Innocent Passage of Warcraft in Territorial Seas from a Historic Perspective

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1. Introduction

This thesis is concerned with the innocent passage of warcraft. It deals not only with warships but also with submarines and aircrafts.

The territorial sea of a state is part of its sovereign territory.[1] The coastal state exercises there rights and duties with some exceptions.

In the case of doubts, as to rights in this zone, there is the legal presumption in favour of the sovereignty of the coastal state.[2]

An exception of the sovereignty that the coastal state enjoys there is the right of innocent passage for foreign ships through the territorial sea. This right is today well established in the international customary law[3] and in the conventions for the Law of the Sea.[4] It has however long been disputed whether this right also applies to warships in the territorial seas.

This thesis deals with the historical development of the dispute, whether the right of innocent passage is also applicable to the passage of foreign warships through the territorial sea of an another state.

> "The question of the passage of warships has been one of the most controversial issues in the international law since the establishment of the regime of innocent passage in the late 19th century. No agreement as to what is or should be the legal rule has been in existence in the writings of the publicists. Nor has there been uniformity in state practice. It seems that both doctrine and state practice during the past 100 years have been dualistic rather than monistic.[5] —

Before I start with the real dissertation, it is the best to deal briefly, with the concepts of warship, passage and innocence.

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[1] art. 2 of the Law of the Sea Convention (LOSC).
[2] Brown p. 20
[3] Hall p. 198
[4] art. 14 of the Convention on the Territorial Sea and Contiguous Zone (TSC), art. 17 LOSC
[5] Shao Jing, p. 62

1.1. Warship

The first question is what kind of vessel falls under the term "warship".

> Art. 29 LOSC defines a warship as a "ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."

Before the emergence of this definition, the situation was not altogether clear.

No direct definition of the term warship occurs in the official documents of the Hague Conference of 1930. An indirect reference can however be found in the Report of the Second Committee on art. 4, which lay down right of innocent passage of vessels other than warships. "The expression vessels other than warships includes not only merchant vessels, but also vessels such as yachts, cable ships, etc., if they are not vessels belonging to the naval forces of a State at the time of passage."[6]

From this time it was clear, that warships were vessels belonging to the naval forces of a state.

This basis was further developed during the preparations for the 1958 Geneva Conference of the Law of the Sea. The International Law Commission (ILC) adopted at its seventh session in 1955 the following definition. "The term warship means a vessel belonging to the naval forces of a state, which is under regular naval discipline."[7] This definition is very similar to arts. 3 and 4 of the Convention on the Conversion of Merchantships into Warships adopted at the Hague Peace Conference 1907. Later at its eight session in 1956 the ILC adopted a supplement to the definition, that a warship must bear the external marks distinguishing warships of its nationality.[8] This definition was included in the Convention on the High Seas (HSC)[9]. Art. 29 LOSC clears up possible doubts that this definition applies to the whole law of the sea.

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[6] League of Nations, Conference for the Codification of International Law, Report of the Second Committee (Territorial Sea), C.230.M.117.1930.V., p. 7 quoted by De Vries p. 32

[7] I.L.C. Yearbook 1955, Vol. II p 23(Art.7 para.2) quoted by De Vries p. 32

[8] De Vries p. 33

[9] art. 8 HSC

1.2. Passage

Passage through the territorial sea is defined in art. 14 (2) and (3) of the TSC as:

> (2) Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal, or of making for the high seas from internal waters.
>
> (3) Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

The definition in art. 18 of the LOSC is in principle similar, but with some additions.

> (1) Passage means navigation through the territorial sea for the purpose of a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or b) proceeding to or from internal waters or a call at such roadstead or port facility.
>
> (2) Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same 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.

The provisions that passage shall be continuous and expeditious is added. Roadsteads and other port facilities outside internal waters, as for example deep water ports, are not dealt in the TSC.

"Stopping and anchoring for other reasons may be lawful, but may cause the stay in the territorial sea to cease to be part of the passage, so that the ship cannot claim the right of innocent passage any longer."[10]

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[10] De Vries p. 34

1.2. Innocence

There have been many attempts to define when passage is innocent and when not so. It is wise to think of the following warning by Sir Gerald Fritzmaurice: "Innocent passage is one of the those concepts easy to understand, and not too difficult to apply in the concrete case, but liable to give rise to difficulties as soon as attempts are made to define them in precise terms."[11]

Art. 3 of the Final Act of the 1930 Hague Codification Conference provided: "Passage is not innocent when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the public policy or the fiscal interests of that state."
In the observations on art. 3 it was added, "that the passage ceases to be innocent if the right accorded by international law and defined in the present Convention is abused and in that event the Coastal State resumes its liberty of action."[12] This statement indirectly describes innocent passage.

The ILC proposed in 1958 the following definition. "Passage is innocent so long as the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules or to other rules of international law."[13]

The Geneva Conference on the Law of the Sea changed this proposal and adopted a modified definition of innocent passage.

"Passage is innocent so long as it 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 other rules of international law.[14] The definition of innocence in art. 19 LOSC is similar. There however the similarity between the two Conventions ends. Art. 19(2) of LOSC goes on to specify what is meant by prejudicial in this context with the enumeration of examples.

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[11] Fritzmaurice, Some results ... p. 92
[12] League of Nations, Conference for the Codification of International Law, Report of the Second Committee (Territorial Sea) C.230.M117.1930.V., p.7. quoted by De Vries p. 35
[13] ILC Yearbook 1956 Vol. II, p. 258 quoted by De Vries p. 35
[14] art. 14 (4) TSC

The TSC gave only one example of non innocent passage. Art. 14(5) TSC states: "Passage of foreign fishing vessels shall not be considered innocent if they do not observe such law and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea." The examples of non innocent in art. 19(2) LOSC are more various and precise.

I shall proceed to a historic analysis of the dispute concerning warships and innocent passage.

2. Innocent Passage of Warships

2.1. Historical Background

The right of innocent passage through the territorial sea for foreign ships is connected with the development of the concept that the coastal state exercises sovereign rights in the waters adjacent to the shore. The first writer who promoted such an idea of innocent passage for foreign vessels was Vattel in 1758. He declared that "ships of all states enjoy a right of innocent passage through the territorial sea".[15] This opinion of Vattel was not the general view of his contemporaries and immediate successors.

The 17th and 18th centuries was the time, when writers argued about the nature of the territorial sea, property theory against sovereignty theory.

The concept of innocent passage was more incompatible with the sovereignty theory. The concept at this time was not well defined right and the concepts of innocent passage and coastal sovereignty developed in parallel, each helping to mould the other.[16]

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[15] Vattel in Le droit des gens (1758), quoted by Churchill and Lowe p. 60

[16] Churchill and Lowe p. 61

The Spanish colonial rights in the 17th/18th centuries show that the property theory was prevalent at this time.

> "The Spanish Empire, especially the colonies in Middle and South America were in principle closed for foreign shipping. Spanish colonial coast guards were under instructions to prevent foreign ships from approaching Spanish colonial ports. Commercial trade with the Spanish colonies was forbidden, except for Spanish ships."[17] "Spain claimed the exclusive right of navigation in the western portion of the Atlantic, in the Gulf of Mexico, and in the Pacific. Portugal assumed a similar right in the Atlantic south of Morocco and in the Indian Ocean.[18]

Under these circumstances there was no demand for passage rights, because free trade was impossible (except in European waters). One fifth of the world and nearly all commercially interesting overseas areas in this time were Spanish. From a navigational point of view, there was no demand for a passage right near the shore. The 18th century was the golden era for sailing navigation. Sailing ships kept naturally their distance from the shore unless making port. They avoided sailing close to the shore, because of the existence of cliffs and reefs. This situation changed in the first half of the 19th century.
As a result of the revolt in the Spanish American Empire most of the South American colonies became independent. This was the end of the prohibition on trade with territories outside Europe. In these circumstances it was natural that the emphasis changed from protection of the shore to promotion of commerce with foreign countries.[19]

Also as a result of the technical development, navigation started to take place more and more with steamships than with sailing vessels. Steamships were not depended on wind and currents. They could take the shortest route between points, and could also use coastal waters when convenient.[20]

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[17] O'Connell p. 262
[18] Fulton p. 4
[19] O'Connell p. 263
[20] ibid. p. 263

The first author to reflect this change was Massé in 1844. He argued that "rights of the coastal state did not extend to interfere with commercial navigation, because it possessed only jurisdiction, not property in the territorial sea."[21]

Since the middle of the 19. century the right of innocent passage has been well established in the practice of states.[22]

2.2. Developments up to World War I

2.2.1. State practice

The history of the dispute, whether warships enjoys a right of innocent passage or not is old. It became acute after the establishment of the right of innocent passage. Obviously before this period no distinction between warships and merchant ships was drawn.[23]
There were some treaties between states that regulated for example the number of foreign warships entitled to enter a port (ordinary six vessels).[24] These treaties are for example the treaties between France and Denmark of 1662, 1678, 1697, 1713 and 1739.[25] The treaties did not deal explicitly with passage rights through coastal waters of the parties. They provided that warships of both monarchs should have a right to enter harbours, rivers, port and ride at anchor. Numerical limits were for example fixed in the treaty of 1748 between Denmark and the two the two Sicilies and in the treaties of 1767 and 1801 between Russia and Sweden.[26]
Before the establishment of the right of innocent passage, the main argument against passage rights of warships was that they would threaten the security of the coastal state.

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[21] Massé. G., Le droit commercial dans ses rapports avec le droit des gens (1844), quoted by O'Connell p. 263
[22] Hall p. 198
[23] O'Connell p. 275
[24] ibid. p. 275
[25] ibid. p. 275
[26] ibid. p. 275

> "In 1807 the United States closed its waters after HMS Leopard fired into USS Chesapeake which resisted search for British deserters. This precedent was relied upon by Wharton for his statement that the admission of warships within territorial waters might be refused on due cause."[27]

Strictly speaking this case was not a case of a passage of a foreign warship through territorial waters, consequently it cannot be a precedent case against a passage right of warships. The opinion of Wharton shows, however that the former threat argument against the passage of all ships in territorial waters now became an argument against the passage of warships in these waters. The state practice on innocent passage of warships before World War I was not uniform. The reasons for this are mentioned above. In the property period of the territorial sea the right to exclude all foreign shipping was conceded to the coastal state, which might tolerate foreign shipping as a matter of practice, without being required to do so. Also as mentioned above, warship fleets in former times were mostly sailing fleets. These fleets preferred rather to sail in deep waters than near the shore. Ironclad warships became established with the technological revolution in naval construction[28] and were used for the first time in the American Civil War 1861-1865. For warships it was now possible to navigate independently of current and wind and also, if convenient, near the shore.

