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Innocent Passage

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A. Historical Evolution of Legal Rules

1 It is long recognized that States exercise authority over coastal waters that are effectively controlled from land. Such a conception seems already to have been part of Grotius' argument on the freedom of the seas. In the early 18th century, Bynkershoek submitted a more specific division of sea areas: the → *high seas* where freedom of the seas was to prevail and a coastal belt of sea subject to the coastal State's → *sovereignty*.

2 The original theory of the → *territorial sea* regarded it as the 'property' of the coastal State: territorial sea was assimilated with coastal land territory. As a consequence, the coastal State was free to exclude from its territorial sea nationals and vessels of any other State. As time passed, such a claim was replaced by a jurisdictional theory, not speaking of property rights but providing the coastal State with various powers to be exercised within its territorial sea (→ *Jurisdiction of States*). This functional approach contained the regime of **innocent passage**: foreign vessels (with some specification) were granted the right to pass through a coastal State's territorial sea provided the **passage** remained '**innocent**'.

3 The regime of **innocent passage** was recognized in the 1958 Convention on the Territorial Sea and the Contiguous Zone (→ *Contiguous Zone*) as well as incorporated in great—although not total—similarity in the 1982 United Nations Convention on the Law of the Sea ('UN Convention on the Law of the Sea').

4 The regime, as presented in the UN Convention on the Law of the Sea, is generally considered to reflect prevailing customary law (→ *Customary International Law*). It applies to the territorial sea having a maximum breadth of 12 nautical miles. In an exceptional case, it may also be applied to → *internal waters* landwards of the territorial sea. According to Art. 8 UN Convention on the Law of the Sea (corresponding to a similar provision in the Convention on the Territorial Sea and the Contiguous Zone), where the establishment of a straight baseline (→ *Baselines*), as provided for in the UN Convention on the Law of the Sea for measuring the breadth of the territorial sea, 'has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of **innocent passage** as provided in this Convention shall exist in those waters'. In the UN Convention on the Law of the Sea, there are also provisions attaching non-suspendable **innocent passage** to such 'straits used for international navigation' in which the new regime of → *transit passage* is not applicable (Art. 45 UN Convention on the Law of the Sea; → *Straits, International*). Under Art. 16 Convention on the Territorial Sea and the Contiguous Zone, similarly non-suspendable **innocent passage** applied to all straits used for international navigation as prescribed in the Convention on the Territorial Sea and the Contiguous Zone. According to the UN Convention on the Law of the Sea, the right of **innocent passage** also applies to → *archipelagic waters* (Art. 52 UN Convention on the Law of the Sea), but without prejudice to the new regime of archipelagic → *sea lanes passage* offering foreign ships navigational freedom similar to transit **passage** in straits used for international navigation (Art. 53 UN Convention on the Law of the Sea; → *Navigation, Freedom of*). Archipelagic sea lanes **passage** may be exercised in sea lanes and accompanying air routes designated by archipelagic States or, absent such designation, through routes normally used for international navigation in the sea areas concerned.

B. Current Legal Situation

1. The Concept of **Innocent Passage**

5 The current legal situation on **innocent passage** is set forth in Arts 17–32 UN Convention on the Law of the Sea. According to Art. 17 UN Convention on the Law of the Sea, there is a 'right of **innocent passage**' through the territorial sea for ships of all States. **Innocent passage** is composed of two elements: the '**passage**' and its 'innocence'.

6 'Passage' includes traversing the territorial sea without entering internal waters, or proceeding to or from internal waters (Art. 18 (1) UN Convention on the Law of the Sea). Such **passage** shall be 'continuous and expeditious'. Stopping or anchoring may only take place insofar as they are 'incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress' (Art. 18 (2) UN Convention on the Law of the Sea; → *Ships in Distress*). The right of **innocent passage** applies to **passage** by ships but not to → *overflight* by aircraft. Such overflight is subject to aviation agreements (→ *Air Law*).

