The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea

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On September 10, 1964, the 1958 Geneva Convention on the Law of the Territorial Sea and the Contiguous Zone came into force, having been ratified by the requisite 22 states. This article analyzes the debates preceding the adoption of the Convention by the 1958 United Nations Conference on the Law of the Sea, concerning Section III of the Convention—"Right of Innocent Passage"—in an effort to explore the rationale and intent of the delegates behind specific textual provisions, showing, in the process, the interplay of the various interest groups which divided the Conference. The Convention is examined in relation to its conformities to, and divergences from, previous authorities on international law in the area of innocent passage. An effort is also made to explain what the current governing international law is in areas where the Convention does not speak.

I. BACKGROUND

The right of innocent passage of foreign ships through the territorial waters of a coastal state is one of the oldest and most universally recognized rules of public international law. Jessup in his book on territorial waters has remarked that, "[a]s a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law." 1 Grotilus considered the right of innocent passage related to the "most specific and 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." 2 The right of innocent passage is premised on the general right of freedom of navigation in international waters. Grotilus was disposed to claim this right as an adjunct of the right to trade. 3 Hyde, on the other hand, claims that the right has a wider purpose. According to his interpretation, government ships, even warships, would be entitled to exercise the right of innocent passage. 4 Smith states that the purpose of this right "lies in the fact that the whole world has a legitimate and necessary interest in being able to use the seas for the purposes of normal intercourse." 5

The very term "innocent passage" implies two prerequisites for its exercise: (a) that passage be "innocent," i.e., not of such a nature as to affect the security or welfare of the coastal state; and (b) that "passage" only may be exercised, to the exclusion of such acts as "hovering" or anchoring in the territorial seas. As Smith explains it, "'Passage' is a word of motion, and in its proper use it signifies continuous movement from one place to another... It does not imply any right to remain at rest on the track or to use it for any other purpose than that of transit." 6

Innocent passage derogates from the authority and sovereignty which the coastal state exercises over its territorial seas. Even those disposed to grant the coastal state full sovereignty over its territorial waters do not claim that its sovereignty is absolute. 7 The essential question is: to what extent is the right of innocent passage an independent right, on a parity with that of the sovereignty of the coastal state; and to what extent should it be deemed a subordinate right, perhaps even a grant, of the coastal state? The concept of "innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters." 8 Many writers maintain that the coastal state exercises sovereignty; on the other hand, a minority deny the territorial character of the maritime belt and concede to the littoral states, in the interests of the safety of the coast, only certain powers of control, jurisdiction, police, etc., but not sovereignty. "The practice of states [however] seems to agree with the first-mentioned view." 9 Smith refers to the consensus of the 1930 Hague Conference on the Law of the Territorial Sea as evidence in support of the view that the authority of the coastal state amounts to sovereignty. 10

This divergence of view is by no means simply of historical

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2. Grotilus, Mare Liberum 7 (Magainn transl. 1916). See also id. at 10, 31, 43-44.
4. Id. 1 HYDE, INTERNATIONAL LAW 516 (2d ed. 1945).
5. Ibid.; cf. supra note 1, at 120.
7. Ibid.
8. Jessup, op. cit. supra note 1, at 120.
10. Smith, op. cit. supra note 8, at 45.
interest in defining the nature of the coastal state's authority in its territorial seas in relation to the general right of innocent passage, it provided the theoretical groundwork for the legal claims of the groups of contending states at the 1960 Geneva Conference.

The Geneva Conference was not the first attempt to deal with the law of the territorial sea and the right of innocent passage. The Institute of International Law dealt with this topic in 1896 and again in 1924. The Barcelona Conference in 1920 also reached agreement on a number of provisions related to the subject. In 1899 the Hague Conference on the codification of international law drew up draft articles on the law of the territorial sea. Finally, the International Law Commission prepared draft articles as a working basis for the 1968 Geneva Conference.

II. THE DRAFT

Article 1 of the Convention declares that the coastal state exercises sovereignty over its territorial sea, subject only to the provisions of the Convention and the general rules of international law. Determination of what this qualification constitutes is the key problem. One important qualification is that of the innocent passage of foreign ships. The Convention devotes ten articles to the subject of innocent passage. These articles form Section III of Part I of the Convention, Section III is divided into four subsections: (A) Rules applicable to all ships (arts. 14-17); (B) Rules applicable to merchant ships (arts. 18-20); (C) Rules applicable to government ships other than warships (arts. 21-23); and (D) Rules applicable to warships (art. 28).

A. Article 14

Article 14 provides, inter alia:

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to or from internal waters, or of making for the high seas from internal waters.

This definition of innocent passage is substantially identical to the draft submitted to the Conference by the International Law Commission. A significant feature of both texts is the inclusion of transit, to and from a port, as part of the exercise of innocent passage. This conforms to the definition adopted in the 1907 Hague Codification Conference. One school of opinion maintains, however, that transit through territorial waters for purposes of entering or leaving a port should be subjected to rules quite different from those governing the case of a ship merely traversing the territorial seas of a foreign state. The commentary to the International Law Commission draft qualifies the rule of innocent passage governing a ship leaving or entering a port, by reference to the Articles 17 (2), 20 (2), and 21 (3). These articles give the coastal state additional powers of jurisdiction in the case of a ship entering or leaving its port. Nonetheless, the principle expressed in the International Law Commission draft and adopted by the Conference is that entering or leaving a port is assimilated to general transit in territorial waters and thus accorded the right of innocent passage. This viewpoint was strongly criticized by Jessup in an article commenting on the International Law Commission draft.