The first sharp distinction between passage right of warships and other vessels was drawn during the Danish War 1850, when Lübeck issued a neutrality decree closing its territorial sea to warships of all belligerents.[29] The next step was the Paris Treaty of 30 March 1856 closing the Black Sea to the warships of all nations.[30] This, like the Treaty of Berlin of the 13 July 1878, embodying the decisions of the Congress of Berlin, declared that the waters of Montenegro should be closed to the warships of all nations[31], were only contrived political compromises and indicated no general principle.[32]

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[27] ibid. p. 262
[28] ibid. p .275
[29] Voigt (1937), 49 quoted by O'Connell p.277
[30] 46 BFSP 13, Art.11 quoted by O'Connell p. 277, later this decision was chanceled. Parties to this treaty were Russia, Prussia, Austria, England, France, and the Ottoman Empire
[31] 69 BFSP 749, Art.29 quoted by O'Connell p. 277
[32] O'Connell p. 277

The next big step in the development of this dispute was a statement made by an official agent of the United States of America in 1910. Elihu Root[33] pleaded for the USA against Great Britain in the hearings of the *North Atlantic Fisheries Arbitration* at the Hague Tribunal. He said:

> "These vague and unfounded claims (of the England, the Netherlands, Spain and Portugal in the 18th, 17th, and earlier centuries in regard to the territorial sea) disappeared entirely, and there was nothing of them left...The sea became, in general, as free internationally as it was under the Roman law. However the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognised in the international law of today. *Warships may not pass,* without consent in this zone, because they threaten. Merchantships may pass and repass because they do not threaten."[34]

This is a famous argument against a passage right for warships. The opponents of such a right still use this argument. It is based on the presumption of the sovereignty of the coastal state to the waters near the shore. These waters near the shore, the territorial waters, were for Elihu Root in the first place a protective area. From such a point of view warships should not be in this zone. Only merchant ships are allowed to navigate, because they serve the commerce, and consequently the welfare, of the coastal state. The question now is, whether this attitude of the United States at the beginning of this century indicates the general attitude of all states at the time. O'Connell writes: "At this time this was scarcely more than an expression of opinion, since there was so little State practice to support a doctrinaire stand one way or the other, beyond the unquestionable fact that warships regularly made transits by the shortest routes."[35] Unanimity between states showed the Hague Peace Conference in 1910. The question of warships arose at the international

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[33] Elihu Root was United States Secretary of State between July 1, 1905 and January 27, 1909. The Court of Arbitration delivered its award on September 7, 1910.

[34] Argument of Elihu Root in XI *Proceedings,* North Atlantic Fisheries Arbitration, p. 2006 quoted by Jessup p. 5 [Italic added]

[35] O'Connell p. 277

level in connection with the law of neutrality. If there was a right of passage for belligerents warships in neutral waters in time of war, *a fortiori* there must be a general right of passage in time of peace. There were differences of opinion in regard to the right of innocent passage of warships through the territorial sea of a state and discussions occurred on mines and the rights and duties of neutral powers in maritime war, showed that there was no agreement among states on this important subject.[36] The Protocol of the Conference shows the dispute between the different states. "It seems to indicate an agreement that a neutral State could forbid passage in limited parts of its territorial waters to the extent that this would appear necessary for the maintenance of its neutrality."[37] Art. 32 of the English draft provided for an unlimited right of passage, but this was not adopted. The limitation that only parts of the territorial sea could be closed does not seem to have been generally accepted.[38]

At the beginning of the First World War some states declared themselves as neutral. Art. 4 of the Netherlands Neutrality Declaration provided that the presence of any warship would not be tolerated within the jurisdiction of the state. The Dutch government took the view that even mere passage of warships could be forbidden.[39]

The non-uniform state practice at the time is showed by a report of the United States Navy's Office of Naval Intelligence published in 1916. It is called 'Regulations governing the visits of men-of-war to foreign ports'.[40] This report does not deal in he first place with the passage right of warships. It deals, as the title suggests with the right of visit of warships to foreign ports. However to go to a port a warship has to traverse the territorial sea too. It is right to say a right of visit to a foreign port of men-of-war does not imply automatically a passage right. However such a right of visit might indicate a right of innocent passage in the territorial sea for warships. The whole report contains the attitude of 44 states and their colonies to this topic. It indicates that in 1916 warships were permitted entry, subject to observance of regulations, into the ports of twenty-nine countries. The

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[36] ibid. p. 277
[37] Actes et documents, Vol. I, 304 quoted by O'Connell p. 277
[38] 110 BFSP 928 quoted by O'Connell p. 278
[39] O'Connell p. 278
[40] 10 AJIL (1916), Suppl. p. 121

rest of the countries did not have any restrictions for the visit of foreign men-of-war in ports at all. These countries were: the Argentine Republic, Chile, China, Columbia, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Salvador, Santo Domingo, Uruguay and Venezuela. The reason for non regulation in Latin American states was probably non involvement in military operation in World War I. Examples of the twenty-nine countries which permitted entry, subject to the observance of regulations were Spain ("give notice as a customary rule through diplomatic channels") and Greece ("as a matter of courtesy through diplomatic channels"). Three of the twenty-nine countries expressly allowed passage (not only a right of visit) and anchoring in territorial waters. They were Denmark, Belgium and France. The Danish Decree of 15 January 1913 read as follows:

> Art. I Warships of all foreign nations are allowed without previous notice, to navigate Danish waters and anchor in the same with the exception of the inland waters, the harbour of Copenhagen and closed waters.[41]

The Belgian Decree of the 18 February 1901 read as follows:

> Art. 3 ...Foreign men-of-war, unless specially authorised by the government, may not remain longer than two weeks in the Belgian territorial waters and harbours. They are required to put to sea within six hours when requested to do so by the navy administration or the military authorities, even if the time fixed for their stays have not expired.

In the case of belligerent warships, the situation was modified.

> Art. 19 Should men-of-war (or merchant vessels) of two nations in a state of war happen to be at the same time in Belgian waters, there shall occur an interval of at least 24 hours, fixed by the competent authorities, between the departure of a vessel of one of the belligerent and the subsequent departure of a vessel of the other belligerent.[42]

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[41] ibid. p. 129
[42] ibid. p. 127

The French provisions in the time of Peace (Decree of 21 May 1913) and War (Decree of the 26 May 1913) are similar to the Belgian provisions.

> In Time of Peace
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> Art. 3 In time of peace foreign men-of-war are permanently authorised to visit the French ports and those of the protectorates and to anchor in the territorial waters...Foreign men-of-war cannot remain over 15 days in the ports and territorial waters. They shall go to sea within 6 hours should they be so requested by the naval authorities or by the *commandants d'armes*, even in case the delay fixed for their stay may not have expired.
>
> In Time of War
>
> Art. 2 No foreign men-of-war may approach, without exposure to destruction, the shores of French territorial waters nearer than 3 nautical miles, without having been authorised to do so.[43]
>
> In Time of War and France is neutral
>
> Should France be neutral, belligerent warships might remain in French territorial waters, which in this case would be ten nautical miles from the coast or a ten mile closing line in bays, for only seventy-two hours.[44]

The regulations of France and Belgium do not mention expressly a passage right. However they speak about staying in the territorial waters and staying also includes passage through them. Accordingly these countries allowed unconditional innocent passage of warships through their territorial waters without conditions.

Also interesting are the regulations of Brazil and Norway on this topic. Brazil's regulations read as follows:

> There are no restrictions as to the number of men-of-war under one flag that may visit any port at any time, nor as to the duration of such visit. There are no closed ports in this country. Foreign men-of-war are not permitted to carry on target practice with guns or torpedo practice in the territorial waters of Brazil.[45]

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[43] ibid. p. 138

[44] Decree of 18 October 1912 10 AJIL (1916), p. 138; art. 1 quoted by O'Connell p. 279

[45] 10 AJIL (1916), p. 128

The Norwegian regulations in regard to naval exercise were similar. "Art. 6 ...Landing exercises and target practice with guns, small arms, or torpedoes may not be carried out."[46] Only the Romanian decree of the 22 November 1912 expressly required previous notice for voyages through the territorial waters (also for visits to ports as in the case most of other states). "Article 1. It is forbidden to foreign warships to enter Romanian ports or to cruise in Romanian waters without notice having previously been given through diplomatic channels."[47] Romania was the first state to forbid passage in territorial waters expressly (most other states only regulated entry into ports). It was also the first state which required previous notification should such a passage take place.

2.2.2. Attempts at Codification up to World War I

Since the second half of the 19th Century we find attempts to codify the international law of the sea. The first attempts were made by non-governmental organisations such as the International Law Association, founded in 1873, and the Institute of International Law - Institut de Droit International- also founded in 1873.

In 1894 the Institute of International Law adopted rules on the definition and regime of the territorial sea. Art 5 read as follows:

> "All ships without distinction have a right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage, and, for the purpose of defence, of forbidding it to any ship, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea. (Tous les navires sans distinction ont le droit de passage inoffensif par la mer territoriale...)."[48]

This seems to grant the right of innocent passage to all ships (merchant and warships). This however is not quite clear, because Art. 9 declared "The peculiar situation of ships of

[46] 10 AJIL (1916), p. 165
[47] 10 AJIL (1916), p. 169
[48] Jessup p. 462

war and the ships assimilated to them is reserved. (Est réservée la situation particulière des navires de guerre et de ceux qui leur sont assimilés.)"[49]

The International Law Association also adopted rules of the law of the sea in 1895. They were very similar to the rules of the International Law Institute with some modifications.[50]

2.2.3. Conclusion

State practice up to the First World War on innocent passage of foreign warships in territorial waters was not uniform. Only Denmark expressly allowed navigation in its territorial waters without previous notice. Romania, by way of contrast to Denmark, forbade cruising in Romanian waters without previous notice. Other states did not deal in particular in their legislation with passage rights of warships. They only regulated access of foreign warships to ports, which was sometimes tied to previous notification. Other states such as the Latin American states, did not limit access rights to ports or transit rights of foreign warships in territorial waters at all. That is why there must be a presumption that in these Latin American states, the right of innocent passage was equally enjoyed by warships and merchant vessels. Whether the situation was the same in states which only regulated access to ports is uncertain and doubtful.

Up to World War I attempts to codify the international law on this topic did not show a clear approach either.

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[49] ibid
[50] ibid

2.3. Juristic Opinions

2.3.1. The classical writers

The classical writers in international law as Grotius[51] and Selden[52] did not mention this topic, for the reasons mentioned above.[53] The treatises dealt more the trade with overseas territories, rather than a sophisticated survey of the right of innocent passage of warships in the territorial sea of another state. The classical writers of the 18th century Bynkershoek[54] and Vattel[55] did not deal with this topic either. Vattel demanded that ships of all nations should enjoy a right of innocent passage through the territorial sea.[56] He did not distinguish between warships and merchant ships. He only declared the existence of such a passage right.