7 The **passage** of a foreign ship is 'innocent' 'so long as it is not prejudicial to the peace, good order, or security of the coastal State' (Art. 19 (1) UN Convention on the Law of the Sea). This description is further clarified in Art. 19 (2) UN Convention on the Law of the Sea by a list of non-**innocent** activities in which a ship in **innocent passage** may not engage. The list identifies a number of activities a passing ship may not embark on, if wishing to retain its right of **passage**. Some of the activities refer to hostile measures such as threat or use of force against the coastal State (→ *Use of Force, Prohibition of*; → *Use of Force, Prohibition of Threat*), exercise of weapons, espionage (→ *Spies*), or acts of → *propaganda* affecting the coastal State's security. Others relate to such activities as launching, landing, or taking on board of aircraft or military devices. Similarly, non-**innocent** activities include loading or unloading of commodities, currency, or persons contrary to the customs, fiscal, → *immigration*, or sanitary laws and regulations of the coastal State. Fishing or the carrying out of research or survey activities also render **passage** non-**innocent**, as does any 'wilful and serious pollution' contrary to the UN Convention on the Law of the Sea or interference with the coastal State's systems of communication or other facilities or installations. The list ends with reference to 'any other activity not having a direct bearing on **passage**', indicating that the list is not intended to be exhaustive, but that even other activities which have no 'direct bearing on **passage**' may be considered prejudicial to the peace, good order, or security of the coastal State (Art. 19 (2) UN Convention on the Law of the Sea).

8 Art. 19 (2) UN Convention on the Law of the Sea speaks of non-**innocent** 'activities'. This suggests that only ship's activities and not instances such as its poor condition, lacking equipment, or dangerous cargo may render **passage** non-**innocent**. The Convention on the Territorial Sea and the Contiguous Zone included a broader formulation, allowing interpretation to the effect that at least a major deficiency in the ship's condition could be taken into account in the determination of the innocence of **passage**. Even under the UN Convention on the Law of the Sea, the more narrow language is hardly to prevent coastal interference with the **passage** of a 'rustbucket', a vessel in notoriously bad shape that threatens the coastal State with an obviously serious environmental hazard (→ *Marine Pollution from Ships, Prevention of and Responses to*).

9 **Innocent passage** shall not be hampered by the coastal State. In particular, the coastal State shall not

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of **innocent passage**; or
- (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State (Art. 24 (1) UN Convention on the Law of the Sea).

Also, there shall be no charges levied upon ships only by reason of their **passage** through the territorial sea (Art. 26 (1) UN Convention on the Law of the Sea).

10 The coastal State may direct the **passage** to safe routes (Art. 22 (1) UN Convention on the Law of the Sea). In particular, this applies to 'tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials' (Art. 22 (2) UN Convention on the Law of the Sea; → *Nuclear Powered Ships*). Whether this amounts to a further

criterion of **innocent passage** is subject to argument. Divergent views have been expressed on a coastal requirement of mandatory pilotage for **passage**. The Australian requirement of mandatory pilotage in the → *Torres Strait* has drawn objections from 'maritime' States. Mandatory pilotage for the territorial sea is not provided for in the UN Convention on the Law of the Sea. At the same time, coastal rights of regulation relating to **innocent passage** in the territorial sea include prescribing for such ends as safety of navigation, conduct of maritime traffic, and protection of the marine environment (→ *Marine Environment, International Protection*). Especially as regards **passage** in straits used for international navigation, the issue of mandatory pilotage has been controversial, while international solutions are pursued at the → *International Maritime Organization* (IMO).

11 On some occasions, even **innocent passage** may be interfered with. This may happen when interference is necessary to prevent a breach of the conditions set for the admission of ships to the coastal State's internal waters or a port facility outside internal waters (Art. 25 (2) UN Convention on the Law of the Sea; → *Ports*). A coastal State may interfere, for instance, with a foreign vessel suspected of smuggling alcohol or drugs to its territory. Coastal security measures have been specified in the ISPS Code: International Ship and Port Facility Security Code (International Maritime Organization 'ISPS Code: International Ship and Port Facility Security Code' [adopted 12 December 2002] SOLAS/CONF 5/33) adopted in reference to the International Convention for the Safety of Life at Sea ('SOLAS Convention') in 2002.

12 The coastal State may also 'suspend temporarily in specified areas of its territorial sea the **innocent passage** of foreign ships if such suspension is essential for the protection of its security, including weapons exercises' (Art. 25 (3) UN Convention on the Law of the Sea). The language used links the provision to military security and hardly allows suspension of **innocent passage**, for instance, for economic or environmental reasons. The length of 'temporary' suspension is not specified in the UN Convention on the Law of the Sea but should, normally, remain relatively short, a few days or weeks rather than months. According to the Convention, such suspension takes effect only having been duly published. Notifications of such suspension of **innocent passage** received by the UN Secretary-General are published at the website of the UN Division for Ocean Affairs and the Law of the Sea.

