. In the territorial sea, "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage."67 The definition of passage poses no difficulty. The focus is on the purpose of navigation through the territorial sea of the coastal state. Thus, a ship may pass through the territorial sea without entering internal waters or calling 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.68

However, "ships are [almost never] 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."69 Therefore, passage is required to be continuous and expeditious.70 Yet, there is an exception to this rule. 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.71

Innocence is negatively defined as passage that "is not prejudicial to the peace, good order or security of the coastal State."72 Since this definition is open to subjective interpretation, the LOSC has a laundry list of activities, under article 19(2), that constitute non-innocent passage.73

67. LOSC, supra note 4, art. 17.
68. See id. art. 18(1).
70. LOSC, supra note 4, art. 18(2).
71. Id.
72. Id. art.19(1).
73. Article 19(2) of the LOSC 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;
Unfortunately, because of the inclusion of the word "propaganda" found in the open-ended formulation of article 19(1), the term innocent passage is both objective and subjective.

In addition, article 19 indicates that there is a presumption of innocence because ships are not required to show that their passage is innocent before they are allowed to pass through the territorial sea. The complaining coastal state, therefore, has the burden to objectively establish that the passage is non-innocent.

Yet, the language of the LOSC does not indicate whether a state must prove factual non-innocence or whether notional non-innocence is sufficient. A state can meet the former standard by demonstrating that a ship has engaged in any of the proscribed activities under article 19(2). Conversely, a state can meet the latter standard by showing that it has reason(s) to suspect that a ship will engage in any of the proscribed acts under article 19(2).

The options available to a state depend on its interpretation of article 19. If the state believes that article 19 requires proof of factual non-innocence before it can act, then it may adopt a "wait-and-see" approach to prevent non-innocent passage. On the other hand, if the state interprets article 19 to allow actions based on evidence of notional non-innocence, the state may resort to preemptive action to prevent reasonably suspected non-innocent passage. The chapeau of article 19(2) tends to favor factual non-innocence. However, as a consequence of fears of terrorist attacks, it would be reasonable to assume that states would interpret article 19 as permitting them to prevent perceived non-innocent passage by simply establishing notional non-innocence.

(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 not having a direct bearing on passage.

74. See, e.g., infra note 75 and accompanying text.

75. Indeed, in one reported incident, the Indonesian government turned away the Lusitania Expresso, a Portuguese registered ferry, from its territorial waters in 1992. The ferry, carrying human 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 Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso, 16 Marine Pol'y 427, 427 (1992). The human rights activists had not yet demonstrated when the Indonesian authorities turned the ship away. But those acts would have violated article 19(2)(d) and thus rendered the passage non-innocent. Therefore, even though this ship was not a terrorist threat, the incident illustrates a state's willingness to take preemptive measures to prevent the occurrence of non-innocent passage.
2. 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 [customs] 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 [p]ublick [sic] [g]ood." Today, the right of innocent passage no longer exists at the pleasure of sovereigns. The LOSC, which vests the right of regulation to coastal states, limits the right of innocent passage.

Through laws and regulations, a coastal state may protect its interests in the territorial sea. 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; the prevention, reduction, and control of pollution, marine scientific research, and hydrographic surveys; and customs, fiscal, immigration or sanitary concerns. Regulatory measures do not apply to the design, construction, manning or equipment of ships, other than in accordance with international standards. Yet, coastal states require foreign ships exercising the right of innocent passage to comply with their laws and regulations.

Additionally, a ship may not exercise the right of innocent passage in all parts of the territorial sea. The coastal state is mandated to direct foreign ships passing through its territorial sea to use sea-lanes and to observe any traffic separation scheme in force. The designation of such schemes, however, should reflect 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.

The LOSC does not specify whether a ship's refusal to obey a coastal state law or regulation, such as using sea-lanes, renders the passage non-innocent. However, by defining non-innocent passage with reference to the interests of the coastal state, the violations of coastal state laws and regulations would cause the passage to be non-innocent (at least in the perception of the coastal state) since such an infraction is clearly provocative and offensive toward the coastal state.

Then again, there is no doubt that articles 19(2) and 21 give the coastal state wide latitude to judge passage as being non-innocent based on its whims. Terms like "peace," "good order," and "security" are highly

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76. Selden, supra note 36, at 124.
77. See LOSC, supra note 4, art. 21.
78. Id. art. 21(1).
79. Id. art. 21(2).
80. Id. art. 21(4).
81. Id. art. 22(1).
82. Id. art. 22(3).
83. See id. art. 21.
84. See id. arts. 19(2), 21.
fluid and susceptible to varying interpretations despite the attempt of the LOSC drafters to inject objective interpretation.