2.3.2. The writers of the 19th century

The first author who distinguished between merchantships and warships was Massé the innovator of the right of innocent passage. For him, the foundation of the right was commercial traffic and so did it not apply to warships.[57] None of Massé's immediate successors who forged the doctrine of innocent passage followed him in this distinction, and there was very little nineteenth century governmental practice by reference to which the distinction could be tested.[58] Massé's point was first elaborated by Hall in 1880 in a passage which has often been relied upon by governments.[59] He confirmed the existence of the right of innocent passage (he described this as innocent use). Hall said:

[51] Mare Liberum (1608)
[52] Mare Clausum (1635)
[53] It was the area of sailing ships which avoided navigating close to the shore.
[54] De domino maris dissertatio (1702)
[55] Le droit des gens (1758)
[56] Vattel in Le Droit de gens (1758) quoted by Churchill and Lowe p. 60
[57] Massé, G. Le droit commercial dans ses rapports avec le droit gens (1844) p. 112 quoted by O'Connell p. 275
[58] O'Connell p. 275
[59] ibid. p. 275

> "In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation. For more than two hundred and fifty years no European territorial water which could be used as a thoroughfare or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right must be considered to be established in the most complete manner. *This right of innocent passage does not extend to vessels of war.*"[60]

Massé and Hall were the first writers who refused a passage right for warships. Innocent passage was for them a limitation of the sovereignty of the coastal state. Limitations of sovereignty should be restricted to very few cases, for example if it would be to the advantage of the coastal state. Only commerce and not naval traffic was in Hall's opinion an advantage for the coastal state.

> Its possession by them could not be explained upon the ground by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all states. But no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war. Such a privilege is to the advantage only of the individual state; it may often be injurious to third states; and it may sometimes be dangerous to the proprietor of the water used. A state has therefore always the right to refuse access to its territorial waters to the armed vessels of other states, if he wishes to do so."[61]

This reflects Hall's opinion that if there is a passage right for warships, it is only in the discretion of the coastal state. His view, however were not widely supported by his contemporaries at the end of the 19th century.

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[60] Hall p. 197, [italics added]
[61] Hall p. 197

2.3.3. Juristic opinion supporting the right

Many writers did not follow Hall in his opinion on this topic. Westlake expressly dissented from Hall's view. He said:

> "...But a ship of war as well as a merchantman may have a lawful errand beyond the littoral sea in question...In the course of its lawful voyage it may be difficult for it to avoid the littoral sea, especially if the width of the latter should receive any general extension. And the possession by the littoral sovereign of a right to interrupt the voyage would expose him, if neutral, to the most inconvenient demands from belligerents for his exercise of that right, while his own safety is sufficiently provided for by the authority to regulate which article 5 of the Institute[62] reserves to him. It would be a very different matter for ships of war to take up even a temporary station in foreign, though friendly, territorial waters, and except under stress of weather they do not in fact do so without previously obtaining permission."[63]

This opinion pro a right of innocent passage of warships contains two remarkable arguments. First, that the old 3 mile rule was not made for ever in the law of the sea and second the counter argument against the statement of Elihu Root[64], that the coastal state has many remedies to protect itself against threats, from warships in innocent passage.[65]
Perels also favoured innocent passage for warships.[66] The next author who asserted this was Lawrence in 1895. He wrote: "It extends to vessels of war as well to merchant vessels."[67] It seems that he limited the innocent passage in general to channels of communication between two portions of high seas, because he defined innocent passage "...as the right of free passage through the territorial waters of friendly states when they form a channel of communication between two portions of the high seas."[68] He continued :

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[62] Art. 5 of the draft of the Institute of International Law for the codification of the law of the sea
[63] Westlake p. 196
[64] in the hearings at the North Atlantic Fishery Arbitration 1910, XI *Proceedings*, North Atlantic Fisheries Arbitration, p. 2006
[65] The coastal sovereign could well protect itself from abuse, as is recognized by art. 5 of the draft resolution of the Institute of International Law.
[66] Perels, F. P. Das internationale oeffentliche Seerecht der Gegenwart (1882) p. 103 quoted by O'Connell p. 276
[67] Lawrence p. 195
[68] ibid. p. 194

> "This right thus created is, of course, confined to vessels of states at peace with the territorial power, and is conditional upon the observance of reasonable regulations and the performance of no unlawful acts. It extends to vessels of war as well as to merchant vessels. No power can prevent their passage through its straits from the sea to sea, even though their errand is to seek and attack the vessels of their foe, or to blockade or bombard his ports."[69]

However the next sentence in this section on innocent passage, shows there is no limitation of the right of innocent passage of warships (and other ships as well) for straits only. He wrote: "As long as they commit no hostile acts in territorial waters, or near the them as to endanger the peace and the security of those within them, their passage is perfectly innocent."[70] Lawrence continued with what is in my opinion the most efficient argument in favour a right of innocent passage of warships and said: "The word as used in the phrase 'right of innocent passage', refers to the character of the passage not to the nature of the ship."[71] Other authors at this time followed this way. Taylor affirmed the right in 1901[72] as did Politis[73], while Rivier implied it.[74] Schüking emphasised in 1897 that no distinction was possible between warships and merchantships with regard to innocent passage[75]. Despagnet[76] in effect adopted the resolutions of the Institute of International Law on both points[77]. Hastschek for example declares that the primary object is "to allow the innocent passage to foreign ships, including warships."[78] This opinion that there is no difference with regard to the innocent passage of warships is also held by Ross.[79] Verdross adhered to the view that the right is shared with merchant ships equally. He said: "Dieses Recht

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[69] ibid. p. 195
[70] ibid. p. 196
[71] ibid. p. 196
[72] Taylor, H., A Treatisie on Public Law (1901) quoted by O'Connell p.276
[73] 8 RGDIP (1901), p. 281 quoted by O'Connell p.276
[74] Rivier, A., Principes du droit des gens, 2 vols (1896) quoted by O'Connell p. 276
[75] Schüking, W., Das Küstenmeer im Internationalen Recht (1897) p. 31 quoted by O'Connell p. 276
[76] Despagnet, F., Cours de droit international public (1894) p. 610 quoted by O'Connell p. 276
[77] art. 5 and art. 9 of the Resolutions of the Institute of International Law 1895 see above
[78] Hastschek, J., An Outline of International Law (1930) [English Translation] p. 138 quoted by Shao Jin p. 62
[79] Ross, A., A textbook of International Law (1947) [English Translation] p.177 quoted by Shao Jin p. 62

wird regelmässig auch fremden Kriegsschiffen eingeräumt".[80] This view is also shared by Hyde. He said:

> "Over its territorial waters along the marginal sea the control of the territorial sovereign is limited While it may regulate at will matters pertaining to fisheries, the enjoyment of the underlying land, coastal trade, police and pilotage, the use of particular channels, as well as maritime ceremonial, it is not permitted to debar foreign merchant vessels from the enjoyment of what is known as the right of 'innocent passage'. Vessels of war, although serving no commercial purpose, are not necessarily deprived of the right of passage under normal conditions, and still less, other public ships devoted to scientific purposes. So long as the conduct of a vessel of any kind is not essentially injurious to the safety and welfare of the littoral State, there would appear to be no reason to exclude it from the use of the marginal sea. ... In a word, the right of so called innocent passage vanishes whenever the conduct of a ship is harmful to the territorial sovereign. To the latter, whether a belligerent or a neutral, must be accorded the right to determine when acts of a passing ship lose their innocent character."[81]

This view shows also the attitude that there should be no difference in the treatment of warships and merchant vessels. There is also the counter argument against Elihu Root, that warships are not dangerous for the coastal state in general, because international law concedes the coastal state enough possibilities to protect itself in time of danger or war.[82] Other authors such as Strupp[83] and Frenzel[84] generally affirmed the right. Liszt, a German author affirmed the right and includes in it passage in time of war. He wrote in 1895:

> Die Durchfahrt durch die Küstengewässer darf den Handels- wie den Kriegsschiffen fremder Staaten in Friedens - wie in Kriegszeiten weder versagt noch von Abgaben abhängig gemacht werden (de droit passage inoffensif, juis passagii sive transitus inoxii). Die friedliche Durchfahrt durch die Küstengewässer für fremde Kriegsschiffe steht in der Regel frei, im Falle der Seenot auch das Anlaufen von Häfen.[85]

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[80] Verdross p. 274

[81] Hyde, C.C., International Law (1922) p. 277-278 quoted by Hackworth p. 646

[82] for example the cancellation of innocent passage for all ships

[83] Strupp, K., Das Küstenmeer im Völkerrecht der Gegenwart und Zukunft (1929) p. 71 quoted by O'Connell p. 276

[84] Frenzel, G., Theorien über die rechltliche Natur des Küstenmeeres (1908) p. 18 quoted by O'Connell p. 276

[85] Liszt p. 144, 182

Reuter said that the right was shared with merchant ships equally. He wrote: "La Convention précitée admet la liberté de passage pour tous les navires, même les navires de guerre; pour ces dernis, celle-ci a été discutée sur le plan coutumier."[86] This view is also adhered by Longo[87] and Cavere[88]

2.3.4. Juristic opinion against the right of innocent passage for warships

There were also many authors, who denied the right of innocent passage of warships and followed Halls opinion. Jessup said:

> "... that as a general principle the right of innocent passage requires no supporting argument, it is firmly established in international law. there is however, a divergence of opinion on two points, first, whether war vessels may exercise this right; second,... As to warships the sound rule seems to be that they should not enjoy an absolute legal right to pass through a states territorial waters any more than an army may cross the land territory."[89]

He carried on and citing the statements of Elihu Root and William Edward Hall in support. Jessup's comparison of land territory and sea sounds logical. However it does not consider the possible necessity of passage rights for navigational purposes. There is no similar necessity for a army on land as for the navigation of a warship near the shore because there is no *terra nullius* anymore the territorial sea which could serve as something like the high seas. Sometimes it is also difficult to avoid or it is much more convenient to use it.

Svarlerie also concedes:

> "that the question, whether warships or other public vessels have a right to innocent passage through the territorial waters subject to the authority of the littoral state cannot be definitively answered at the present time, as considerable disa-

[86] Reuter p. 210
[87] Longo, C., Diritto Internazionale Publico (1905) p. 109 quoted by O'Connell p. 276
[88] Cavere, L., Le Droit International public positif (1967) p. 506 quoted by O'Connell p. 276
[89] Jessup p. 120

> greement is found among jurists and publicists. ... warships do not enjoy a legal right to innocent passage under the law of nations."[90]

He also cites meanings of Elihu Root and Hall in support. Tan Tsu-hung [91]and Keilin and Vinogradov [92] write similar.