13 The concept of '**innocent passage**' usually relates to peacetime → *law of the sea*. However, it may also apply in armed conflict, for instance as regards **passage** of belligerent ships through neutral territorial sea. Such **passage** refers to the rules of → *neutrality in naval warfare*, to the effect currently applicable.

2. Coastal State Regulation

14 While the coastal State shall not hamper the **innocent passage** of foreign ships it may, to a certain extent, regulate such **passage**. According to Art. 21 (1) UN Convention on the Law of the Sea, the coastal State may adopt laws and regulations relating to **innocent passage** concerning a wide range of activities. Such regulation may, for instance, provide for the safety of navigation, conservation of fish resources (→ *Conservation of Natural Resources*), preservation of the coastal State's environment, conduct of → *marine scientific research*, and hydrographic surveys as well as prevention of infringement of the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State. Such laws and regulations shall be in conformity with the provisions of the UN Convention on the Law of the Sea and 'other rules of international law'.

15 The list of matters subject to coastal regulation has much in common with the instances of non-**innocent passage** in Art. 19 UN Convention on the Law of the Sea. This applies to activities such as fishing and marine scientific research or matters relating to customs, fiscal, immigration, and sanitary control. In such cases, coastal regulation comes close to the regime of **innocent passage**. Infringements of such regulations readily materialize as acts prejudicial to coastal

'peace, good order or security' making **passage** 'non-**innocent**'. At least in part, Art. 21 UN Convention on the Law of the Sea simply seems to authorize the coastal State to issue regulations forbidding non-**innocent** activities.

16 This is, however, not entirely the case. Among others, the coastal State may adopt laws and regulations for the preservation of its environment and the prevention, reduction, and control of pollution (Art. 21 (1) (f) UN Convention on the Law of the Sea). Such prescriptive power extends beyond the criteria of **innocent passage**. For the purpose of pollution control, **passage** of a foreign ship is 'prejudicial to the peace, good order or security' of the coastal State if it engages in 'any act of wilful and serious pollution' contrary to the UN Convention on the Law of the Sea. As a result, any act of pollution not of a 'serious' nature, as well as any accidental discharge or mere threat of pollution, is exempted from the category of non-**innocent** activities. All of them, however, seem to be covered by Art. 21 (1) (f) UN Convention on the Law of the Sea. The wording of this provision appears to be broad enough to authorize practically any type of coastal regulation on marine pollution providing that the respective laws and regulations do not 'deny' or 'impair' the right of **innocent passage**, nor discriminate against any ships or cargoes.

17 The coastal State's prescriptive competence is expressly limited in one aspect. According to Art. 21 (2) UN Convention on the Law of the Sea: 'such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards'. This provision was the result of time-consuming discussions at the Third UN Conference on the Law of the Sea ('UNCLOS III'; → *Conferences on the Law of the Sea*). Some delegations regretted the outcome as it suggested that even where international standards on ship design, construction, manning, or equipment were lacking, the coastal State could not resort to national measures but had to await the elaboration of 'generally accepted international rules or standards' for the purpose. Others, 'maritime' States, objected to broader coastal competence in order to avoid a 'mosaic' of coastal State laws and regulations on the design, construction, manning, or equipment of passing ships, and insisted on submitting coastal regulation to international standards. The meaning of 'generally accepted international rules or standards' remains subject to interpretation. In particular, its relationship to treaty law and customary law has invited argument. The UN Convention on the Law of the Sea does not offer any definition of the phrase nor do documented discussions of UNCLOS III offer much assistance in this regard. The matter has since been thoroughly examined in the work of the → *International Law Association (ILA)*, specifically its Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991–2000). In literature, views have varied from assimilation to customary law or IMO conventions in force, to less strict standards of acceptance. The relevant conclusions of the 'Final Report' (*Report of the Sixty-Ninth Conference* [London, 2000] [International Law Association London 2000] 443) of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution suggest that '[g]enerally accepted international rules and standards cannot be equated with customary law nor with legal instruments in force for the states concerned' but 'are primarily based on state practice, attaching only secondary importance to the nature and status of the instrument containing the respective rule or standard' (at 475). As such, the emphasis is on general acceptance of a rule or standard as it is, rather than general acceptance of the legal instrument containing such a rule or standard. While the issue was controversial at UNCLOS III, later developments in international regulation have reduced the need for additional national legislation (see, in particular, relevant amendments to the SOLAS Convention; the International Convention for the Prevention of Pollution from Ships, 1973 [signed 2 November 1973, entered into force 2 October 1983] 1340 UNTS 184 as modified by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 [signed 17 February 1978, entered into force 2 October 1983] 1340 UNTS 61; the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 [with Annex] [signed 7 July 1978, entered into force 28 April 1984] 1361 UNTS 2); and the ILO Maritime Labour Convention [adopted 23 February 2006, entered into force 20 August 2013]).