The result of these three paragraphs seems to be that a vessel passing through territorial waters en route to or from a port of the coastal state is considered to be exercising a right of innocent passage. It is believed that the contrary view expressed in the Comment to Article 14 of the Harvard Research Draft on Territorial Waters is the correct one. This was the view strongly stated by the United States delegate at the 1960 Hague Codification Conference and supported by Great Britain. Access to ports should . . . properly be considered a topic separate from innocent passage. The jurisdictional rights of a coastal state are different in the two cases, exercise of jurisdiction over ships entering or leaving ports being in many instances reasonable or even necessary, while such exercise over a vessel in innocent passage could not be justified.

Jessup indicated that the 1960 Hague Conference had included entry to and exit from a port as part of innocent passage only because of special considerations, and he advocated modification of the text on this subject. The Rapporteur, in his 1966 report, 13

15. Id. at 6.
acknowledged that the difference in the regime applicable to the two forms of transit was sound. However, he expressed preference for the present text which qualified entry to and exit from a port by the aforementioned articles. The states of the Genera Conference contain no reference to this question. It is, therefore, difficult to establish whether the delegates accepted the International Law Commission draft provision because they considered it to be declaratory of existing law or because they merely felt that this was a desirable provision which should be included in the codification.

Paragraph 4 of Article 14 provides:

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with the other rules of international law.

Two points are to be noted in connection with this paragraph:

(a) the element of "passage," rather than its exercise by an individual ship, is defined. In other words, passage may be considered prejudicial to the security of the coastal state even though the particular ship involved was not acting in its capacity as a threat either in its cargo or in its manner of sailing; (b) as a consequence, the coastal state has the right to determine whether passage through its territorial waters is to be deemed innocent. An Israeli memorandum on the 1955 International Law Commission draft raises these issues. The memorandum states: "None of the dispositions ... appear to place any emphasis on the fact that it is the behaviour of the vessel herself, and not extraneous circumstances, which determines the innocent character of a particular passage." 19

A United States amendment introduced the change of emphasis from particular to general passage, and thereby a new subjective element, by implicitly limiting the application of the question to the coastal state. The original International Law Commission text read: "Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State." 20 The United States amendment read: "Passage is innocent so long as it is not prejudicial to the security of the coastal State." 21

18. Ibid.
2. Int'l. L. Rep. 1956).]
Conference 215] [emphasis added].
22. 5 Conference 38 [emphasis added].
24. 2 Conference 44.
25. Id. at 80-85.

That the United States draft proposed to create law, in the sense that no previous convention or judicial authority had claimed this to be the governing international law, appears from the statement made in the discussion by Mr. Sorensen, the Danish delegate:

[T]he revised United States proposal was unsatisfactory because it referred to passage itself as being innocent if not prejudicial to the security of the coastal State. Such a text was inconsistent with existing international law and it was not in the interests of the international community to alter the law in that respect. The proposed new formulas would enable a State to claim that the actual passage of a ship was prejudicial to its security. A submission along those lines had been made in the Corfu Channel Case. . . . the International Court of Justice, however, had not accepted that submission, and had gone on to consider the meaning in which passage was carried out in order to determine whether it was innocent. 22

The part of the Corfu Channel judgment referred to holds:

The Albanian Government has further contended that the sovereignty of Albania was violated because the passage of the British warships . . . was not an innocent passage . . . but a political mission. . . . [T]he Government of the United Kingdom wanted to ascertain by other means whether the Albanian Government would maintain its illegal attitude and again impose its view by firing at passing ships. The legality of this measure . . . cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. 23

Both the Soviet and Norwegian delegates supported Mr. Sorensen in opposing the United States amendment. Each declared that the United States proposal introduced a subjective element, allowing the coastal state too much latitude in determining whether passage was innocent. 24

The view of the United States was expressed by Mr. Yingling, who said that it was the intention of the amendment to indicate that the sole test of the innocency of a passage was whether it was prejudicial to the security of the coastal state. He claimed that the U.S. amendment allowed the greatest measure of freedom consistent with the sovereignty of the coastal state. 25 In effect, this approach would seem to imply that the sovereignty of the
coastal state assumed primary importance, and the right of innocent passage was a derogation from that primary right. It is to be noted that the United States delegate did not attempt to refuse the legal argument presented by Mr. Sorenson; he did not seek to refuse the argument that the amendment was in reality declaring new law. Rather, he asserted that the United States amendment, under the circumstances, was the fairest balance between the two conflicting interests—i.e., that of freedom of navigation and that of a coastal state's sovereignty. He pointed out that the amendment properly balanced both interests, with due emphasis on the primary right. The American argument was not based on legal criteria in the strict sense of that term but rather on criteria derived from general jurisprudential principles in the form of a balance of interests. This balance required a change from the previously accepted standard. To that extent, it was new law and was acknowledged as such.