3. Rights and Duties of the Coastal State

If the coastal state is vested with the power to regulate innocent passage, then the coastal state, as a necessity, must also have the right to enforce these rules. One right implies the other. The LOSC permits the coastal state to take essential steps to prevent non-innocent passage in its territorial sea. Specifically, the coastal state may take necessary measures to prevent any violations associated with the admission of ships to its internal waters or call at a port facility outside its internal waters.

Additionally, article 25 strongly implies that a ship's violation of the rules and regulations of the coastal state renders the ship's passage non-innocent. However, neither article 25 nor any other LOSC provision instructs the coastal state as to what it can do to prevent non-innocent passage. Accordingly, coastal states have complete and arbitrary control over preventive measures. Nevertheless, there is one limitation on this enforcement power. The coastal state cannot levy charges upon a foreign ship simply because of its presence in the territorial sea. Yet, even such a constraint in theory, does not limit the coastal state's ability to do so since the restriction employs the use of the hortatory term "may," instead of the mandatory term "shall."

Coastal states also have the power to suspend innocent passage in specified areas of the territorial sea. The LOSC does not specify the upper limit of such a suspension. Consequently, a coastal state can impose a temporary suspension of innocent passage in parts of the territorial sea that has the effect of permanent exclusion since the coastal state’s decision with respect to the duration of the suspension cannot be reviewed. The only limitations are that the coastal state can only impose these suspensions to uphold its security and that the suspensions cannot be discriminatory, in theory or in practice.

However, the coastal states' legislative and enforcement powers are not writ large. The LOSC preserves the traditional delicate balance between freedom of navigation and restricted access. Thus, notwithstanding the extensive regulatory rules it may have, the coastal state cannot adopt measures that have the "practical effect of denying or impairing the right of innocent passage" through its territorial sea. The coastal state also has a negative duty not to discriminate between ships on the basis of nationality.

85. Id. art. 25.
86. Id. art. 25(2).
87. See id. art. 25.
88. See id. art. 26.
89. Id. art. 26(2).
90. Id. art. 25(3).
91. See generally LOSC, supra note 4 (indicating there is no such upper limit to suspension).
92. Id. art. 25(3).
93. Id. art. 24(1)(a).
or cargo. The coastal state also has a positive duty to "give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea." The LOSC is unclear as to whether this positive duty arises only with respect to actual knowledge of the existence of any danger to navigation or whether coastal state responsibility may be triggered by imputed or constructive knowledge. On this point it is instructive to note that the International Court of Justice in Corfu Channel found a coastal state liable for damage arising from a danger in its territorial waters that it should have reasonably known about. The court maintained that proof of such knowledge "may be drawn from inferences of fact, provided that they leave no room for reasonable doubt."

However, notwithstanding such an interpretation, it is unlikely that a coastal state will have to pay reparation for damage resulting from its failure to warn about dangers in its territorial waters. This is because the LOSC does not have any enforcement mechanism.

B. Innocent Passage of Different Types of Ships

1. Ships with Special Characteristics

Certain ships, including nuclear-powered ships and ships carrying hazardous substances, pose grave environmental concerns to the states in whose waters they traverse. Such ships must carry documents and will have to observe special precautionary measures established by international agreements. Thus, while the true scope of the regime of innocent passage for such ships has yet to be determined, coastal states presently may require these ships (including tankers) to confine their passage to designated sea-lanes.

2. Merchant Ships

Under certain circumstances, a coastal state has civil or criminal jurisdiction over foreign merchant ships and government ships operated for commercial purposes in its territorial waters. The general international law rule is that the flag state has exclusive jurisdiction over incidents occurring aboard a ship. However, the coastal state can make arrests or impose fines for civil infractions that occur while the ship is passing through the coastal state's territorial waters. For instance, a coastal state can levy pilotage charges or fine a ship for damaging navigational aids or cables.