18 Coastal State regulation is also assumed in Arts 27 and 28 UN Convention on the Law of the Sea, providing for criminal jurisdiction on board foreign ships as well as civil jurisdiction in relation to such ships. The emphasis of these provisions being on coastal enforcement jurisdiction, they are discussed below (see paras 24–28).

3. Coastal State Enforcement

19 A ship in ‘non-**innocent**’ **passage** falls subject to full coastal enforcement powers. According to Art. 25 (1) UN Convention on the Law of the Sea, the coastal State ‘may take the necessary steps in its territorial sea to prevent **passage** which is not **innocent**’. In practice, this means that such a ship can be stopped and inspected as well as diverted from the territorial sea or detained and forced to a coastal port for the institution of legal proceedings (→ *Ships, Diverting and Ordering into Port*; → *Ships, Visit and Search*). Coastal enforcement powers are more limited in a case where the ship remains in ‘**innocent passage**’ while committing a breach of coastal regulations not amounting to ‘non-**innocent**’ activity.

20 As indicated above, in a number of cases, violations of coastal regulations may embrace non-**innocent** activity. In such instances, infringements of coastal regulations are also ‘prejudicial to the peace, good order or security’ of the coastal State, and therefore subject to full coastal enforcement powers. The same is not necessarily the case with infringements short of violating the requirements of **innocent passage**. Nevertheless, Art. 21 (4) UN Convention on the Law of the Sea—which is similar to a corresponding provision in the Convention on the Territorial Sea and the Contiguous Zone—provides that foreign ships exercising the right of **innocent passage** through the territorial sea shall comply with all laws and regulations established by the coastal State in compliance with Art. 21 (1) UN Convention on the Law of the Sea as discussed above (see paras 14–17). What this means in terms of coastal enforcement measures is largely left for → *State practice*, while the UN Convention on the Law of the Sea offers some guidance as regards vessel-source pollution.

21 According to Art. 220 (2) UN Convention on the Law of the Sea, a coastal State may extend enforcement measures to foreign vessels navigating in its territorial sea where such vessels have, during their **passage**, violated coastal laws and regulations or applicable international rules and standards for the prevention, reduction, and control of vessel-source pollution. Such enforcement may include physical inspection of vessels as well as, where evidence so warrants, the institution of legal proceedings, including detention of vessels. On the other hand, such measures are also subject to a set of flag State safeguards provided for in Section 7 of Part XII UN Convention on the Law of the Sea dealing with the Protection and Preservation of the Marine Environment (→ *Flag of Ships*).

22 Whatever the case, coastal enforcement is only allowed to the extent that the UN Convention on the Law of the Sea provisions on **innocent passage** are complied with. This raises the question whether, in the context of vessel-source pollution, coastal enforcement is allowed only where the ship commits an ‘act of wilful and serious pollution’ constituting a breach of **innocent passage** under Art. 19 (2) (h) UN Convention on the Law of the Sea. This provision refers to the infliction of pollution at the same time both wilful and serious, thus suggesting a particularly high threshold for coastal enforcement.