2.3.5. Ambivalent juristic opinion

This school contains many writers showing sometimes a tendency to views which admit the right and sometimes views which denied it. Oppenheim is an example. He stated:

> "that a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognised. It may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; ..."[93]

Oppenheim's view is similar to the view, that there is a right of innocent passage for warships.[94]

Dahm would allow prohibition or conditional passage under certain circumstances and he admitted the question was controversial. He said:

> Ob Kriegsschiffe ein Durchfahrtsrecht haben, ist lebhaft umstritten. ... Es treffen die Erwägungen, auf denen das Recht der Durchfahrt beruht, namentlich das Bedürfnis nach einer Rücksichtnahme auf den Handel und Verkehr nicht auf Kriegsschiffe zu. Diese sind auch der Jurisdiktion des Küstenstaates entzogen, und sie können eine Gefahr für die Sicherheit bilden. Sofern keine Verträge bestehen möchten wir meinen, darf der Staat die Durchfahrt fremder Kriegsschiffe durch seine Küstengewässer verbieten, sie von Bestimmungen abhängig machen und ihre Durchfahrt im einzelnen regeln. Allenfalls lässt sich erwägen, ob nicht Kriegs-

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[90] Svalerien p. 195
[91] Tan Tsu-hung, Principles of Public International Law (1922) [in Chinese] p. 110 quoted by Shao Jin p. 62
[92] Keilin and Vinogradov, Law of the Sea (1939) [in Russian] p.115 quoted by Shao Jin p. 62
[93] Oppenheim p. 494
[94] see for example Westlake's opinion at footnote number 62

> schiffen die Durchfahrt insoweit gewährt werden muss, als daran ein internationales Interesse besteht."[95]

He argues, as Hall, that the necessity for a passage right is to support commerce and therefore does not apply to warships. He further argues that warships of other states are not under the jurisdiction of the coastal state and because of that they could be a threat. The conclusion of Dahm is that the coastal state can prohibit passage or grant the it subject to conditions. He is also of the view that there might be a right of innocent passage for warships where an international interest is involved.

Bustamante y Sirven seems to envisage prior authorisation. He says:

> "Il importe en outre d'établir, au point de vue du transit et de sa réglementation, une difference entre les navires, suivant l'usage auquel ils sont destinés. Les navires de commerce et ceux qui sont susceptibles de proprieté privée en genéral, n'ont pas d'autres restrictions que celles fondées sur sur le principe antérieurement exposé, et en dehors d'elles ont la liberté de croiser ou non. Tandis que les navires de guerre, qui en principe ne doivent passer par les eaux territoriales étrangères que quand le pays auquel ils appartiennent entretient des relations diplomatiques avec l'Etat souverain de ces eaux, ont à obéir de même à toutes les prescriptions spéciales établies pour eux. Parmi celles-ci peuvent figurer la necessité d'une permission de l'autorité compétente, la prohibition de visiter certaines zones, la limitation du nombre de ceux qui passent en même navire de recommender son voyage sans qu'il y ait certains intervalles, et toutes autres que la sécurité nationale impose ou requiert."[96]

Kelsen seems to limit the passage of warships to where it a is necessary for navigation. He states:

> "The territorial waters (maritime belt) legally belong to the territory of the littoral States, but the latter are here, according to international law, subjected to certain restrictions. The most important restriction is this: the littoral State is obliged, in time of peace, to allow the merchantmen of every other State to pass inoffensively through its territorial waters. As far as foreign men-of-war are concerned it is assumed that the right of passage through such parts of the maritime belt as form parts of the highways for international traffic cannot be denied."[97]

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[95] Dahm p.647
[96] Bustamante y Sirven p. 206
[97] Kelsen p. 211

Bonfils-Fauchille hold a relative point of view as well. He would allow the territorial state to forbid the passage through its territorial straits, 'sauf le respect des convenances internationales', but adds "that passage through its territorial waters can only be forbidden in time of war and if the territorial power is belligerent."[98] Fauchille said in another publication:

> "Un droit de passage innocent existe indistinctement au profit de tous les bâtiments etrangers, marchands ou militaires, dans la partie territoriale des détroits qui joignent deux mers libres, mais non dans celle des détroits qui unissent uné mer libre à une mer fermée : dans ces derniers détroits les navires de commerce seuls peuvent prétendre à un passage innocent."[99]

He rejects the opinion that the right of innocent passage be reserved to trade. In this respect there is no difference between merchant and warships: "... s'il existe ainsi un droit de passage innocent au profit des navires etrangers, il n'y a pas de motifs pour ne pas en faire bénéficier les navires de guerre aussi bien que les navires de commerce."[100]
Colombos also supports a similar point of view, as all the opinions in this mixed group. He said:

> "As regard men-of-war, the question is controversial whether they enjoy the same right of innocent passage. The better view appears to be that such use should not be denied in time of peace when the territorial waters are so placed that the passage through them is necessary for the international traffic."[101]

Gidel wrote:

> "Le passage des bâtiments de guerre étrangers dans la mer territoriale n'est un droit mais une tolérance c'est l'opinion qui semble préferable. Elle est davantage de nature à proteger certains Etats contre les abus auxquels ils pourraient être exposes du fait de voisins turbulents ou indiscrets."[102]

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[98] Bonfils-Fauchille $$ 517-18, $ 507 quoted by Hall p. 199
[99] Fauchille p. 254
[100] Fauchille p. 1005
[101] Colombos p. 114
[102] Gidel, C.G., Le droit international public de la mer Vol. 3 (1934) p. 284 quoted by O'Connell p. 276

He seems to treat this question as one of tolerance rather than that of a right of innocent passage for warships. He continuos "that the state of customary law was difficult to define because States regularly accord passage to foreign warships, but with the reservation of the right, not only to regulate but even to forbid this passage."[103]

Smith wrote in 1959 that "there is no legal right of passage, although its prohibition would be an unfriendly act."[104] Spiropoulos stated in 1933 "that a right of innocent passage for warships could be denied in exceptional circumstances."[105] Cavaglieri said the exercise of this right was subject to previous authorisation[106], although elsewhere he said that warships benefited from the presumption of innocence.[107] His opinion is similar to that of Bustamante y Sirven.[108] Podesta Costa said that it was a matter of comity, though never denied.[109] De Louter restricted the right to necessary access routes.[110] Mercker would limit the number of warships and regulate their passage to insure they were not a threat, but he said that in peace time in practice the passage of warships is generally permitted without restriction.[111] This view is partly similar to the view of Colombos and Oppenheim. The difference is that the number of warships should be regulated. Björksten also followed Oppenheims qualified opinion.[112] Sibert thought it is difficult to say when the passage of warships is innocent.[113]

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[103] Gidel, C.G., Le droit international public de la mer Vol. 3 (1934) p. 279 quoted by O'Connell p. 276
[104] Smith, H.A., The Law and the customs of the sea (1959) p. 48 quoted by O'Connell p. 276
[105] Spiropoulos, J., Traité théoretique et pratique du droit international public (1933) p. 117 quoted by O'Connell p. 276
[106] Corso di Diritto Internazionale p. 260 quoted by O'Connell p. 276
[107] in 26 Hague Recueil (1929) 444 quoted by O'Connell p.276
[108] see footnote number 95
[109] Podesta Costa, L.A., Derecho Internacional Publico (1955) p. 312 quoted by O'Connell p. 276
[110] De Louter, J., Le droit internacional positif Vol. 1 (1920) p. 430 quoted by O'Connell p. 276
[111] Mercker, R., Das Küstengewässer im Völkerrecht (1927) p. 38 quoted by O'Connell p. 276
[112] Björksten, S.R., Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht (1926) p. 105 quoted by O'Connell p. 276
[113] Sibert, M., Traite de droit international public Vol. 2 (1951) p. 275 qouted by O'Connell p. 276

2.3.6. Conclusions on the juristic opinion

Since 1960 writers on the international law of the sea have not advanced new arguments in favour of a right of innocent passage of warships or against such a right. They rather repeat the old arguments of previous authors than devise new theories on the topic.[114] The reasons for this are found in the first codification of the law of the sea in 1958 and the different state practice between western countries and the communist block at the zenith of the cold war. "After UNCLOS I (1958) there seems to be a tendency in the writings of publicists to concentrate on the interpretation of the Convention on the Territorial Sea and the Contiguous Zone (1958).[115]

In conclusion the majority of writers more or less favour for a right of innocent passage for warships in territorial waters. However different state practice and the non-uniform views of the authors are evidence against a customary embodying such a right. As Gidel put it:

"Le passage des bâtiments des marines de guerre étrangères dans la mer territoriale n'est pas un droit, mais une tolérance."[116]

2.4. Developments up to 1945

2.4.1. State practice

Between the World Wars, state practice was similar to before. There was a lack of uniformity amongst states in regard on the topic. Most national legislation on visiting foreign warships dealt only incidentally with the territorial sea as before World War I.[117] There is

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[114] see for example Churchill and Lowe p. 74
[115] Shao Jin p. 62
[116] Gidel p. 284 quoted by Dahm p. 647
[117] O'Connell p. 279

for example the German Regulations of 1 September 1925 concerning the admission of foreign warships to ports and waters on the German coast (which replaced those of the 24 May 1910). They did not require formalities for entry into territorial waters, but specified that, if the commander of a foreign warship did not comply with German laws and regulations, the vessel might be required to leave.[118] A Belgian Royal Decree of 9 January 1924 specified that previous notice of the sojourn of warships in Belgian territorial waters must be given through diplomatic channels and limited the length of the stay and the number of warships concerned. No mention was made of passage. The naval administration was authorised to terminate the sojourn at any time.[119] Regulations made by Denmark on 19 January 1927 specified that visiting warships were bound to observe Danish regulations, and might be required to depart.[120] The Swedish Royal Notices of 1925 and 1928 on access of foreign warships did not deal with passage, but only with sojourn[121]. Iran guaranteed in 1934 the right of innocent passage of foreign warships.[122] A Netherlands Decree of 2 June 1931 respecting warships with aircraft aboard stated that the limitations therein did not prevent free passage of warships through territorial waters in accordance with international law. [123] The Italian Royal Decree of 24 August 1933 permitted free entry of and anchoring by foreign warships within six nautical miles of the low water mark, subject to restrictions on numbers of ships and an eight day limit. But in the interests of national defence, they might be prohibited from passing through or remaining in the territorial waters of such particular areas as might from time to time be designated by the means employed for the dissemination of hydrographical information relating to navigation.[124] The legislation of El Salvador of 1933 impliedly permitted passage of warships.[125] Honduras in 1935 decreed limitations on the entry of foreign warships into territorial waters, and required previous notification. However the intention seems to have been to regulate visiting

[118] UN. Leg. Ser. ST/LEG/SER. B/6, 373 quoted by O'Connell p. 279
[119] UN. Leg. Ser. ST/LEG/SER. B/6, 361 quoted by O'Connell p. 279
[120] UN. Leg. Ser. ST/LEG/SER. B/6, 409 quoted by O'Connell p. 279
[121] UN. Leg. Ser. ST/LEG/SER. B/6, 409 quoted by O'Connell p. 279
[122] UN. Leg. Ser. ST/LEG/SER. B/6, 24 quoted by O'Connell p. 279
[123] UN. Leg. Ser. ST/LEG/SER. B/6, 390 quoted O'Connell p. 279
[124] UN. Leg. Ser. ST/LEG/SER. B/6, 384 quoted by O'Connell p. 280
[125] UN. Leg. Ser. ST/LEG/SER. B/6, 126 quoted by O'Connell p. 280

rather than transiting vessels.[126] The Brazilian legislation of 1934 required previous authorisation.[127] These examples show the non-uniformity in state practice on the topic.