94. Id. art. 24(1)(b).
95. Id. art. 24(2).
97. Id. at 18 (emphasis in original).
98. LOSC, supra note 4, art. 23.
99. Id. art. 22(2).
100. Id. art. 28(3).
101. See id. art. 28(2).
The coastal state can exercise civil jurisdiction over *in rem* maritime claims but not for *in personam* actions. The coastal state has no power to stop or divert the course of a ship in its territorial sea so as to exercise civil jurisdiction over a person aboard the ship.\(^\text{102}\) Article 2(2) of the Convention on the Arrest of Ships reaffirms this limitation by stating that "[a] ship may only be arrested in respect of a maritime claim but in respect of no other claim."\(^\text{103}\) However, the "without prejudice" formulation in article 28(3) of the LOSC suggests that a coastal state may arrest or levy execution of judgments on foreign ships for other civil claims.\(^\text{104}\)

With respect to criminal jurisdiction, it seems that the coastal state can exercise full authority upon foreign merchant ships proceeding from its internal waters to its territorial sea.\(^\text{105}\) However, the coastal state's criminal jurisdiction is limited if ships are merely passing through the territorial sea without entering internal waters or calling at a port facility. The coastal state can exercise full jurisdiction under any circumstance if the offense disturbs "the peace of the country or good order of the territorial sea"\(^\text{106}\) and the master of the ship or operatives of the flag state have requested the coastal state to assume criminal jurisdiction, or if the coastal state is attempting to prevent drug trafficking.\(^\text{107}\)

Coastal states have jurisdiction over crimes committed aboard foreign merchant ships passing through its territorial waters with very few restrictions. Under article 27(1) of the LOSC, a coastal state has wide latitude to assume such jurisdiction since it is only the coastal state that can determine whether the consequences of a crime affect the coastal state or whether the crime is a type that disturbs its peace or good order.\(^\text{108}\) Thus, a coastal state can exercise a high degree of subjectivity in its analysis and act arbitrarily in its determinations--a good recipe for unilateralism.\(^\text{109}\)

Theoretically, a coastal state cannot assume jurisdiction over every crime committed aboard a foreign merchant ship in its territorial waters. In reality, however, that is not the case. Even in situations where the transgression occurs before the ship enters the territorial sea (and thus article 27(5) of the LOSC forbids the coastal state from assuming jurisdiction), the coastal state can still intervene and assume authority over the ship if the coastal state regards the crime as one that violates the rules regarding its exclusive economic zone (EEZ) or rules that protect and preserve the marine environment.\(^\text{110}\)

\(^{102}\) *Id.* art. 28(1).


\(^{104}\) LOSC, *supra* note 4, art. 28(3).

\(^{105}\) *Id.* art. 27(2).

\(^{106}\) *Id.* art. 27(1)(b).

\(^{107}\) *Id.* art. 27(1).

\(^{108}\) See *id.* art. 27(1)(a)–(h).

\(^{109}\) See *id*.

\(^{110}\) *Id.* art. 27(5).
3. Warships

Article 32 of the LOSC provides traditional immunity for warships and other government ships operated for noncommercial purposes. Article 29 of the LOSC narrowly defines warships 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.

Accordingly, a ship belonging to an insurgent, nationalist, or rebel movement and used for warfare, does not qualify as a warship under the LOSC. This is because the ship does not belong to a state, is not manned by a crew under regular armed forces discipline, and is not under the command of a duly commissioned officer whose name appears on the service list.111

A coastal state has no civil or criminal jurisdiction over foreign warships. The coastal state can only demand that such ships leave its territorial sea.112 However, it is unclear as to what actions a coastal state may take if the warship fails to obey the order.113 The only certainty is that the flag state is obliged to reimburse the coastal state for any loss or damage resulting from the noncompliance of the warship.114

The right of innocent passage is not uniform. The nature of the ship and its navigational purpose determine the incidents—rights, privileges and responsibilities—associated with it. The LOSC "seeks to maintain a balance between the right of a coastal state to enact appropriate laws and regulations dealing with innocent passage and the maintenance of the right in instances of overbearing coastal [s]tate laws."115 However, the balance appears to weigh in favor of coastal state regulation.116

C. Unresolved Issues

There are several provisions in the LOSC addressing innocent passage that lead to various interpretations. For example, coastal states can interpret and apply article 19(1) to prohibit several activities not listed under article 19(2). Moreover, article 19(2)(h) indicates that "willful and serious

111. Id. art. 29. Article 20 of the LOSC requires that submarines navigate on the surface of the territorial sea while showing their flag.
112. LOSC, supra note 4, art. 30.
113. Article 30 of the LOSC states that if a warship ignores the regulations and laws of the coastal state regarding passage through its territorial waters, then the coastal state may “require it to leave the territorial sea immediately.” However, the LOSC does not indicate what means the coastal state may take to effectuate its order to vacate.
114. LOSC, supra note 4, art. 31.
115. See Rothwell, supra note 75, at 433.
116. See Froman, supra note 15, at 657 (noting that whenever a foreign ship can exercise the right of innocent passage, the danger of non-innocent passage exists, and suggesting that as a result, the burden of proving non-innocent passage rests on the regulating coastal state, which therefore must enact clear and objective regulations).
pollution" can render passage non-innocent. Willful speaks of volition. However, the gravity of the "pollution" that would render passage non-innocent is unclear. The word "serious" is a relative term, and its meaning will thus depend on the coastal state's interpretation.