23 Apparently, however, Art. 220 (2) UN Convention on the Law of the Sea is not to impose such a drastic limitation on coastal competence. Instead, it implies that at least in some (serious) cases the coastal State may interfere with a foreign vessel, even if it remains in **innocent passage** but, nevertheless, commits a violation of coastal regulations established in compliance with the coastal State’s prescriptive powers. The coastal enforcement measures shall not deprive the vessel of its right to **innocent passage**, but after paying a possible fine or making other satisfactory arrangements, it should be left to proceed with its **passage**. This pattern of procedure suggests a

practical interpretation of the UN Convention on the Law of the Sea regime similar to that of the earlier Convention on the Territorial Sea and the Contiguous Zone. Admittedly, it also implies a certain contradiction: temporary interference with a ship's **innocent passage** due to coastal enforcement measures may cause it more hardship than mere diversion from the coastal State's territorial sea as a consequence of 'non-**innocent**' activities.

24 As indicated, the UN Convention on the Law of the Sea also contains specific provisions on 'criminal jurisdiction on board a foreign ship' (Art. 27 UN Convention on the Law of the Sea; → *Criminal Jurisdiction of States under International Law*) and 'civil jurisdiction in relation to foreign ships' (Art. 28 UN Convention on the Law of the Sea), allowing, to a certain extent, coastal interference with foreign ships in **innocent passage**. The articles are virtually identical to the corresponding provisions in the Convention on the Territorial Sea and the Contiguous Zone.

25 Concerning the coastal State's criminal jurisdiction, it is provided that it should not be exercised on board a foreign ship to arrest a person or to conduct an investigation in connection with any crime committed on board the ship during its **passage**, except in four cases. Again, the emphasis is on free **passage**, but coastal jurisdiction may be exercised, for instance, over crimes committed on board where the consequences of the crime extend to the coastal State. Similarly, there is coastal jurisdiction over crimes that disturb 'the peace of the country or the good order of the territorial sea' (Art. 27 (1) (b) UN Convention on the Law of the Sea), or where coastal interference is necessary for the suppression of illicit traffic of → *narcotic drugs and psychotropic substances*. Also, the case is taken into account where the master of the ship or the flag State's diplomatic or consular representative requests the assistance of coastal authorities in connection with crimes committed on board.

26 It is not entirely clear to what extent coastal jurisdiction under Art. 27 UN Convention on the Law of the Sea differs from other types of coastal (criminal) jurisdiction over vessels in **innocent passage**. One difference refers to the object of enforcement measures. Article 27 (1) UN Convention on the Law of the Sea provides for 'arrests of persons on board' while, for instance, Art. 220 (2) UN Convention on the Law of the Sea on enforcement by coastal States in the case of vessel-source pollution authorizes coastal States to institute proceedings, including detention of the vessel, where 'there are clear grounds for believing' that the vessel has committed a pollution violation (subject to the overall regime of **innocent passage**). So, the object of enforcement is the suspect of a crime rather than the vessel itself, and Art. 27 UN Convention on the Law of the Sea would seem to refer not so much to incidents (like discharge of oily ballast) related to the conduct of **passage** through the territorial sea as to other activities on board the ship which may have 'external' effects (eg a shooting on board). At least in part, though, it seems that the two provisions may also apply to similar types of activity, such as pollution violations. Of a different nature is the provision on the suppression of the illicit traffic of narcotics. It adds a specifically formulated element to the coastal State's powers of regulation and enforcement.

27 The limitations to coastal competence under Art. 27 (1) UN Convention on the Law of the Sea do not apply to arrests or investigation carried on board a foreign ship when passing through the territorial sea after leaving internal waters (Art. 27 (2) UN Convention on the Law of the Sea). On the other hand, with some exceptions, no arrest or investigation may take place on board a foreign ship in connection with a crime committed before the ship entered the territorial sea if it is only passing through the territorial sea without entering internal waters. The exceptions relate to violations (regarding fisheries and vessel-source pollution) under Part V and Part XII UN Convention on the Law of the Sea, as committed in the coastal State's → *exclusive economic zone*.

28 A foreign ship passing through the territorial sea should not, as the main rule, be stopped or diverted by the coastal State in order to exercise its civil jurisdiction thereon (Art. 28 UN Convention on the Law of the Sea). In contrast to criminal jurisdiction, it would seem that Art. 28 UN Convention on the Law of the Sea is not affected by the other rules in the UN Convention on the

Law of the Sea, but offers sole authority over the subject matter. The respective provisions differentiate between the exercise of civil jurisdiction over the persons on board and over the vessel. As to persons on board, it is simply stated that a foreign ship passing through the territorial sea should not be stopped or diverted for the purpose of exercising civil jurisdiction. With respect to the vessel, the coastal State may not, as a general rule, levy execution against, or arrest, a ship in **passage** for the purpose of civil proceedings. The coastal State may, however, levy execution against or arrest such a ship 'in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State' (Art. 28 (2) UN Convention on the Law of the Sea). No limitation, accordingly, to levy execution against or to arrest a foreign ship applies to cases where the foreign ship is lying in the territorial sea or passing through it after leaving internal waters (Art. 28 (3) UN Convention on the Law of the Sea).