The analysis in terms of the balancing of the interests of the coastal state and sovereignty on the one hand, and the universal claim to the right of innocent passage on the other, runs through all the debates. In most of the subsequent debates, however, the United States, as a seafaring state, adopted its more typical role of defender of the rights of innocent passage, while the Soviet Union likewise reverted to its more typical position as a vehement defender of the rights supposedly inherent in a state's sovereignty. (But see section H infra.)

B. Article 16

Article 16 provides, inter alia:

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, 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. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.
The Soviet and Indian delegates supported the Indonesian rejection of the Four Power Draft. They claimed this draft would deprive the coastal state of important rights.

In the debate on this article, there was no express reference to earlier codified law such as the Hague Conference or to the views of legal writers. Rather, the debates reflected concern with the proper balance of interests between the right of navigation and the right of sovereignty. Legal material was relegated to the background, and only the practical results of the drafts in question were offered as bases for consideration. To this extent, the Conference was not concerned with the measure of legal innovation it was introducing but rather with the practical effects on existing international conditions. That such practical considerations were uppermost in the minds of the delegates in their consideration of these articles is well borne out by the discussion on the meaning and scope of the term "security" as found in Articles 14 and 16. The Yugoslavian delegate, for example, declared that his delegation considered that the term in question covered far more than merely military security.19

In considering the wider question of whether innocent passage could be suspended by a coastal state when its economic security was threatened, the debates did produce some direct references to earlier legal authority. The Chilean delegate, in discussing the United States amendment to draft Article 15, remarked that the revised proposal, by making the security of the coastal state the sole criterion of the innocence of passage, appeared to enact a new rule of international law rather than to codify existing law. The Hague Conference and the International Law Commission, he added, had concluded that the coastal state had rights in the territorial sea which went beyond mere protection of its security; and that view was consistent with state practice and the opinion of scholars.20

Other Latin American states argued similarly, and an Eight-Power amendment to the United States’ draft was introduced by Mexico.21 The effect of the amendment was to make a threat to “the interests” of a coastal state the equivalent of a threat to its security. Presumably the prime interest motivating this move by the Latin American states was their concern for a measure of

19. Id. at 83.
20. Id. at 82.

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authority over sedentary fishing grounds off the South American coast.

Opposition to this amendment was expressed by the representatives of the sea-faring states led by the United Kingdom delegate, Sir Gerald Fitzmaurice. He remarked that the amendment, in referring to the interests of the coastal state, so widened the whole concept of possible restrictions that it would make a farce of the whole right of innocent passage.28 He pointed out that the term “interests” was not inherently limited to fiscal matters and would allow for indiscriminate interference with the exercise of innocent passage.29 In the vote on the matter, the Eight-Power amendment was rejected;30 protection for the specific fiscal interests of a state, such as customs and immigration, was to be inferred from the general tenor of the article, particularly the words “other rules of international law.”

C. Article 17

Article 17 provides:

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with those articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

The debates on Article 17 in the First Committee further illustrate the conflict of interests involved in the attempt to limit the power of the coastal state to restrict the innocent passage of foreign ships through its territorial waters. The final text adopted is that of Article 18 of the International Law Commission draft.

The adoption of the text has an interesting history. Essentially, the present text follows the 1929 Hague Codification; the latter was, however, much more detailed. Conflict at Geneva centered around whether the phrase “in conformity with these articles and other rules of international law” was to modify the phrase “the laws and regulations of the coastal State” or the phrase “foreign ships exercising the right of passage.” If the former, foreign ships need only observe those laws and regulations of the coastal state which were in conformity with international law. If the latter, there would be no such limitation on the authority of the coastal state. The International Law Commission text clearly places the limitation on the coastal state.

32. 3 Conference 85.
33. Id. at 84.
34. Ibid.
Mexico introduced an amendment which transposed the limitation to refer to the passage of the foreign ship. A group of six Scandinavian States opposed to the International Law Commission text so as to make even clearer that it was the coastal state which was to be subject to the rules of international law. Sir Gerald Fitzmaurice, the United Kingdom delegate, opposed the Mexican amendment on the grounds that it destroyed the entire balance of the International Law Commission's draft and that of the six-power proposal. He stated:

The essence of the last two texts was that foreign ships must comply with laws and regulations enacted by the coastal State, subject to the one proviso that such legislation was in conformity with the present and other rules of international law. If both measures were omitted, there would be no limitation whatsoever on the laws which the coastal State could enact. The Mexican amendment, far from making the enactment of laws and regulations by the coastal State subject to their conformity with the rules of international law" binds the ship especially different proposals; that the qualification should apply exclusively to ships exercising their right of passage.

The Chilean delegate, in supporting the Mexican amendment, declared that "[i]f would be absurd to lay down that foreign ships were obliged to conform only with the laws and regulations enacted by the coastal State, and not with the rules of international law." That is, such might be implied if the words "in conformity with international law" qualified the enactment of laws by the coastal state rather than the exercise of right of passage by foreign ships.

The Mexican proposal was accepted 33 to 30, with 10 abstentions. Under the rules of procedure the adoption of the Mexican amendment necessarily implied rejection of the Six-Power amendment.