Another contentious issue is the preservation of the marine environment and its resources. The coastal state must balance this concern with its obligation to permit innocent passage. This balance is especially problematic for states with ecologically sensitive marine environments and marine protected areas. One proposed solution is to regulate speed, anchorage, and the imposition of routing measures in such areas. However, there is no uniform guidance or consensus as to how to resolve this issue.

Additionally, coastal states must deal with ships that are carrying nuclear or other highly hazardous material. The issue here is whether the mere presence of these ships in the territorial sea constitutes non-innocent passage. A coastal state in favor of this interpretation can argue that any spillage will have grave ecological damage, such as permanent radioactive contamination, to its marine environment. Moreover, there are no salvage measures in the event of a spill of these noxious substances.

Ships carrying casks of plutonium are the greatest concern. "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." In addition, there is the specter of the so-called "leper ships," that is, ships in distress or ships whose mere presence in the territorial sea pose grave threats to the marine environment owing to their unseaworthiness.

117. Article 19(2)(h) of the LOSC states that "[p]assage 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: . . . (h) any act of wilful and serious pollution contrary to this Convention."

118. See LOSC, supra note 4, pt. xii.

119. A marine protected area is defined as "[a]ny area of intertidal or subtidal terrain, together with its overlying waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation to protect part or all of the enclosed environment." Resolutions 17.38 and 19.46 of the IUCN General Assembly, in WORLD COMM’N ON PROTECTED AREAS, WORLD CONSERVATION UNION, GUIDELINES FOR MARINE PROTECTED AREAS annex 4 (1999), available at http://app.iucn.org/dbtw-wpd/edocs/PAG-003.pdf (last visited Apr. 25, 2006).


122. Id.


124. For an analysis of the controversy surrounding the status of such ships under the LOSC, see Christopher F. Murray, Note, Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the Erika and the Castor, 63 Ohio St. L.J. 1465 (2002). It is understandable that coastal states are wary of the presence of such ships in their territorial sea. However, the LOSC innocent passage provisions do not appear to permit states to keep out such ships from their territorial sea. Neverthe-
There is also the lingering issue of whether the coastal state can require foreign ships passing through its territorial sea to carry equipment that would enable the coastal state to monitor the ship's movement. Some commentators opine that no LOSC provision prevents the coastal state from imposing such a measure.\textsuperscript{125} Yet it is doubtful whether the LOSC permits the characterization of a foreign ship's passage in the territorial sea as non-innocent if it fails to carry such equipment as required by the coastal state.

With respect to foreign submarines, the convention requires them to navigate on the surface while in the territorial sea. Indeed, "[t]his rule has been accepted for as long as submarines have been used as naval vessels."\textsuperscript{126} However, it is unclear whether simply violating this custom would deprive the submarine the right of innocent passage. Several commentators have argued that since the rule on submarines is not listed under article 19, which lists non-innocent activities, submerged navigation only violates coastal state laws and regulations without rendering passage non-innocent.\textsuperscript{127} According to Froman, "[t]he 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."\textsuperscript{128}

However, this conclusion is perplexing. The incorporation of the rule in another article does not automatically make such navigation innocent. Froman's observation tends to uphold absolute formalism without regard to the purpose of the rule. Submarines are 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 thus carries the attribute of high suspicion. Accordingly, submerged navigation can be perceived as having a non-innocent purpose.