C. Special Legal Problems

1. Warships

29 In both the UN Convention on the Law of the Sea and the Convention on the Territorial Sea and the Contiguous Zone, basic provisions on **innocent passage** are defined to apply to 'all ships' (Arts 17–26 UN Convention on the Law of the Sea). This suggests that → *warships* (and other government ships operated for non-commercial purposes) also are entitled to enjoy the right of **innocent passage** (→ *State Ships*). → *Submarines* and other underwater vehicles are 'required to navigate on the surface and to show their flag' (Art. 20 UN Convention on the Law of the Sea).

30 Nonetheless, **passage** of warships has raised a measure of controversy. A number of (mainly developing) States have claimed the right to demand prior authorization or at least prior notification of the entry of foreign warships to their territorial seas. When signing/ratifying the UN Convention on the Law of the Sea, certain States have made declarations claiming that a requirement of prior authorization was in compliance with the UN Convention on the Law of the Sea (→ *Treaties, Declarations of Interpretation*). This is difficult to bring into line with the convention itself. On this point, Art. 24 (1) UN Convention on the Law of the Sea appears clear enough when forbidding coastal States from imposing 'requirements on foreign ships which have the practical effect of denying or impairing the right of **innocent passage**'.

31 The question of prior notification leaves more room for argument. In declarations made upon signing the UN Convention on the Law of the Sea, Finland and Sweden, for example, took this view. In terms of reasoning, it was considered that a mere request of information neither denies nor impairs **passage**. Nonetheless, several maritime States found even requests for prior notification an unacceptable limitation on the right of **innocent passage**, and later on, Finland and Sweden abandoned their respective legislation and did not renew their declarations when ratifying the UN Convention on the Law of the Sea. On the other hand, the right of prior notification continued to be claimed by a number of others.

32 An important development took place in 1989 when the United States of America ('US') and the then Union of Soviet Socialist Republics ('USSR') agreed on a 'Uniform Interpretation of Rules of International Law Governing **Innocent Passage**' ([done 23 September 1989] 28 ILM 1444), according to which:

All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of **innocent passage** through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required (at 1446).

Absence of global uniformity in State practice, however, questions the existence of a clear cut customary rule to this effect.

33 At the same time, warships (and other government vessels operated for non-commercial

purposes) enjoy sovereign immunity under international law (→ *Immunities*; → *State Immunity*). If failing to 'comply with the laws and regulations of the coastal State concerning **passage** through the territorial sea', a warship may be diverted from the coastal State's territorial sea (Art. 30 UN Convention on the Law of the Sea) but, as a rule, it cannot be subjected to the coastal State's enforcement jurisdiction in terms of inspecting, detention, or the institution of proceedings in local court. The warship may, however, be deprived of its immunity if it resorts to hostile acts against the coastal State.

2. Hazardous Cargoes

34 In recent years, carriage of hazardous cargoes has highlighted a main difference in the views on **innocent passage**. As pointed out above, the UN Convention on the Law of the Sea does not refer to the nature of the cargo as a criterion for the innocence of **passage**. Nevertheless, a number of States have established national legislation providing for a prohibition of such carriage in the territorial sea or establishing regimes of prior notification or prior authorization to apply to ships carrying such cargoes. Regimes of prior authorization fail to comply with the requirements of the UN Convention on the Law of the Sea, while regimes of prior notification leave more room for interpretation.

35 The issue has arisen in various contexts, including transboundary movement of hazardous waste and the establishment of 'Ship Reporting Systems' ('SRS') and 'Vessel Traffic Services' ('VTS') for environmentally oriented guidance and assistance of international shipping. Conventions such as the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal have not expanded coastal rights in this regard. The Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution recognizes a coastal right of prior notification of **passage** even if not of prior authorization. While the new regimes of SRSs and VTSs provided for in the SOLAS Convention remain somewhat undefined in their effect on the right of **innocent passage**, they test the limits of coastal State competence as provided for in the UN Convention on the Law of the Sea. On the other hand, to the extent that their application draws on the approval of the IMO, they obviously secure the general acceptance of the maritime community.