An amendment submitted by the Greek delegation, with Dutch endorsement, prohibited discrimination between foreign vessels of different nationalities and placed further limitations on the power of the coastal state to restrict innocent passage. Although this amendment was incompatible with the Mexican amendment, which

confirmed the coastal state's unconditional right to regulate the passage of foreign ships through its territorial sea, it was adopted 31 to 15, with 18 abstentions. The Saudi Arabian delegate vigorously pointed out the complete incompatibility of the two amendments and declared that even amalgamation was impossible. Thereupon, draft Article 18, consisting of the Mexican and the joint Greek-Netherlands amendments, was rejected 34 to 28, with 10 abstentions. At this stage the Convention was without any text for Article 18. Finally the original International Law Commission draft was adopted by the Committee 29 to 6, with 5 abstentions. The two sides were evenly matched.

In connection with this provision, as in the case of provisions previously noted, little reference was made by the delegates to earlier formulations such as the standard adopted at the 1909 Hague Conference. Even the United Kingdom delegate failed to refer to it—or any similar provision—as authority in support of his delegation's amendment. Certainly the Latin American viewpoint, that the term "subject to international law" binds the ship rather than the coastal state, could adduce no authority in its support. Again, it was a clash of specific interests, rather than determination of the accepted law on the matter, which engaged the attention of the delegates.

D. Article 14(5)

Article 14(5) provides:

Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

No such paragraph appeared in either the 1930 Codification or in any of the International Law Commission's drafts. However, the Commission's commentary to paragraph 1 of this same article specifically stated that "[t]his article lays down that ships of all States, including fishing boats, have the right of innocent passage through the territorial sea." The 1956 Yearbook of the International Law Commission refers to mention by Jessup of the question of fishing vessels.

38. 3 Conference 97.
39. Ibid.
27a. Id. at 104.
Jessup had expressed regret over the fact that the Commission had never answered the question of whether fishing vessels enjoy the right of innocent passage. This problem apparently gave rise to differences of opinion between states. The Rapporteur in reply stated that in his opinion it was clear that fishing vessels did enjoy this right of innocent passage, and if the Commission agreed, an express statement to that effect might be included in the comment.44

This was done, but the Conference obviously felt that a reference in the Commentary was insufficient and that an express article dealing with the subject was necessary. Initially, a Four-Power proposal sponsored by Canada, Denmark, Italy, and Yugoslavia was submitted, declaring that fishing vessels also enjoyed a right of innocent passage, subject to the laws and regulations of the coastal state applicable to innocent passage, and if the Commission agreed, an express statement to that effect might be included in the comment.45

In that fishing vessels, as part of general shipping already enjoyed such a right, by virtue of Article 15, paragraph 1. The Four-Power proposal was therefore withdrawn46 in favor of a United Kingdom text which read as follows: "In the exercise of the right of innocent passage... foreign fishing vessels shall observe such laws and regulations as may be made and published by the coastal State."47

At a subsequent meeting, Mr. Dean, the United States delegate, stated that he would be unable to support the United Kingdom amendment. He did not question the propriety of a State's protecting the exclusive fishing rights which it enjoyed in its own territorial sea in accordance with the rules of international law. But he would have to vote against the amendment because it placed no limitation whatsoever on the kind of laws and regulations which fishing vessels would have to observe, and because it failed to require the coastal State to comply with the "present rules and other rules of international law", as required in the International Law Commission's text for article 18, which had been adopted by the Committee without dissenting voice.48

The United Kingdom delegation amended its proposal to make it acceptable to the United States delegate, "by inserting 'in connection with the present rules and other rules of international law' in the appropriate place." Thus a new limitation was again sought to be imposed on the coastal state, preventing it from unilateral regulation of foreign fishing vessels. This implied that such extensions of the territorial sea or contiguous zone as had been adopted by the South American states and which, to the vast majority of states, had no international legal validity, would not limit the right of foreign fishing vessels to innocent passage.

The Mexican delegate re-introduced the Four-Power amendment in the name of the Mexican delegation alone. The Mexican amendment made no reference to a need for the coastal state's laws to comply with international law.49 The Chilean delegate, in supporting the Mexican amendment, pointed out that "under the United Kingdom amendment, a fishing vessel which failed to observe the fishing rules and regulations of a coastal state could still be regarded as in innocent passage."50 The Venezuelan delegate also supported the Mexican amendment.51 The Mexican amendment was adopted 29 to 23, with 14 abstentions.52

E. Article 15

Article 15 provides:

1. The coastal State must not hamper innocent passage through the territorial sea.
2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

The positive duty to which the coastal state is subject in this provision should be contrasted with the more general and passive duty expressed in the Hague draft: "A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea."53 The change in the measure of duty incumbent on the coastal state is a consequence of the International Court of Justice decision in the Corfu Channel Case,54 which declared that the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters.