The negotiations that preceded the adoption of the LOSC are responsible for these unsolved issues. The patronization of polarized interests between the maritime powers and coastal states characterized these negotiations. While the former pushed for greater navigation freedoms, the latter advocated for constrained mobility.\textsuperscript{129} The marine powers' desires to control the seas to carry out their military operations and to enhance the status of their merchant fleets were motivating factors in their quest for unrestricted freedom of navigation.\textsuperscript{130} Theoretically, freedom of naviga-

\begin{itemize}
\item \textsuperscript{126} Churchill, supra note 69, at 90-91.
\item \textsuperscript{127} Treves, supra note 63, at 927-29; Froman, supra note 15, at 663.
\item \textsuperscript{128} Froman, supra note 15, at 663.
\item \textsuperscript{129} Yann-huei (Billy) Song, China and the Military Use of the Ocean, 21 Ocean Dev. & Int'l L. 213, 215 (1990).
\item \textsuperscript{130} See Jens Evensen, UNCLOS: Origin and Process of Negotiation, in Toward a New International Maritime Order 1, 3 (Finn Laursen ed., 1982).
\end{itemize}
tion equally protects the rights of all states. Nevertheless, in practice, this doctrine favors greatly the interests of the maritime powers, especially with respect to military uses of the ocean. The coastal states, aware of the practical realities of freedom of navigation, revolted against the old regime. 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.

The confrontation of interests between the maritime powers and coastal states was most evident with respect to the issue of innocent passage of warships in the territorial sea. The debate turned on whether such ships had to notify the coastal state prior to passage and whether such ships required prior authorization before entering the territorial sea. Presently, the LOSC does not expressly require prior notification or authorization. Therefore, coastal states making such demands are violating the LOSC. Arguably, prior notification is less objectionable than prior authorization since the latter implies that innocent passage does not exist for warships while the former merely suggests diplomacy and courtesy.

In reality, warships have weapons and ammunition aboard. Consequently, coastal states have a legitimate reason to consider the presence of warships in their territorial sea as a threat to their 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." The warship issue heavily dominated the negotiations leading to the adoption of the LOSC. One observer summed up the controversy by stating that:

Many delegations 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 favor 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

131. Pirtle, supra note 8, at 8.
133. Pirtle, supra note 8, at 29.
134. Florsheim, supra note 11, at 92.
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 favor of a statement by the President of the Conference, on the record, that its withdrawal was “without prejudice to the rights of coastal states to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of this Convention.”

This statement, taken out of context, suggests that the Conference President was stating his legal opinion on the effect of the withdrawal of the proposed amendment. However, the President was only voicing the resolution of the sponsors of the proposal. His statement cannot be taken as an invitation to restrict innocent passage of warships in the territorial sea because the law does not support or justify this restriction.

Both articles, alluded to by the sponsors of the proposed amendment, do not support any preconditions for the innocent passage of warships. It is only when such ships engage in any of the proscribed activities listed under article 19 that their passage is rendered non-innocent. Moreover, article 25 only permits a temporary suspension of the right of innocent passage for security reasons and does not require warships to notify or receive prior authorization by the coastal state. Any other interpretation would suggest that the mere presence of foreign warships in the territorial sea is an offensive conduct. The claim that articles 19 and 25 reinforce the idea that there is a requirement of prior notification or authorization is “valid only for those States whose opinion it expresses.”

However, the circumstances surrounding the negotiation of innocent passage of warships suggest that there is dissent among the nations and many coastal states do not consider themselves bound by the LOSC provisions on innocent passage of warships. Consequently, the matter is far from settled, and “there seems to be a general sense that the question is,

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136. The President of the Conference 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.
137. Indeed, “President Koh has since stated in public that, in his view, the right of warships to 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 OR. L. REV. 53, 64–65 (1984).
138. Treves, supra note 63, at 934.
for all practical purposes, best left without a clear answer.140 Having examined the innocent passage regime under the LOSC, we will now turn to contemporary state practice.

III. Innocent Passage Outside the Book

As a result of either the flexible and often inconclusive LOSC provisions on innocent passage or the ideological turmoil that preceded the signing of the LOSC, coastal states have not uniformly interpreted and applied innocent passage as outlined in the LOSC.141 This note will now examine state practice, beginning with a discussion of the practice of the United States (the only superpower) and the Russian Federation (a recently retired superpower). After years of inconsistent practice by both states,142 sometimes marked by open confrontation between them,143 the United States and the Russian Federation finally adopted the Uniform Interpretation144 of the innocent passage regime of the LOSC in 1989. Although these rules were primarily intended to settle questions regarding innocent passage between the two nations, the two countries believed that the Uniform Interpretation would be a blueprint for the rest of the world to follow.145

Article 2 of the Uniform Interpretation provides that all ships, including warships, have the right of innocent passage in the territorial sea, without prior notification or authorization.146 To minimize any potential confrontation, article 8 requires that issues arising with respect to passage of ships through the territorial sea be settled through diplomatic means.147 Article 4 also mandates that the coastal state give the foreign ship an opportunity “to clarify its intentions or correct its conduct within a reason-