2.4.2. Private attempts at codification in the 1920's

There were some attempts in the 1920's by private organisations to codify the international law of the sea. These attempts dealt with the problem of innocent passage of warships too. The International Law Association in article 10 of its 1926 Draft Convention on Maritime Jurisdiction in Time of Peace was clearly in favour of a right of innocent passage for warships. It stipulated:

> "The ships of all countries, public as well private have the right to pass freely through territorial waters, but are subject to the regulations enacted by the State through whose territorial waters they pass, provided that such regulations do not infringe any provisions contained in this Convention."[128]

The draft of the German Society of International Law merely, mentioned a right of passage without distinguishing the category of ships.[129] Strupp's draft referred only to merchant ships.[130] In 1928 the Institute of International Law (Institut de Droit International) adopted the following rule:

"Le libre passage des navires de guerre peut être assujetti à des règles spéciales par l' Etat riverain." (Article 11)[131]

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[126] UN. Leg. Ser. ST/LEG/SER. B/6, 143 quoted by O'Connell p. 280
[127] UN. Leg. Ser. ST/LEG/SER. B/6, 363 quoted by O'Connell p. 280
[128] Report of the Thirty-Fourth Conference, 1926 p. 102 quoted by De Vries p. 38
[129] Mitteilungen der deutschen Gesellschaft für Völkerrecht Heft 8 (1927), 116 quoted by O'Connell p. 281
[130] Strupp, K. Das Küstenmeer im Völkerrecht der Gegenwart und Zukunft in O. Schreiber (Ed.) Die Reichsgerichtspraxis im deutschen Rechtsleben (1929) [Festgabe zum 50-jährigen Bestehen] p. 66 quoted by O'Connell p. 281
[131] 34 Annuaire (1928) P. 758 quoted by de Vries p. 38

The draft of the American Institute of International Law was far from clear. It provides in art. 6:

"The entry of warships shall depend entirely upon the consent of the republic, sovereign of the port. In time of peace such consent shall be presumed."

Art. 9 provided:

> "Merchant vessels of all countries may pass freely through the territorial sea, subject to the laws and regulations of the republic to which the said sea belongs. Neither warships nor merchant vessels can sojourn in the territorial sea or fish there, or commit any act involving the violation of those laws and regulations, without the authorisation of the said republic."[132]

Another research draft[133] on the topic from the American continent provides in the section territorial waters:

"A state must permit innocent passage through its marginal sea by vessels of other states, but it may prescribe reasonable regulations for such passage."

From this point of view it seems there could be a right of innocent passage, but in the comment on this article the opposite view adheres.

> "The word vessels in Article 14 is limited by the definition in Article 22, thus confining innocent passage to vessels which are privately owned and privately operated and to vessels the legal status of which is assimilated to that of such vessels. This excludes vessels of war from exercising the right of innocent passage. The sovereignty of the littoral state is restricted by the right of innocent passage, because of a recognition of freedom of the seas for the commerce of all states. There is, therefore, no reason for freedom of innocent passage of vessels of war. Furthermore, the passage of vessels of war near the shore of foreign states might give rise to misunderstanding even when they are in transit. Furthermore, the passage of vessels of war near the shores of foreign states and the presence without prior notice of vessels of war in marginal sea might give rise to misunderstanding even

[132] 20 AJIL (1926) Special Supplement p. 323 art. 6, 9

[133] Research in International law -Harvard Law School- Nationality, Responsibility of States, Territorial Waters, art. 14; 23 AJIL (1929) Special Supplement part III p. 295

> when they are in transit. Such considerations seem to the be basis for the common practice of states in requesting permission for the entrance of their vessels of war into the ports of other states. A state may permit the passage of the war vessels of other states through its marginal sea, but the text relieves it from any obligation to do so... Regulations may, of course, distinguish different kinds of vessels."[134]

This draft of the Harvard Law School rejected the right of innocent passage for warships. It was the only draft made by a private institution, which denied expressly the right.

2.4.3. The Hague Codification Conference 1930

2.4.3.1. Background

The Hague Codification Conference in 1930 was the first major attempt to codify some of the peace time rules of the international law of the sea.

In 1924 the League of Nations appointed a Committee of Experts to draw up a list of subjects ripe for codification. Territorial waters, piracy, exploitation of marine resources and the legal status of State owned merchant ships were amongst the subjects considered. The Committee circulated "Questionnaires" to the governments on the first three of them. Subsequently, a Preparatory Commission was set up to prepare three topics - nationality, State responsibility and (very important) territorial waters - for codification. These preparations involved the circulation of a "Schedule of Points" to governments, and, after replies had been received, the drafting of "Bases of Discussion" on which the Codification Conference could base its work. There were also reports on the topic drawn up by the German lawyer Schücking.[135]

This was the basic work background for the Hague Conference.

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[134] 23 AJIL (1926) Supplement Part III Art.14 p. 295

[135] Churchill and Lowe p. 12

2.4.3.2. The antecedents to innocent passage of warships

2.4.3.2.1. Questionnaire of the Preparatory Committee

On 2 September 1927 the Preparatory Committee was set up.[136] This committee raised the following points on innocent passage of warships :

Point IX. Rights of passage : a) merchant ships; b) of warships; c) of submarines. Anchoring in territorial waters while exercising the right of passage. Anchoring in case of distress

...

Point X. Regulation of the passage and the anchoring in the territorial waters of foreign warships. Penalties for non observance of local laws and regulations. Right to require the ship to depart.[137]

This was the content of the questionnaire addressed to the governments by the Preparatory Committee.

Schücking, stated in his Report to the Committee of Experts that it was more natural to doubt the pacific character of the passage of a large war fleet which enters the territorial sea in a time of general political tension than in the case of an ordinary merchant ship. However, he suggested that this did not affect in any way the legal principle that even warships possess a right of common user in respect of foreign territorial waters, which could not be restricted arbitrarily, but only for reasons of national self-preservation. He argued that it was important that this principle be codified, in order that all vessels without distinction might be assured the right of passage.[138] Schücking proclaimed the right of passage for all vessels without distinction.

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[136] 22 AJIL (1926) Special Supplement p. 233, with the following members : Professor Basdevant (France), Counsellor Carlos Castro Ruiz (Chile), Professor Francois (Netherlands), Sir Cecil Hurst (Great Britain), M. Massimo Pilotti (Italy).

[137] League of Nations, Conference for the Codification of the International Law, Bases of Discussion drawn up for the Conference by the Preparatory Committee, Vol. II - Territorial waters (C.74.M.39.1929.V), pp. 65 and 72 quoted by De Vries p. 40

[138] League of Nations Documents C.196.M.70.1927.V.1, p 44 quoted by O'Connell p.281

Twenty-three States commented on Point IX and twenty-two on Point X.[139]

2.4.3.2.2. States which replied affirmatively

On Point IX thirteen states contented that warships have a legal right of innocent passage through territorial waters, and mentioned it in the same breath as the right of innocent passage of merchant ships. These states were Australia, Canada, Denmark, Estonia, Great Britain, India, Italy, New Zealand, Norway, Poland, Soviet Union, South Africa, and Sweden. Germany recognised the right under Point X. Japan considered that such a right should certainly be created. France replied with the formulation that warships may pass through French territorial waters without formality. Finland conceded the right of innocent passage of warships, but the coastal state has the authority to close certain areas to navigation. The point of view of the Netherlands was similar. It granted the right "in so far as the right is recognised by the rules of international law" and stated on Point X, "that passage through its territorial waters may be prohibited in special circumstances".[140]

2.4.3.2.3. States which required previous notification or authorisation

The following states required previous notification authorisation. Belgium declared under Point X that it required previous notification of passage through its territorial sea. Romania demanded previous notification if a warship wished to pass through her territorial sea. For purposes of international codification, however, Romania recommended adoption of a rule requiring prior authorisation by the coastal state. Bulgaria and the United States also considered that warships may not pass through the territorial sea unless authorised by the coastal state.

[139] League of Nations Documents C.74.M.39.1929.V.1, p. 67 quoted by De Vries p. 41
[140] League of Nations Documents C.74.M.39.1929.V.1, p. 67 quoted by De Vries p. 41

2.4.3.2.4. Conclusion

The replies of the governments ranged from the Bulgarian view of prior authorisation to the view of the Swedish government, that warships should comply with the same navigational requirements as merchant ships only, but it seemed that the majority of the governments tended to the Swedish view.

2.4.3.3. Developments at the Conference

The Preparatory Committee summarised all these observations as Basis of Discussion No. 20 and No. 21.