44. 2 Yearbook, op. cit., supra note 17.
46. 3 Conference 286.
47. Id. at 109.
49. 3 Conference 113.
50. Id.
52. 3 Conference 113.
53. Id.
54. Id. at 114.
waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, ... which is applicable in time of war, but on certain general and well recognized principles, namely: elementary considerations of humanity, even more earlier in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. The basis of this decision the International Law Commission draft sought to impose considerable obligations on the coastal state to ensure freedom of passage in its territorial waters. The Commission draft was considerably attenuated as a result of amendments at the Conference, but the rule adopted was still more stringent than was the rule in effect prior to the Corfu Channel Case. The Commission draft had proposed that the coastal state be "required to use means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other States." The United Kingdom delegate said that "this delegation ... proposed ... the deletion of the latter part of the ... sentence because the obligation which it would impose on a coastal State was not recognized in existing international law, and the wording raised manifold problems of a political nature. Furthermore, no State could comply with such an obligation without subjecting the passage of every ship to the closest supervision, and thus hindering the freedom of navigation." The United States delegate explained that his delegation's amendment had been prompted by the belief that the sentence embodied certain rights unknown to the law of nations. He said that "[t]he compliance with those rules would impose on the coastal State a heavy economic burden, and there was no justification for introducing the notion of absolute liability." The text as adopted meant that the coastal state was not bound to take actual measures to ensure the right of innocent passage of foreign ships. Unlike the Corfu Channel rule, it merely required the coastal state to give appropriate publicity to anything which might affect the exercise of that right. The difference is in the degree to which the coastal state bears a duty in reference to the innocent passage of foreign ships through its territorial waters. It would not be correct to assume that the sole or major reason for the United States—United Kingdom amendment was to lighten the burden on the coastal state. Of considerable significance is the statement by the United Kingdom that such a heavy duty on the coastal state might require it to subject the passage of every ship to the closest supervision and thus hinder the freedom of navigation. There is no doubt that such a form of duty to investigate could be abused. Here again, the sea-faring nations were true to their primary interest, the greatest measure of maritime freedom possible. In an endeavor to attain this goal, they did not feel bound to conform to the declared law on the subject, even if this declaration had been made by an authoritative body as the World Court. It is true that the delegates, particularly the United States representative, sought to disqualify the binding authority of the relevant passage in the judgment, by classifying it as obiter. But the very line of reasoning adopted only helps to emphasize the underlying interest which prompted the actual changes proposed. The delegates recognized that their formulation of the law was different from that of the Court, but they preferred to declare the law in accordance with what they thought the circumstances warranted. They were not, however, creating new law; they merely preferred to revert to a more conservative standard of duty on the coastal state, in order to ensure that the greater duty, which was designed to promote the freedom of innocent passage, should not operate seriously to hinder it. One might say that while it appeared that the Court's view in this matter and the view expressed in the amendment were inconsistent, in intent and purpose they were at one, namely, to effect an unhampered exercise of the right of innocent passage. In the light of this interpretation, it would not be correct to assume that the delegates felt that they were creating new law—rather they were formulating the same law more carefully, so as to prevent distortion of its true aim. F. Article 16(4) Article 16(4) provides: There shall be no suspension of the innocent passage of foreign ships through straits which are used for interna-

57. Id. at 22.
60. 3 Conference 77-78.
61. Id. at 79.
63. 3 Conference 78; it added that it was based on simply a dictum in the Corfu Channel Case and that the sentence had hardly been adopted by the International Law Commission. Ibid.
nacional navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

The first half of this paragraph, dealing with straits connecting two parts of the high seas, is based on the Corfu Channel decision. The latter half, dealing with straits connecting territorial waters to the high seas, is a novel provision in the codification of the law of the sea. It was meant in particular to cover the case of the Straits of Tiran which provide the sole means of access to the southern Israeli port of Elath. In reference to the general question of passage through straits connecting the high seas the International Court has declared:

'It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of war are not bound to close their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.'

The International Law Commission, in adopting this decision, prepared the following draft for Article 17 (4) (the present Article 16 (4)): "There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas." Two points to be noted in this draft are:

(a) Inclusion of the word "normally" to qualify usage of the straits for navigation and (b) omission of any reference to right of access to territorial waters through international straits.

The Commission's draft was the subject of strong critical analysis in an Israeli memorandum on the subject. The memorandum declared that the correct manner of looking at the question of innocent passage is to regard the principle of freedom of navigation as part of the essence of any rights of sovereignty, including those classified by the Commission as rights of navigation, as an extension from the predominant right and interest of the international community. What this means is that where access to a given port is possible by traversing a strait (in the geographical sense), then it is quite immaterial whether that strait is or is not

64. [1949] I.C.J. Rep. at 28 [emphasis in original].
to the maritime countries." 74 To this the Saudi Arabian delegate expressed opposition. He questioned the legal validity of the changes proposed in the Three-Power Amendment. To begin with, he asked why the word "normally", which had been part of the International Law Commission draft, had been omitted. Furthermore, he considered that inclusion of straits providing access to territorial waters under the general principles governing international straits would constitute an existing international law. In support, he cited the Corfu Channel Case, which, by omitting any declaration on this question, implied that no right of innocent passage existed in such cases. In conclusion, he said that in his opinion "the amended text no longer dealt with general principles of international law, but had been clearly tailored to promote the claims of one State." 75 The Indonesian delegate also expressed the view that no right of innocent passage existed in the case of straits connecting territorial seas with the high seas. 76