36 Eventually, debates on 'prior notification' may be exhausted by technological developments. Amendments to the SOLAS Convention have included provisions on an automatic identification system ('AIS') to be installed in ships to:

provide automatically to appropriately equipped shore stations, other ships and aircraft information including the ship's identity, type, position, course, speed, navigational status and other safety-related information' (Regulation 19.2.4.5, Chapter V Annex SOLAS Convention).

AIS, working through automatic transponders placed on board, provides the coastal State with valuable information for the protection of its marine environment in terms of vessel traffic off its coastline. Regulation 19.2.4.5 does not, however, include specific reference to cargoes.

37 Particular problems have related to the transport of radioactive materials through the coastal States' maritime zones. In particular, a number of developing island States have been concerned about such **passage**. The matter has caused difficulty at the → *United Nations (UN) General Assembly* ('UNGA') when discussing the item of 'Oceans and the Law of the Sea'. According to a compromise formula appearing in recent resolutions, the UNGA notes, on the one hand, that 'cessation of the transport of radioactive materials through the regions of small island developing States is an ultimate desired goal of small island developing States and some other countries', while, on the other hand, also recognizing 'the right of freedom of navigation in accordance with international law' (most recently, see UNGA Res 67/78 [11 December 2012] para. 121). The

resolutions also note that:

States should maintain dialogue and consultation, in particular under the auspices of the International Atomic Energy Agency and the International Maritime Organization, with the aim of improved mutual understanding, confidence-building and enhanced communication in relation to the safe maritime transport of radioactive materials (see UNGA Res 67/78 [11 December 2012] para. 121).

In combination with some further provisions to similar effect (see UNGA Res 67/78 [11 December 2012] paras 120, 122) all this underlines the concerns expressed over transport of radioactive materials even if within the established framework of the regime of **innocent passage**.

38 One recent development is the → *Proliferation Security Initiative (PSI)* introduced by US President Bush in 2003. The initiative has joined a number of States in cooperation to interdict shipments of → *weapons of mass destruction* ('WMD'), their delivery systems, or related materials (→ *Weapons of Mass Destruction, Counter-Proliferation*). A statement of interdiction principles refers, among others, to stopping and searching in territorial seas vessels reasonably suspected of carrying cargoes of chemical, biological, or nuclear weapons and their delivery systems to or from States or non-State actors of proliferation concern (→ *Biological Weapons and Warfare*; → *Chemical Weapons and Warfare*; → *Nuclear Weapons and Warfare*). Interdiction of such cargoes shall, however, be consistent with the obligations of participants to the PSI 'under international law and frameworks'. It is also stated that participants to the PSI should:

seriously consider providing consent under the appropriate circumstances to the boarding and searching of [their] own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states (PSI 4(c)).

The PSI may authorize interference with foreign ships in **innocent passage** where, apparently, such interference would be based on agreement between the respective coastal and flag States (→ *Consent*). Such agreements have also been concluded. Unilateral interference by coastal States might draw some support from a broad interpretation of Art. 27 (1) UN Convention on the Law of the Sea referring, as a basis to the coastal State's criminal jurisdiction, to crimes 'of a kind to disturb the peace of the country or the good order of the territorial sea'. The PSI has gained different levels of support, but also met with reservation in defence of navigational freedoms (see Logan; UNGA 'Report of the Secretary-General: Oceans and the law of the sea' [10 March 2008] UN Doc A/63/63 para. 81).

3. Arctic Waters

39 The UN Convention on the Law of the Sea provides for a special jurisdictional regime over vessel-source pollution in environmentally vulnerable 'ice-covered areas'. According to Art. 234 UN Convention on the Law of the Sea:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

40 The provision was negotiated at UNCLOS III 'behind the scenes' between three interested States: Canada, the then USSR, and the US. The result of these discussions was then approved by others when brought 'into the open'. Like many other provisions in the convention, Art. 234 UN Convention on the Law of the Sea introduces compromise language accommodating coastal and

maritime interests.