> Basis of Discussion No. 20
>
> A coastal state should recognise the right of innocent passage through its territorial waters of foreign warships, including submarines navigating on surface.
> A coastal State is entitled to make rules regulating the conditions of such passage without, however, having the right to require previous authorisation. A coastal state is entitled to make rules governing the anchoring of foreign warships in its territorial waters, but it may not forbid anchoring in case of damage to the ship or in distress.[141]
>
> Basis of Discussion No. 21
>
> In foreign territorial waters, warships must respect the local laws and regulations. Any case of infringement will be brought to the attention of the captain : if he fails to comply with the notice so given, the ship may be required to depart.[142]

The Preparatory Committee, perceived no difficulty in the non uniformity of the replies of the governments and thought that the right of the coastal State to regulate could be accepted without difficulty.[143]

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[141] League of Nations Documents C.74.M.39.1929.V.2, 75 quoted by De Vries p. 41
[142] League of Nations Documents C.74.M.39.1929.V.2, 75 quoted by De Vries p. 42
[143] O'Connell p. 282

2.4.3.3.1. Discussions at the Conference

However at the Hague Conference the situation was not so clear and easy. Not all delegations discussed the passage of warships, only a few did. Here are some examples. The United States delegate denied the right. He said:

> "In my view, the right of innocent passage as a matter of a right does not extend to warships. It is ordinarily granted that the right of innocent passage is primarily in favour of commerce, and it seems to me that, so far as warships are concerned, the question is wholly one of usage and comity of nations. A coastal state is therefore quite within its competence, at any rate as regards part of its coastal water ... if it says that the right of innocent passage for warships does not exist there. A coastal state should ordinarily, as a matter of comity, permit innocent passage through its territorial waters of foreign warships, including submarines navigating on the surface only and not submerged or half-awash."[144]

The Romanian representative also considered that, it should be possible for the coastal state to require authorisation prior to the warships passage.[145] Gidel the French delegate, proposed his own amendment 'to prevent ambiguity in regard to the right of passage through territorial waters of certain public vessels, which were not strictly speaking, merchant ships. His solution was to refer to 'ships other than ships belonging to naval forces'.[146] Great Britain proposed that the text should be redrafted to preserve the status quo, whatever that was. "The entry and the passage through territorial waters of a foreign warship shall continue to be regulated by the existing international usage and practice."[147] The purpose behind the British motion was that it was the best to 'let sleeping dogs lie', because the discussion did not show support for equivalent rights of war and merchant-ships.

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[144] League of Nations Documents C.352(b).M.145(b).1930.V.2, 59 quoted by De Vries p. 42
[145] League of Nations Documents C.352(b) M.145(b).1930.V.2, 59 quoted by De Vries p. 42
[146] League of Nations Documents C.351(b).M.145(b).1930.V.16, 59 quoted by O'Connell p. 282
[147] League of Nations Documents C.351(b).M.145(b).1930.V.16, 63 quoted by O'Connell p. 282

2.4.3.3.2. Results of the discussions

The delegates seemed to prefer a solution that in times of a threat to national security, passage of warships could be prohibited and even in normal times previous authorisation or at least previous notification was required.[148] The Netherlands delegate wished to adopt the English version of Basis No. 20, with the insertion of " in normal times". Finally, the Spanish representative also required that the coastal state has the right to subject innocent passage to prior authorisation.[149] The Soviet Union did not participate at the Hague Conference. The delegates did not pay a lot of attention to basis No. 21.

The outcome was deliberately ambiguous. The article and observations, which were adopted then read as follows :

> Art. 12
> As a general rule, a coastal state will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorisation or notification. The coastal state has the right to regulate the conditions of such a passage. Submarines shall navigate on the surface.
>
> Observations
>
> To state that a coastal State will not forbid the innocent passage of foreign warships through its territorial sea is but to recognise existing practice. That practice also, without laying down any strict and absolute rule, leaves to the state the power in exceptional cases to prohibit the passage of foreign warships in its territorial sea. The coastal state may regulate the conditions of passage particularly as regards the number of foreign units passing simultaneously, through its territorial sea - or through any particular portion of that sea - though as a general rule no previous authorisation or even notification will be required. Under no pretext, however, may there be any interference with the passage of warships through straits constituting a route for international marine traffic between two parts of the high sea.[150]

[148] O'Connell p. 283
[149] De Vries p. 43
[150] This sentence was adopted at the special request of the German representative, see De Vries p. 43

Art. 13

If a foreign warship passing through the territorial sea does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea.

Observations

A special stipulation to the effect that warships must in the territorial sea, respect the local laws and regulations has been thought unnecessary. Nevertheless, it seemed advisable to indicate that on non observance of the regulations the right of free passage ceases and that consequently the warship may be required to leave the territorial sea.[151]

2.4.4. Conclusion

The proposed article at the Hague Conference was plainly a compromise formula. Admittedly it did not express the passage of warships as an absolute right in all circumstances, but at the same time it did require the coastal state not to forbid passage save in exceptional cases.[152]

The use of "will" instead of "shall" in art. 12 signifies that the requirement is not a legally obligatory one for the coastal state.[153]

The Hague Conference did not enjoy success in on the topic territorial waters. No Convention was adopted. Hence the problem was still unresolved. The reasons for the controversy are clear. The major naval powers were seeking maximum freedom to manoeuvre their warships to secure their interests all over the world. Great Britain and France , the main supporters of a right of innocent passage for warships, had at this time colonial empires all over the world. To ensure access for their warships to these somewhat remote

[151] League of Nations, Conference for the Codification of the International Law, Report of the Second Committee (Territorial Sea) (C.230.M.117.1930.V) p.10 quoted by De Vries p. 44
[152] O'Connell p. 285
[153] Shao Jin p. 63

areas, it was sometimes convenient to cross the territorial waters of other states. Hence it was necessary for them to have such a right. Other states with small fleets, short coasts or no particular interests overseas denied such a right. For them it was a threat to their security. This strong division of interests prevented the adoption of any clear rule on the matter. However the Hague Conference did not fail because of this issue. The main reason for the failure of the Conference in 1930 to adopt a convention on territorial waters was, that the delegations were unable to find a compromise on the issue of the breath of the territorial sea.

During the next fifteen years until the end of World War II nothing fundamental changed in the light of our topic. The only thing worth mentioning is an incident in connection with the war and the law of neutrality.

2.4.5. World War II - The *Altmark Incident*

The "Altmark" was a former German merchantman steamer that had become a German naval auxiliary.[154] She was armed and flew the German official service flag as a public vessel. In February 1940 she was carrying as prisoners British merchant seamen that had been captured by the "Admiral Graf Spee". At the time of the incident, she was attempting to bring the prisoners back from the South Atlantic to Germany. For this purpose she avoided the English Channel and the Allied blockade by using Swedish and Norwegian territorial waters. After she entered Norwegian territorial waters, she was stopped, her papers were inspected and inquiry was made as to the presence of prisoners on board. False answers were given and were accepted by the Norwegian authorities. In the meantime the "Altmark" was discovered by British forces who demanded an inspection by the Norwegians, but the Norwegians refused. Shortly after this the "Altmark" was boarded by the British and the prisoners released. The Norwegian government protested against this because of the violation of their sovereignty.[155]

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[154] MacChesney, p. 322
[155] MacChesney, p. 323

Shortly afterwards and again after the war a dispute developed in about this. The issue was, whether the "Altmark's" circuitous route and her extended trip through the Norwegian territorial waters was an abuse of neutrality regulations under art. X of the Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War.[156]
In terms of the Convention, the act of the British Navy was a violation of the neutrality of Norway, but the Hague Convention was not technically in force in World War II, because certain belligerents including the United Kingdom, were not parties to it. It was recognised however that the provisions of the Convention as a whole constituted binding international customary law.[157] Hence British writers argued that the deliberately use of neutral territorial waters was an abuse of the passage right.
This case does not however contribute much to do with our topic. It shows, however as mentioned before, that there was something of a "passage right" for belligerents to use neutral territorial waters in international customary law. Why therefore should there not be a right in time of peace?

2.5. Development from 1945 to UNCLOS I 1958

2.5.1. State practice

The state practice after World War II was not so different from state practice before the war. Sixteen countries expressly granted the right of innocent passage to warships subject to possible restrictive conditions such as time limits on their stay in the territorial sea, a limit on warships of one and the same nationality allowed to stay simultaneously in the territorial sea, the requirement of previous notification and other conditions.[158] They were

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[156] Art. X provides that the neutrality of a power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents.
Art. II provides that 'any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power constitutes a violation of neutrality.
[157] MacChesney p. 324
[158] Laws and Regulations on the Regime of the Territorial Sea UN. Legislative Series, ST/LEG/SER.B/6 (1957) quoted by De Vries p. 48

Cambodia, Denmark, Brazil, Lebanon, Libya, Peru, Belgium, France, the Federal Republic of Germany, Honduras, Iran, Italy, the Netherlands, Norway, Sweden, Yugoslavia. Only two countries expressly denied warships the right of innocent passage, since they subjected it to prior authorisation. They were Bulgaria and Romania.[159] The United States required prior authorisation for the entrance of foreign warships in their ports[160], but it is doubtful if this rule was applicable to the territorial sea. In the light of the opposing attitudes displayed during negotiations at UNCLOS I.

Thirteen states had law and regulations in force relating to the presence and the navigation of foreign warships in territorial waters, but did not mention expressly passage rights.[161] These were Chile, Republic of China, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Finland, Guatemala, Nicaragua, Philippines, Poland and South Africa. The silence may be interpreted as an implied recognition of the right.[162] The law of twenty other coastal states was also silent and it might be concluded they were not opposed to the innocent passage of warships.[163] They were Australia, Canada, Ceylon, Cuba, Ethiopia, Greece, Iceland, India, Iraq, Israel, Japan, Jordan, Republic of Korea, Monaco, Morocco, New Zealand, Pakistan, Portugal, United Kingdom and the United States.

To summarise it may be concluded that a considerable number of states expressly or implied recognised the right.[164] Only a small number of coastal states denied the right. Compared to the time before the Hague Conference, the situation was the same.

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[159] Laws and Regulations on the Regime of the Territorial Sea UN. Legislative Series, ST/LEG/SER.B/6 (1957) quoted by De Vries p. 48

[160] Laws and Regulations on the Regime of the Territorial Sea UN. Legislative Series, ST/LEG/SER.B/6 (1957) quoted by De Vries p. 48

[161] Laws and Regulations on the Regime of the Territorial Sea UN. Legislative Series, ST/LEG/SER.B/6 (1957) quoted by De Vries p. 49

[162] Laws and Regulations on the Regime of the Territorial Sea UN. Legislative Series, ST/LEG/SER.B/6 (1957) quoted by De Vries p. 49

[163] Laws and Regulations on the Regime of the Territorial Sea UN. Legislative Series, ST/LEG/SER.B/6 (1957) quoted by De Vries p. 49

[164] under conditions as mentioned above

2.5.2. The *Corfu Channel Case* 1949

The *Corfu Channel Case* is actually out of place here, because it does not deal with the right of innocent passage of warships in territorial waters. It deals with the right of innocent passage of warships in straits only. Nevertheless it is a important milestone in the history of the dispute. The pleadings of both parties, the United Kingdom and Albania are based on support of the right of innocent passage of warships in territorial waters or on the rejection of the existence of the right. Briefly the history of the Corfu Channel incident is as follows. In late 1944 the Corfu Channel was swept by allied minesweepers. After the war, in autumn 1946, British naval vessels sought entry to the Channel, which is formed by the Albanian mainland and the Greek island Corfu. Shortly after the entry some British vessels were damaged and some seamen were injured and killed. It was not possible to find out who was responsible for the laying of the mines.