The Netherlands delegate replied to these different arguments by stating that the term "normally" had been dropped because it was considered that the paragraph should apply to sea-lanes actually used by international navigation. Furthermore, "the addition of the words 'the territorial waters of a foreign State' reflected existing usage safeguarding the right to use straits linking the high seas with the territorial sea of a State." 77 The Netherlands delegate did not, however, refer to any specific authority in support of this new insertion. 78

The Soviet delegate spoke in favor of retention of the qualifying word "normally" which, he said, had been suggested by the decision of the International Court of Justice in the Corfu Channel Case. 79 The United States delegate agreed that the case had been submitted as the authority for including the term in question. He noted that careful examination of the records of that case, however, would show that the Court itself had never used the word. The Commission had not taken a vote on the insertion of the word "normally", which had been proposed by the Soviet member at the Commission's seventh session and accepted without discussion. He therefore considered that the Committee was free to delete or re-
innocent passage has long been a source of controversy. The International Court of Justice, which declared such a right to exist in reference to passage through international straits, specifically reserved the question "whether such a right existed in other terrestrial waters." 87 Eilhu Root, in a famous statement made during the North Atlantic Coast Fisheries Arbitration, declared that "Warships may not pass without consent into this zone [the territorial sea], because they threaten. Merchant-ships may pass and repass, because they do not threaten." 88 Jessup has written: "As to warships, the sound rule seems to be that they should not enjoy an absolute legal right to pass through a state's territorial waters any more than any other ship may. The wise declares that warships do not enjoy a right of innocent passage." 89 This is also the view adopted by Oppenheim 90 and by the Harvard Research Draft. 91 On the other hand, many authorities maintain that warships do enjoy a right of innocent passage. Among those supporting this viewpoint are Hyde, 92 Moore, 93 and Westlake. 94

In the Corfu Channel Case, the United Kingdom, aided by a United States Navy publication, set forth the practice of states respecting innocent passage for warships. The collection showed that the regulations of 84 states clearly assumed a right on the part of warships to traverse territorial waters; only one state, Rumania, required prior notification; and the views of two other states were unclear. The United Kingdom also noted that in the 1930 Hague Codification Conference questionaire, 15 states recognised that warships had a right of passage, and only 3 states besides Rumania denied the right (the United States, Bulgaria, and Latvia.) 95

In the only article in the Convention specifically relating to warships and read: "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea, and regards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea."

88. 21 Proceedings, North Atlantic Coast Fisheries Arbitration 2007 (1911).
89. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927).
90. 90. 21 Proceedings, North Atlantic Coast Fisheries Arbitration 2007 (1911).
91. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927).
92. 21 Proceedings, North Atlantic Coast Fisheries Arbitration 2007 (1911).
94. 21 Proceedings, North Atlantic Coast Fisheries Arbitration 2007 (1911).
95. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927).
Prior to the vote, the Arab states expressed strong views against draft Article 24, as did Albania, Indonesia, Iran, and Bulgaria. The Ceylonese delegate remarked that he had voted against the deletion of the words "authorization or," since its effect was "to subordinate the sovereignty of the coastal State to that of the flag State of the warship effecting passage." The Indian delegate, Mr. Sikri, said: "India regarded the passage of warships through its territorial sea as a courtesy, and in practice never refused such passage. But it could not regard such passage as a right, and as reserved its own right to refuse it. He would vote against [draft] Article 24 and, if it were adopted, his government would enter reservations to it." The Ghanaian delegate said that he would vote against draft Article 24 "since a vote for that article by weaker countries would be tantamount to aiding and abetting their own extermination."

The United States delegate said that it was "generally recognized, and laid down in many authoritative legal texts, that innocent passage for warships through territorial waters of other States was admissible in time of peace." To this statement the Soviet delegate, Mr. Tunkin, expressed surprise and cited the stand of the United States delegate to the 1930 Hague Conference who espoused the contrary view, i.e., that the passage of warships was based on international courtesy and not right. The Italian delegate remarked that the right of innocent passage of warships was one of the oldest rights in international law and was not a simple matter of international courtesy.

Although draft Article 24 failed to receive the necessary two-thirds majority for adoption, draft Article 25, Article 23 of the Convention, was overwhelmingly adopted. This article empowers the coastal state to require a warship passing through territorial waters to leave territorial waters if the warship fails to comply with that state's regulations. Since no separate article bestows a right of innocent passage on foreign warships, the question remains open. The Soviet bloc countries expressly declared in reservations at the time of signing that they did not recognize any right of in-