140. Churchill, supra note 69, at 90.
141. State practice forming the basis of the discussion in this part of the note is based on declarations made by states upon signature or ratification of the LOSC and national legislation published in the U.N. Division for Ocean Affairs and the Law of the Sea and Office of Legal Affairs’ Law of the Sea Bulletin, available at http://www.un.org/depts/los/doalos_publications/los_bult.htm, and the U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs’ Limits in the Seas, available at http://www.state.gov/g/oes/ocsn/c16065.htm. The caveat is that some of these laws may have been amended or even repealed at the time of the publication of this note. It has been difficult to ascertain the most current state of the cited national legislations. The reader should be cautioned as to possible amendment or repeal subsequent to the date of publication.
142. See Franckx, supra note 139, at 484, 485.
143. On two occasions, March 13, 1986 and February 12, 1988, the Russian Federation 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, Russian ships bumped the two American ships. Id. at 485.
144. Uniform Interpretation of Norms of International Law Governing Innocent Passage, 14 L. SEAS BULL. 13 (1989).
145. See Roach, supra note 13, at 228.
146. Uniform Interpretation of Norms of International Law Governing Innocent Passage, supra note 144, art. 2.
147. Uniform Interpretation of Norms of International Law Governing Innocent Passage, supra note 144, art. 8.
ably short period of time.”

The agreement appears to be keeping the peace between these two nations. However, its effect on the rest of the world is doubtful since coastal states continue to pursue undue restrictions on the right of innocent passage, which the LOSC does not support. One commentator reinforces this latter point by noting that “[a]s state practice evidences, this position of the major powers could be regarded as reflecting wishful thinking rather than existing customary international law.”

A. Restriction on Innocent Passage in General

Undoubtedly, a foreign ship has a right to innocent passage. However, at least in one case this assertion may not hold true. Section 13 of the Maritime Zones of Maldives Act No. 6/96 states that “[s]ave such vessels engaged in innocent passage compatible with international laws, no vessel shall enter the territorial sea of Maldives except in accordance with the laws and regulations of Maldives.” While this provision does not contradict the right of innocent passage, section 14 of the same statute states that “[n]o foreign vessel shall enter the exclusive economic zone 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. The purpose of section 14 is to prevent unauthorized fishing in the EEZ. However, it is unduly overbroad since it denies the existence of freedom of navigation in the EEZ, which includes the territorial sea. Even if one concedes that section 14 does not apply to the territorial sea, the geophysical nature of Maldives, an archipelago, dictates that a ship can only access its territorial sea via the EEZ. The section 14 restriction on passage through the EEZ, which encompasses the territorial sea, violates the LOSC and all the tenets of freedom of navigation.

The Kingdom of Saudi Arabia also imposes restrictions on the right of innocent passage. The Kingdom maintains that “innocent passage does not apply to its territorial sea where there is a route to the high seas or an exclusive economic zone which is equally suitable as regards navigational and hydrographic features.”

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148. Uniform Interpretation of Norms of International Law Governing Innocent Passage, supra note 144, art. 4.
151. Id.
B. Environment Based Restriction

Many coastal states have passed legislations to preserve the marine environment. Because these statutes impact the right of innocent passage, we now consider a few of these legislations.

As previously noted, article 19(2)(h) of the LOSC provides that willful and serious pollution committed by a ship renders its passage non-innocent. Yet, the LOSC does not define the "serious" requirement, even though an ordinary meaning interpretation suggests that the pollution must be of a grave magnitude before it can be considered serious. However, several states have eliminated altogether the requirement of "serious" pollution in their domestic laws and regulations. For instance, under Polish\(^{153}\) and Croatian\(^{154}\) laws, an act of deliberate or willful pollution of the marine environment renders passage non-innocent. Under these two laws, the magnitude of the pollution is inconsequential.

In the case of Bahamas\(^{155}\) and Belize,\(^{156}\) passage is non-innocent if the act of polluting is likely to cause damage to the state, its resources, or marine environment. The overriding consideration is simply the likelihood of damage. Iranian law\(^{157}\) is even more restrictive. It removes the mens rea requirement by stipulating that passage is non-innocent if a ship passing through its territorial waters engages in any acts of pollution of the marine environment contrary to Iranian laws. There is no requirement that the act of pollution be willful.