Albania claimed the passage of the British warships through the Corfu Channel violated its sovereignty. The British Government claimed the right of innocent passage for warships also for warships. Both parties expected a resolution of the dispute from the judgement of the International Court of Justice. However the International Court of Justice avoided expressing an opinion on the right of innocent passage of warships through territorial waters. It limited its observations to the case of straits, and did not advert to the British contention that the right of passage of warships through straits was merely a particular instance of a general right of passage through the territorial sea.[165] It held: "In these circumstances, it is unnecessary to consider the more general question, much debated by the parties, whether states under international law have the right to send warships in time of peace through territorial waters not included in a strait."[166] There were also two dissenting opinions by judges Azvedo and Krylov who held that the right of innocent passage of warships does not exist.[167]

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[165] O'Connell p. 286
[166] ICJ Report 1949 p. 30 quoted by de Vries p. 45
[167] O'Connell p. 286

2.5.3. Developments in the International Law Commission

2.5.3.1. General

After the League of Nations was replaced by the United Nations in 1945, the member-states of this new organisation set up a commission to codify international law. This was the International Law Commission (ILC) with thirty-four members. The first were elected in 1948. The ILC started by preparing draft articles on the High Seas and the Territorial Waters. Its rapporteur was Francois, the same who had prepared the Hague Conference Report. In 1956 the ILC had produced a report, which covered all the aspects of the law of the sea in this time. The report was the basis for the work of the United Nations Conference on the Law of the Sea (UNCLOS) in 1958.

During its work the ILC also dealt with the problem of whether warships have a right of innocent passage through the territorial sea or not.

2.5.3.2. Developments at the sixth session of the ILC

Francois submitted his report to the ILC at the fourth session in 1951. It contained articles 12 and 13 of the Hague Conference. A paragraph four was added to the first article (the old article 12 of the Hague Conference). This reflected the decision in the "Corfu Channel" Case. The second article was identical to art. 13 of the Hague Conference. The articles read as follows:

> First article
>
> 1. As a general rule, a coastal state will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorisation or notification.
> 2. The coastal State has the right to regulate the conditions of such a passage.
> 3. Submarines shall navigate on surface.

> 4. Under no pretext, however, may there be any interference with the passage of warships through straits used for international navigation between two parts of the high seas.[168]
>
> Second article
>
> If a foreign warship passing through the territorial sea does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea.[169]

After the ILC had adopted these two articles with some modifications, the UN member states were requested to comment upon them. Eighteen governments replied: ten States commented on the first article and six on the second article.[170] Seven States agreed with the principles of the first article (Belgium, Brazil, Egypt, Great Britain, the Netherlands, Norway, Thailand and the United States). Yugoslavia wanted the possibility of requiring previous notification. The attitude of Haiti was that passage of warships was subject to the express consent of the coastal state. The six States which commented the second article agreed with the principle laid down in it.[171] After the commentaries the first article read as follows:

> 1. Subject to observance of the provisions of articles 17-21, warships shall have the right of innocent passage through the territorial sea. As a general rule previous authorisation or notification shall be required. Such authorisation or notification may however be prescribed for certain parts of the territorial sea , or in times of crisis, in order to protect the military interests of a State, provided that there be no interference with passage through straits used for international navigation between two parts of the high seas.
> 2. Submarines shall navigate on the surface.

This formulation was just in the interest of the USA and its allies. That was very surprising, because the USA was such an opponent of the right before World War II at the Hague Conference 1930 and before the *North Atlantic Fishery Arbitration* in 1910.

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[168] ILC. Yearbook 1953 Vol. II p. 58 quoted by De Vries p. 50
[169] ILC. Yearbook 1953 Vol. II p. 58 quoted by De Vries p. 50
[170] ILC. Yearbook 1953 Vol. II p. 58 quoted by De Vries p. 50
[171] De Vries p. 51

2.5.3.3. Developments at the seventh session of the ILC

At the seventh session of the ILC in 1955 there was a very fundamental discussion of the first article. The opposition to a right of innocent passage of warships in territorial waters was growing. There were two chief views. The affirmative group for a right was leaded by Sir Gerald Fitzmaurice. He said:

> "If previous authorisation or notification were to be required in all instances a severe restriction would be placed on the normal movements of warships in peacetime. Commerce was not the only legitimate object of navigation and vessels passing through a territorial sea for another reason should not be *ipso facto* regarded as suspect."[172]

He suggested contributing to the protection the interests of the coastal state by including in the first article a reference to draft arts. 17 and 20 para 2 which gave the coastal State the right to suspend innocent passage temporarily and locally. Hence there should be sufficient protection of the interests of the coastal State.

The opposite group was headed by Zourek. He considered that the passage of warships is subject to the consent of the coastal state and referred to the draft conventions of the Institut de Droit International and the Harvard Law School. Warships constituted for him a threat, because of their nature. He therefore could not agree with the text which granted warships the right. Zourek was supported by Krylov.[173]

To achieve a solution the ILC chairman Spiroupoulos requested the Commission either to opt for Fitzmaurice's or Zourek's opinion. After this request both groups struggled, to find an adequate procedure to opt. Finally Zourek formulated the basic question for the ILC to decide as follows:

> "Does the coastal State enjoy, in virtue of its sovereignty over the territorial sea, the general right to forbid the passage of foreign warships through its territorial sea - in other words, the right to make such passage subject to previous authorisation or notification.?"[174]

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[172] ILC Yearbook 1955 Vol. I p. 143 quoted by De Vries p. 52
[173] De Vries p. 52
[174] ILC Yearbook 1955 Vol. I p. 148 quoted by De Vries p. 53

The result of the vote was six affirmative to three with four abstentions. Subsequently the Drafting Committee was requested to re-formulate the First Article. In the light of the vote it read as follows:

> 1. The coastal state may make the passage of warships through the territorial sea subject to previous authorisation or notification. Normally it shall grant innocent passage subject to the observance of the provisions of Articles 19 and 20.
> 2. It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas.
> 3. Submarines shall navigate on the surface.

The re-formulation was accepted by eight votes to two, with one abstention. All draft articles were submitted to the governments of the UN-member states again. Eight commented on the first article.[175]

2.5.3.4. Developments at the eight session of the ILC

At the eight session the battle went on. Fitzmaurice, strongly supported by Scelle and El Khouri, still fiercely opposed the text of the first article, while Zourek defended it.[176] However nothing big was changed, only some small changes being. The main content, that innocent passage was subject to previous notification was unchanged. The first article became article 24 of the final draft of the ILC for the Convention Conference. It read as follows:

> The coastal State may make the passage of warships through the territorial sea subject to previous authorisation and notification. Normally it shall grant innocent passage subject to the observance of the provisions of Article 17 (i.e. the rights of protection of the coastal State) and 18 (i.e. duty of foreign ships in innocent passage to comply with the laws and regulations of the coastal State).

This formula seems to be a compromise between the two opinions ('..normally it shall grant'). The commentary on article 24 stated:

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[175] ILC Yearbook 1956 Vol. II p. 31 quoted by De Vries p. 54
[176] ILC Yearbook 1956 Vol. I pp. 211-216 quoted by De Vries p. 54

> "... While it is true that a large number of States do not require previous authorisation or notification, the Commission can only welcome this attitude, which displays a laudable respect for the principles of freedom of communications, but this does not mean that a State would not be entitled to require such notification or authorisation if it deemed to be necessary to take this precautionary measure. Since it admits that the passage of warships through the territorial sea of another state can be considered by that State as a threat to its security, and is aware that a number of States do require previous notification or authorisation the Commission is not in a position to dispute the right of States to take such a measure."[177]

It seemed that the battle was lost by the advocates of an unlimited the right of innocent passage for warships. At the ILC meetings there was no a open dispute between the real contestants (the Communist bloc against NATO powers). The ILC was only a forum of jurists to prepare the law of the sea for codification at the Conference. However the discussion at the ILC meetings showed that this was not a dispute between jurists only. It was already a fight between the two blocks, in a kind of "proxy war". The real dispute should follow, when the official delegations should meet at the Conference in Geneva 1958.

2.5.4. The Geneva Conference

2.5.4.1. General

At the Geneva Conference - officially called the United Nation Conference on the Law of the Sea [UNCLOS I[178]] - eighty-six States took part, almost the double number at the Hague Conference 1930. UNCLOS I was successful in the adoption of four Conventions, the Convention on the Territorial Sea and the Contiguous Zone (TSC), the Convention on the High Seas (HSC), the Convention on the Continental Shelf (CSC) and the Convention

[177] ILC Yearbook 1956 Vol. II pp.276-277 quoted by De Vries p. 55
[178] UNCLOS I, because it was followed by UNCLOS II and UNCLOS III

on Fishing and Conservation of the Living Resources of the High Seas. Our topic was dealt within TSC.

2.5.4.2. Developments at the Conference

The draft which was presented to the Geneva Conference, subjected innocent passage of warships to previous authorisation or notification. This was contrary to the attitude of NATO States and in the interests of the Soviet Bloc.

On the 10 April 1958 the Soviet Bloc secured a victory and the first article was adopted (with amendments) by the First Committee by 54 votes to 5 with 8 abstentions. It read as follows:

> 1. The coastal State may make the passage of warships through the territorial sea subject to previous authorisation or notification. Normally it shall grant innocent passage subject to the observance of the provisions of Articles 17 and 18.
> 2. During the passage, warships have complete immunity from the jurisdiction of any state other than its flag state.[179]

This development was unacceptable for the Western States. In the Plenary meeting, the next level of the adoption process, on the 27 April 1958 parliamentary tactics were employed and resistance organised. The Danish delegation proposed changing the text to the following:

> 1. The coastal State may make the passage through territorial sea subject to previous notification. Such a passage shall be subject to the provisions of articles 15 to 18.
> 2. During passage warships have complete immunity from the jurisdiction of any State other than the flag State.

The Italian representative proposed a separate vote on the words "authorisation or".[180] This proposal was adopted by 50 votes to 24 with 5 abstentions. The tactics of the West-

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[179] United Nations Conference on he Law of the Sea, Official Records, Vol. III: First Committee (Territorial Sea and Contiguos Zone) p. 260 quoted by De Vries p. 56

ern counties showed that they tried to create something like a right, because if this version was to be adopted, there would still be a right, which could be exercised subject to previous notification. Of course the coastal state could forbid the passage, but that would be only under exceptional circumstances, as in the case of merchant ships. In the case of previous authorisation, there would not be a right because passage would depend completely on the consent of the coastal State. From this point of view, this tactic was able to preserve some kind of a right for the NATO States.