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105. Id. at 67.
106. Ibid.
107. Ibid.
108. Ibid.
109. Ibid.
110. Id. at 67-68.
111. Id. at 68.
112. Ibid.
113. Ibid.
114. 4 WHITMAN, supra note 97, at 414.
115. 2 CONFERENCE 67.
116. Sorenson, supra note 85, at 236. The reference to submarines in Article 14, para. 8, requiring them to navigate on the surface when exercising the right of innocent passage, does not imply that warships have such a right. This paragraph can be relocated strictly to submarines used for commercial purposes.
assumption that present day international law actually recognizes an unlimited right of innocent passage of warships. Finally, the fact that the International Law Commission in its final draft empowered the coastal state to require authorization or notification would seem to add authority to the view which denies an unrestricted right of passage for warships. Certainly notification to the coastal state, if required, would seem to be the minimum requirement before warships could lawfully exercise the right of innocent passage. The abiding force of this rule stems from the fact that both the International Law Commission draft, and the revised draft presented to the Plenary Session for final vote prescribed fulfillment of this requirement. The reason that this rule was not carried by the necessary two-thirds majority in the Plenary Session was not because the delegates felt it prescribed too high a duty on the naval state but rather that the duty prescribed was not sufficiently onerous. Certainly, then, an international court would be bound to give consideration to the fact that the overwhelming majority of states favors and endorses the requirement of notification by warships as a prerequisite for passage through the territorial waters of another state. This rule, of course, only applies where the coastal state has effectively promulgated and declared such a requirement.

In the case where a coastal state also requires authorization for the passage of foreign warships through its territorial waters, the Court might be compelled to go back to the original premise and basic assumptions underlying the right of innocent passage. If it is a mere grant by the coastal state in derogation of its sovereignty, in case of doubt the rights of the coastal state would be favored. On the other hand, if the right of innocent passage is an independent right, derived from the universal freedom of navigation, it would follow that the warships of any state are free to traverse territorial waters. This latter argument could only be sustained if the whole concept of innocent passage is subsumed under a wider category as claimed by Hyde.\textsuperscript{117} If, however, the interpretation of Hall\textsuperscript{118} is accepted, that innocent passage is an adjunct of the right to trade, it follows that warships would not be entitled to exercise innocent passage unless expressly authorized.

Above all, the Court might be inclined to consider the actual practice of states on this matter. In view of the fact that the majority of states do not require authorization for the innocent

\textsuperscript{117} Hyde, op. cit. supra note 93, at 515-16.

\textsuperscript{118} Hall, op. cit. supra note 90, at 162-63.


international law that the coastal State had unlimited criminal jurisdiction within its territorial sea." The First Committee adopted the United States proposal by 23 votes to 21, with 20 abstentions.

Paragraph 5 had never appeared in the Commission draft. It was added at the instigation of the United Kingdom. The motive was quite the opposite of that behind the United States amendment. It sought to ensure that the sovereignty of the coastal state would have only limited applicability in the field of criminal jurisdiction so that the right of innocent passage would not be needlessly impeded. In this purpose the two amendments were in stark contrast. Nonetheless, the Committee adopted both amendments, reflecting once again the close balance between those intent on confirming the sovereignty of the coastal state and those more concerned with the broad rights of innocent passage. Both amendments were confirmed by the plenary session, except for deletion of the word "generally" from the United States amendment.

A similar see-saw struggle took place over adoption of the wording in Article 20, dealing with the subject of civil jurisdiction. Article 20, in Article 20, inter alia, provides:

1) The coastal State should not stop or divert a foreign ship passing through the territorial seas for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2) The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course of or for the purpose of its voyage through the waters of the coastal State.

Once again there is a contrast between the use of hortatory language in paragraph 1 and mandatory language in paragraph 2. The International Law Commission draft had utilized hortatory language in both paragraphs. The change in paragraph 1 was the result of a United States amendment which sought to replace the Commission's "may not arrest" with "shall, generally, not...

121. 2 Conference 81.
123. 2 Conference 66.

stop. . ."

The United States, in line with its argument "that international law did not recognize the curtailment of the coastal State's civil jurisdiction," also sought to amend paragraph 2. In place of the Commission draft (identical with the final text) the United States amendment would have substituted "The civil jurisdiction of the coastal State over ships in innocent passage shall be exercised with due regard to the interests of navigation." Members of the First Committee were not slow to recognize the radical implications of the U.S. amendments. The Norwegian delegate objected to the proposed amendment to paragraph 1 on the ground that the amendment would transform the original rule (which, he maintained, "conformed to the generally accepted standards of international law") into "nothing but a polite request to coastal States to be reasonable in the exercise of their civil jurisdiction. . ." The U.S. amendment to paragraph 2, he declared, was totally objectionable, since "in practice . . . it would amount to total deletion of the paragraph."

The U.S. amendment to paragraph 1 was accepted in part and rejected in part. "Should not" was inserted in place of "may not"; but the word "generally", which would have instituted a far more radical modification in the Commission text, was rejected. The U.S. amendment to paragraph 2 was totally rejected and the International Law Commission text was adopted in toto. The Convention thereby affirmed the absolute ban on the exercise of civil jurisdiction by the coastal state with reference to events taking place prior to the ship's entry into the coastal waters, as already enunciated at the Hague Conference in 1930. In the interim period a contrary decision had been delivered on the subject in the case of the David. This decision had been the subject of criticism by Jessup and Borchard. By reaffirming the Hague rule, the Convention decisively repudiated the David decision.