Countries impose the most restrictions on nuclear-powered ships and ships carrying ultra hazardous substances. For example, Djibouti,\(^{158}\) Pakistan,\(^{159}\) Malta,\(^{160}\) the United Arab Emirates (UAE),\(^{161}\) and South Korea\(^{162}\) require prior notification from such ships before the ships enter their terri-

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158. Republic of Djibouti: Office of the President of the Republic, Law No. 52/AN/78 Concerning the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, the Maritime Boundaries, and Fishing (1979), reprinted in ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 111, 112 (1986). See ROACH, supra note 13, at 273.
torial sea. In addition, Egypt, Oman, Iran, Yemen, Saudi Arabia, Malaysia, Maldives and Seychelles further require prior notification and permission or authorization for the passage of such ships in their territorial waters. Moreover, Romania and Lithuania prohibit altogether the passage of ships carrying nuclear and other weapons of mass destruction.

The transboundary transport of hazardous waste has generated negative reactions. For example, in response to the Khian Sea incident where a foreign ship deceived and dumped waste on an Haitian beach, the Haitian government 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 its marine, air, and land environment. Furthermore, Haiti has declared that it will use all means within its power to enforce this rule. Similarly, coastal states along the possible route of plutonium shipments from France to Japan in 1992, protested angrily, and some openly declared that they would prevent such shipments through their territorial seas and EEZs.

The LOSC does not mandate or sanction the above legislations, declarations, claims, and measures. However, it is difficult to disapprove of these actions. These coastal states are acting responsibly and protecting

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165. Iran, supra note 157, at 12.
169. Maldives, supra note 150, at 17.
171. Romania: Act Concerning the Legal Regime of Internal Waters, the Territorial Sea and the Contiguous Zone of Romania (Aug. 7, 1990), 19 L. SEAS BULL. 9, 11 (1991) [hereinafter Romania].
173. On September 5, 1986, the Khian Sea, a Liberian-registered vessel, set sail from Philadelphia, wandering the oceans in search of a dumpsite for its cargo of approximately 14,000 tons of incinerator waste. After the Bahamas, Bermuda, Dominican Republic, Honduras, Guinea-Bissau, and the Netherlands Antilles turned it away, the ship arrived at Gonaives, Haiti, in December 1987. It convinced the Haitian authorities that it was carrying fertilizer. After the ship unleashed 4,000 tons of ash on the Gonaives beach, the Haitian government ordered it to reload the waste and leave. The Khian Sea left but without its noxious cargo. See Weinstein, supra note 124, at 147-49.
175. Id.
176. Van Dyke, supra note 123, at 399.
their legitimate interests by restricting ships that pose a grave risk of environmental degradation. This is especially true when coastal states derive no benefit, direct or indirect, from the passage of such ships in their territorial waters.

C. Restriction on Innocent Passage of Warships

As previously noted, many coastal states have imposed restrictions on innocent passage of warships. For example, states have required prior notification and/or prior permission or authorization and limited the maximum number of warships navigating through their territorial waters.

Presently, Croatia, Egypt, Finland, Guyana, India, South Korea, Libya, Malta, Mauritius and the former Yugoslavia (Serbia and Montenegro) all require prior notification before a foreign warship can pass through its territorial waters. However, most of these countries do not specify when a foreign warship must provide this notification. Therefore, theoretically, a foreign warship could communicate its desire to pass just moments before the foreign ship enters that country's territorial waters. However, Croatia and the former Yugoslavia require notification at least twenty-four hours in advance while South Korea requires three days' prior notification.

Moreover, at present, Algeria, Antigua and Barbuda, Bangladesh, Barbados, Burma, Cambodia, Cape Verde, China, Congo (Brazzaville), Grenada, Iran, Maldives, and the former Yugoslavia all require prior notification before a foreign warship can pass through their territorial waters.

177. Croatia, supra note 154, at 32.
179. See ROACH, supra note 13, at 267.
180. See id.
181. See id.
183. ROACH, supra note 13, at 267.
184. See Malta, supra note 160, at 16.
185. ROACH, supra note 13, at 267.
187. See Croatia, supra note 154, at 32; Yugoslavia, supra note 186, at 9; Korea, supra note 182, at 88.
191. ROACH, supra note 13, at 266.
193. ROACH, supra note 13, at 266.
194. See Cape Verde: Innocent Passage Through the Territorial Sea and Security Interests (Part II, Section 3, Subsection A), 1 L. SEAS BULL. 17 (1983).
Oman, Pakistan, Philippines, Romania, St. Vincent and the Grenadines, Seychelles, Somalia, Sri Lanka, Sudan, Syria, United Arab Emirates, Vietnam, and Yemen 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. The former Yugoslavia restricts the number of foreign warships of the same nationality passing through its territorial sea to a maximum of three at a time. Denmark also stipulates that simultaneous passage through the "Great Belt or the Sound of more than three warships of the same nationality" is subject to prior notification through diplomatic channels.