41 Art. 234 UN Convention on the Law of the Sea notably expands coastal powers of regulation and enforcement over foreign ships in **passage**. In particular, the coastal States of 'ice-covered' waters may establish standards on the design, construction, manning, and equipment of foreign ships stricter than is otherwise the case. On several points, however, Art. 234 UN Convention on the Law of the Sea remains subject to interpretation. It refers to 'ice-covered areas' in general while understood specifically to apply to Arctic waters (→ *Arctic Region*). It speaks of areas 'within the limits of the exclusive economic zone', which raises the question of the status of territorial sea in that context. Exclusion of the territorial sea from the scope of Art. 234 UN Convention on the Law of the Sea would suggest that in Arctic waters coastal State competence over vessel-source pollution is broader in the exclusive economic zone than in the territorial sea. This gives preference to an interpretation including the territorial sea in the regime of 'ice-covered areas'. Moreover, under Art. 234 UN Convention on the Law of the Sea, 'due regard' shall be given to navigation (if also to 'the protection and preservation of the marine environment based on the best available scientific evidence'). This implies that foreign ships are not to be totally excluded from 'ice-covered areas' but also suggests that neither the regime of **innocent passage** within the territorial sea nor the freedom of navigation within the exclusive economic zone is fully to apply to such areas.

42 Environmental components of navigation in Arctic waters were elaborated on by Guidelines for Ships Operating in Arctic Ice-covered Waters adopted within the IMO in 2002. An expanded set of Guidelines for Ships Operating in Polar Waters addressing both Arctic and Antarctic areas was adopted by the IMO Assembly in 2009. The Guidelines are of a technical and recommendatory nature, and do not elaborate on the jurisdictional aspects of **passage** rights in polar waters. Preparations are also under way at the IMO to develop a mandatory code of safety for ships operating in polar waters ('Polar Code'). In view of global warming and the melting of polar ice, time will show the future importance and need of special regulatory regimes for 'ice-covered areas'.

D. Evaluation

43 The regime of **innocent passage** is well-established in customary international law. At the same time, it is regulated in detail by conventional law, especially the UN Convention on the Law of the Sea. As a whole, the relevant provisions of the UN Convention on the Law of the Sea reflect prevailing customary law.

44 The UN Convention on the Law of the Sea provisions on **innocent passage** present a compromise between 'coastal' and 'maritime' interests. As such, they constitute an important part of the 'package deal' of the UN Convention on the Law of the Sea arrangement. The particular importance of **passage** rights to maritime States is underlined in several provisions introducing to the text elements not found in the Convention on the Territorial Sea and the Contiguous Zone. This applies, in particular, to identification of non-**innocent passage** as confined to 'activities' of foreign ships. The condition or cargo of ships seem not to be relevant for this purpose. This is balanced by coastal rights of regulation and enforcement even over ships in **innocent passage**.

45 The **passage** of warships and ships carrying hazardous cargoes has given rise to some controversial practice. While the UN Convention on the Law of the Sea speaks of **innocent passage** for 'all ships' some States require prior notification or prior authorization for entry into **passage** of specific type of ships or cargo. The UN Convention on the Law of the Sea hardly offers a basis for regimes of prior authorization as it prohibits coastal States from imposing 'requirements on foreign ships which have the practical effect of denying or impairing the right of **innocent passage**' (Art. 24 (1) (a) UN Convention on the Law of the Sea). Prior notification is of a different character but was equally not incorporated in the UN Convention on the Law of the Sea. In recent times, various developments have taken place to emphasize the need for communication

in the prevention of marine pollution caused by ships in **passage**. Instalment of transponders in ships transmitting relevant information to coastal States has brought about a notification system widely accepted and, consequently, to be taken into account in the interpretation of the regime of **innocent passage** under the UN Convention on the Law of the Sea.

46 In Arctic waters, the status of **innocent passage** appears subject to argument. This concerns the areal scope of Art. 234 UN Convention on the Law of the Sea as well as, in general, practical limits on conduct of **passage** in the territorial sea in 'ice-covered areas'.

47 '**Innocent passage**' constitutes one of the cornerstones of the law of the sea. The fundamental principle of a right to such **passage** is universally recognized and well-respected in conduct. In its specific features State practice may present some contradiction, but as a whole its message is clear: **passage** not prejudicial to the peace, good order, or security of the coastal State shall not be hampered.

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