126. 3 Conference 82.
128. 3 Conference 119.
129. Id. at 125.
130. 2 Conference 125.
131. Id.
134. 27 Am. J. Int'l L. 747 (1933).
135. Id. at 99, 108 (1935).
136. LAW OF THE SEA
During the debates, certain delegates noted that the subject of civil jurisdiction had been dealt with in considerable detail in the 1952 Brussels Convention.\textsuperscript{136} They sought to ensure that no conflict would arise between the provisions of the present Convention and those of the Brussels Convention and submitted various amendments to that end. The matter was resolved by adoption of a general provision in Article 25 which declared that "the provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them." The discussions on Articles 19 and 20 once again reflect the difficult task of balancing the interests of the coastal state and the rights of the sea-faring vessel. The United Kingdom, Denmark, and Norway, supported this time by the Soviet Union, sought to allot the coastal state criminal and civil jurisdiction only under specified conditions. The United States on the other hand regarded the sovereignty of the coastal state as paramount and would have accorded the coastal state absolute jurisdiction. In this instance the Soviet Union and the United States once more revealed their own dichotomy of interests—at times supporting the sea-faring states and at other times the coastal states.\textsuperscript{137} In this instance, the Conference overwhelmingly adopted the view of limited jurisdictional rights for the coastal state, and in so doing apparently believed it was simply confirming existing international law.

III. CONCLUSIONS

The United Nations Conference on the Law of the Sea, and the resulting Convention on the Territorial Sea and the Contiguous Zone, offer a singular illustration of the elements influencing the final result of a conference of this nature. The basic principle of innocent passage remained unquestioned throughout. The general character and scope of this right, as enunciated in the Conference and Convened by it, was based largely on the draft submitted by the International Law Commission. This draft in itself followed the outline established by the 1930 Hague Conference. Thus, in its broad pattern, the section on innocent passage draws heavily upon earlier established principles in this field. The play of conflicting interests is seen only with regard to the detailed phraseology adopted for particular provisions. On these details there was, generally, very little judicial or legal opinion to

\textsuperscript{136} See 3 Conference 119-20, 123-24.

\textsuperscript{137} The Soviet Union, in this instance, may have been motivated by its desire to protect its extensive "trawling" operations, especially in the vicinity of the United States.
teria for determining the right of innocent passage, particularly in view of the fact that fishing vessels were also recognized as possessing the right. Above all, they sought adoption of rules which would require the ship exercising the right of innocent passage to conform to the rules and regulations of the coastal state, whether these rules in themselves conformed to international law or not. Other matters, such as the question of innocent passage for warships or the question of access to seaports through certain straits, there was no uniform policy line, because these questions did not affect their special interest. The foremost argument of this position was premised on a concept that law is a dynamic element in society and must evolve to solve economic and social requirements.

The "specific interest states" were, on the one hand, Israel, which sought to ensure its right of access to Eilat through the Straits of Tiran, and, on the other hand, the Arab States, which sought to deny this right. There was very little concealment of this clash of interests. Israel, quite naturally, sought to gain the support of the sea-faring states, which were primarily interested in securing the unobstructed right of innocent passage. The Arab states, on the other hand, sought the support of the "security group." But it was not a simple clash of these two groups. Pointedly, it was a struggle to gain a political solution within a context of law codification. The exact issue had never been broached before, and the Conference was offered an opportunity to establish a rule, the effect of which would alleviate a dangerous situation. In this specific context, the vote became a test not only of attitudes toward the principle of free maritime communications but also of attitudes toward the Arab-Israel conflict."

Both sides openly acknowledged the political nature of the conflict. In the First Committee of the Conference, the Yemeni delegate declared: "The codification of the international law of the sea had political implications, and it was impossible to consider the problems involved from a purely technical point of view. . . ."

The debates, which represent only the points at issue between the delegates, indicate that juridical authority played a subordinate role to other motivations and interests. Although the delegates were at one in their acceptance of the general principle, the primary interest of each state or group of states came to the forefront on specific issues. In support of their views, the delegates drew very sparingly from legal authority; rather they argued the issues in terms of the practical consequences. On occasion, they advocated proposals which were, in fact, contrary to earlier declared law on the matter. The issue of warships illustrates the relative disinterest of the delegates in legal precedent. Perhaps earlier authority was so split that little probative value could be attributed to it. It appears in any case that the security needs of certain states were placed before all other considerations in determining this matter. In reference to the question of access to ports through certain straits, the issue produced no legal argument of note. Here again, there was practically no authority, and the Conference concerned itself with non-legal factors. It may be said, then, that on those questions which elicited conflict between various interest groups, the solution was sought through non-legal or quasi-legal approaches. The fact that the Convention in its framework and general scope adhered so closely to the International Law Commission draft indicates the value of such preparatory work in the formulation and codification of international law. It was the I. L. C. draft which provided the outline, classification, and basic substance of the final Convention. Moreover, the draft enabled the delegates to come to grips with the various proposals designed to alter an existing standard or to solve an unanswered question. Obviously important changes were made; but these changes referred only to particular issues, such as the introduction of a subjective standard in determining the right of innocent passage, access to seaports through international straits, specific reference to fishing vessels, or omission of reference to warships. The underlying principle of innocent passage was never at issue. What was at issue was the relative weight to be accorded, in specific instances, to the sovereignty of the coastal state on the one hand and the right of freedom of navigation on the other. While in the exceptional instances cited, the final Convention reflected a different balancing of the two factors from that of the International Law Commission, the delegates in the main followed the I.L.C. draft as representing the fairest balance possible.