Most coastal state legislations do not define "warship" and thus are implicitly adopting the LOSC definition. Other countries have explicitly incorporated a version of the LOSC definition in their legislations. For example, a statute of the former Yugoslavia and Croatia contains a definition of warships that is not dissimilar to that found in the LOSC. Meanwhile, 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." The express reference to weapons is not found in the LOSC definition. Thus, the Republic of Maldives does not consider a warship, as defined under the LOSC, as a warship unless it has weapons. Accordingly, the Maldivian definition is narrower in scope than that of the LOSC.

The cited legislations, claims, and declarations of the various coastal states indicate that these states do not recognize innocent passage of war-

196. See Roach, supra note 13, at 267.
197. See id.
198. See Iran, supra note 157, at 12.
199. See Maldives, supra note 150, at 17.
201. See Roach, supra note 13, at 267.
202. See id.
203. Romania, supra note 171, at 14.
204. See Roach, supra note 13, at 267.
205. Seychelles, supra note 170, at 21.
206. See Roach, supra note 13, at 267.
207. See id.
208. See id.
209. See id.
211. See Roach, supra note 13, at 267.
212. Yemen, supra note 166, at 20.
214. Yugoslavia, supra note 186, at 12.
216. See Yugoslavia, supra note 186, at 9; Croatia, supra note 154, at 26; see also LOSC, supra note 4, art. 29.
217. See Maldives, supra note 150, at 18.
ships. The various restrictions violate the LOSC, which imposes no restrictions on warships, but it does not appear that these states will relax their restrictions in the near future.\(^{218}\) In fact, in 1999 Seychelles actually tightened its 1977 requirement of prior notification and prior authorization.\(^{219}\)

Coastal states defend their actions by claiming that they are fighting the maritime states to prevent maritime hegemony.\(^{220}\) The United States has been challenging these excessive restrictions through its Freedom of Navigation program established in 1979 by the Carter administration.\(^{221}\) This program emphasizes the freedom of navigation provisions of the LOSC\(^{222}\) and maintains that "unless these excessive claims are actively opposed, the challenged rights will be effectively lost."\(^{223}\) It is arguable that acquiescence in the face of restrictions opens "the door for ever-increasing restrictions."\(^{224}\) The United States appears to be the only nation that possesses the capability to effectively challenge unwarranted restrictions. However, its persistent refusal to ratify the LOSC harms its credibility to effectively challenge these restrictions.

Conclusion

Accepted state practice has reflected the exact scope of the right of innocent passage. Although steeped in antiquity, the concept is as relevant today as it was centuries ago. The international community has attempted to settle the juridical nature of the right of innocent passage. However, the complex nature of this right makes it difficult to design a permanent solution. Many coastal states are placing excessive limitations on this right while conveniently ignoring the pacta sunt servanda principle.\(^{225}\)

One thing is clear: the struggle between mare liberum and mare clausum continues unabated. This disagreement will continue to shape the development of the law of the sea and the right of innocent passage. If it sank in troubled waters during the time of James Brown Scott,\(^{226}\) recent state practice suggests that Selden's Mare Clausum is well afloat, side by side Grotius' Mare Liberum. Indeed, it is likely that the former may over-ride the latter in the near future despite the provisions of the LOSC.

However, I suggest that states allow freedom of navigation prevail because it is indispensable in our increasingly interdependent world. To

\(^{218}\) However, some coastal states, including Brazil, Bulgaria, Denmark, Indonesia, Poland, Sweden, and Turkey have relaxed their former restrictive laws and declarations on innocent passage of warships. ROACH, supra note 13, at 258–80.

\(^{219}\) For the 1977 requirement, see ROACH, supra note 13, at 267; for the 1999 requirement, see Seychelles, supra note 170, at 18.

\(^{220}\) Song, supra note 129, at 217.

\(^{221}\) ROACH, supra note 13, at 5.

\(^{222}\) See id.

\(^{224}\) See Scott, supra note 38.
this end, states must streamline their domestic laws with the view of becoming compliant with the LOSC. Nations must strive for uniformity of state practice to encourage international cooperation and harmony and to reduce the opportunity for violent confrontation. Unilateralism will not do.