The Plenary Meeting voted first on the Italian proposal. The words "authorisation or" in the first article (art. 24 of the draft) were rejected by 27 votes to 45 with 6 abstentions. This made the Danish proposal superfluous.[181] After this the first article dealt with previous notification only. This partial victory of the NATO-Bloc was unacceptable for the communist countries. The only way to stop this amendment from becoming a Convention article, was to prevent the required two-thirds majority in the final vote. (this majority was required to adopt an article as part of the Convention).

The amended article got 43 votes in favour, 24 against and 12 abstentions. Thus it failed to get the required two thirds majority and was not adopted.[182]

The second article was adopted without change in the plenary meeting. It read as follows:

> If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance

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[180] United Nations Conference on the Law of the Sea, Official Records, Vol. II p. 66 quoted by De Vries p. 56.

[181] United Nations Conference on the Law of the Sea, Oficcial Records. Vol. II p. 67 quoted by De Vries p. 57

[182] United Nations Conference on the Law of the Sea, Official Records. Vol. II p. 68 quoted by De Vries p. 57. The states in favour were : Australia, Belgium, Brazil, Cambodia, Canada, Chile, China, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, EL Salvador, France, Federal Republic of Germany, Great Britain, Guatemala, Haiti, Honduras, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, South Africa, South-Vietnam, Spain, Sweden, Thailand, Venezuela, and the United States. The States against were: Albania, Bulgaria, Burma, Byelorussia, Ceylon, Czechoslovakia, Ghana, Hungary, India, Indonesia, Iran, Iraq, Libya, Federation of Malaya, Poland, Romania, Saudi-Arabia, Republic of Korea, Soviet Union, Tunisia, Turkey, Ukraine , United Arabic Republic and Yugoslavia. The following states were abstained : Afghanistan, Argentina, Austria, Finland, Greece, Holy See, Laos, Liberia, Mexico, Nepal, Switzerland, and Uruguay.

which is made to it, the coastal State may require the warship to leave the territorial sea.[183]

2.5.4.3. Conclusion

The reasons for the difference between the two groups were political and military rather than ideological in nature. The affirmative group were mostly western orientated states and their allies. In the negative group were the communist orientated states and newly independent states. This group could be called the "second and third" world.

In the first group, were states such as the United Kingdom, France and the Netherlands which traditionally had big naval fleets. Surprisingly, we can find in this group also the United States. Before the war the United States was the main opponent of such a right. This shows clearly from the statement of Elihu Root in the *North Atlantic Fishery Arbitration* in 1910 and the attitude at the Hague Conference, where the US-delegate rejected the right of innocent passage of warships. After the war the USA changed their position. They now had a big naval fleet as the result of the war and big see battles against Japan in 1941-1945. The USA now needed a passage right for warships, as did the United Kingdom, which had maintained a big war fleet for ages. Of course at the conference the opponents of the right did not fail to remember the USA as a former opponent of the right, which was certainly embarrassing for the USA.

In the first group most states were like Bulgaria, Poland and Yugoslavia. They had as this time traditionally small coastal navies and fishing fleets. They did not see the necessity of a passage right of warships through the territorial sea, because they did not have so many of them. For them such a passage right was a threat. The attitude of the Soviet Union was surprising too. Before the war it affirmed the right, as the former legislation and the reply to the questionnaires for the Hague Conference show. The USSR was now a "superpower" without a big naval fleet. Hence they rejected such a right. After the Conference all Soviet Bloc countries except Poland made reservations asserting the right of

[183] United Nations Conference on the Law of the Sea, Official Records. Vol. II p. 68 quoted by De Vries p. 57. Finally art. 23 of the TSC

the littoral state to determine[184] whether and how warships may pass through the territorial sea. Colombia made an unusual declaration that since its Constitution requires the consent of its Senate to the passage of foreign troops through Colombian territory, by analogy such authorisation would also be required for the passage of foreign warships through its territorial sea. The Soviet Union for example made the following reservation to art. 23 TSC:

"The Government of the Union of the Soviet Socialist Republics considers that a coastal State has the right to establish procedures for authorisation of passage of foreign warships through its territorial waters."[185]

This development showed that the Communist countries could not accept the result of the non-regulation in regard to our topic. They still rejected anything what could lead to the conclusion there might be such a right.

2.5.5. Interpretations of developments at the Conference

The entire Geneva Conference 1958 was a success because for the first time the Law of the Sea became codified. With regard to our topic UNCLOS I was unsatisfactory. I shall deal with this very briefly only, because the emphasis in this thesis is more a historical overview than a detailed presentation of the dispute. Here are the arguments of the supporters of a right of innocent passage. This group argued that TSC contains such a right, because section III, subsection A has the title "Rules applicable to all ships". They say that all ships includes merchant ships and warships too. They also used the division of subsection B (Rules applicable to merchant ships) and subsection D (Rules applicable to warships) to support this view, because subsection A, which is before, laid down the right of

[184] Jessup, The United Nation Conference on the Law of the Sea p. 248
[185] Multilateral Treaties in respect of which the Secretary General performs Depositary Functions, 1971, ST/LEG/SER.D/4, Ch.XXI, pp. 363 quoted by De Vries p. 64

innocent passage for warships. Fitzmaurice put this view as following : "Consequently, the Convention created no *special regime* of warships, and does not place upon them any disabilities, as compared with merchant ships, or subject them to any conditions or restrictions to which the latter are not subject, but gives them exactly the same rights."[186] This group also argues that art. 23 gives the coastal State authority only to regulate the use of the territorial sea by foreign warships but not to require previous permission for their transit.[187] Another argument of the group in favour of a right is that the Geneva Conference article which provided for previous notification got a majority of the votes, and failed only on the required 2/3 majority. Other members of the group cited the decision of the ICJ in the *Corfu Channel case* as an argument in favour of a right, but this view is not correct because the judgement only deals with passage of warships in straits.

The following are the arguments of the opponents of such a right. This group says, that there is nothing mentioned in the Convention, which would lead to the conclusion that there is a right of innocent passage for warships. Only art. 23 deals with warships, but it does not confirm such a right. Subsection D is not related to subsection A from this view point. They also point out, that the article which prescribed a right, did not get the required 2/3 majority and failed. A subgroup of the group points out in relation to art. 23 that "... the clause requiring foreign warships to observe the rules governing passage through territorial waters laid down by the coastal State remained. Such rules can of course, include a requirement that prior permission has to be obtained or prior notification of the passage has to be given."[188] It seems to be doubtful whether art. 23 contain a requirement of prior authorisation, because a majority of the states voted in the plenary meeting against previous authorisation and deleted it from the proposal.[189] The normal practice, where a convention does not give the answer to a problem is to look to international customary law. However this does not give any further clarification, because there is no uniform state practice on innocent passage of warships. The problem was still unresolved at the beginning of the 1960's.

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[186] Fitzmaurice in: Some results... p. 102
[187] O'Connell p. 290
[188] C. M. Franklin quoted by De Vries p. 62
[189] see before

2.6. Developments to date

2.6.1. State practice in the 1960's and 1970's

As with state practice in the 1920's and 1950's nothing fundamental changed on the treatment of the right of innocent passage. Some states still required previous authorisation and notification, some states did not require anything for innocent passage of foreign warships through the territorial sea.

After UNCLOS I states tried to avoid confrontation on this issue in practice. Where a coastal state did not require authorisation or notification, it seemed that the naval powers gave none. Where some requirement was laid down by national legislation, low level contacts between naval attaches and local navy officers on a rather informal basic seemed to be favoured.[190]

There is one example from the state practice of the superpowers in the 1960's. In August 1967 two US coastguard icebreakers wanted to navigate through the Vilitsky Strait. The Vilitsky Straits are formed by the southern island of Severnaja Zemlya and the Geyberga Island and by these islands and the Taymyr peninsula. They have a width of 22 miles and of 11 miles. Hence they are Soviet territorial waters, since claimed 12 nm territorial waters. Both icebreakers had military equipment on board and also fulfilled the other requirement in the definition of a warship under art. 8 (2) HSC. The Soviet Union made a reservation at UNCLOS I that it would require for the passage of foreign warships in its territorial waters previous authorisation. In 1960 the it adopted Rules for the Visit of Foreign Warships in Territorial Waters and Ports of the USSR. This rules provided that permission should be sought from the Ministry of Foreign Affairs not later than 30 days prior to the passage. Neither icebreaker complied with this requirement. The judgement of the ICJ in the *Corfu Channel case* did not help either because the Vilitsky Straits were more a route used for national navigation. Most of the year they are covered by ice. Only the Soviet Union used them as part of the Northeast passage for navigation at this time with the

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[190] Churchill and Lowe p. 75

assistance of its icebreakers. Hence the Vilitsky Straits were not straits used for international navigation. The judgement in the *Corfu Channel case* did not give the USA a right of passage here. Both warships had to return.[191] This example shows how the main adversaries dealt with each other at the time of the cold war.

2.6.2. UNCLOS III

2.6.2.1. General

The next big step in the development of our issue is the 'Third United Nation Conference on the Law of the Sea' (UNCLOS III). The Second United Nation Conference on the Law of the Sea did not deal with our topic. The main issue was the unresolved breath of the territorial sea. UNCLOS II failed by only one vote to adopt a six mile territorial sea plus six mile fishery zone.

UNCLOS III was completely different compared to the both other Conferences on the Law of the Sea. A main feature was the big attendance of states. About 150 took part at the negotiations. Among them were many of newly independent states, which previously could not take part in international conferences. A feature at UNCLOS III was that it had no 'Bases of discussion' or ILC report as an aid for its work, as did the Hague Conference and UNCLOS I. Every issue had to be discussed in detail between the participants. With 150 participants that was sometimes complicated, because each state had its own interests and defended them. Soon three big interests groups emerged. They were the 'Group of 77' being mostly developing states, the group of the Western, capitalist countries and the group of European socialist countries. Main issues at the Conference were for example deep sea bed exploitation and recognition of EEZ. All these topics and the procedure for adoption by consensus made negotiations difficult. That was also a reason why UNCLOS III was the longest conference in the history of the United Nations. The Conference held

[191] Pharandt p. 131

its first session in 1973 and worked for several month each year until the final adoption of the Convention in 1982.

2.6.2.2. Developments on our topic

2.6.2.2.1. Developments in the 1970's

The right of innocent passage was discussed in the main Committee Two of the Conference, which dealt also with innocent passage in the territorial sea.
There was a fortuitous coincidence of interests of the superpowers USSR and USA on innocent passage at UNCLOS. The immediate result of this convergence of interest was the principle of equality between merchantships and warships in the Informal Single Negotiating Text of 1975. In the revised text of 1976 no mention was made however about this equality and the old situation, as at the Geneva Conference prevailed.[192]

2.6.2.2.2. Attempts to establish of a notification/authorisation regime

The issue came up again during the Eleventh (NewYork) session of the Conference (March-April 1982), when two amendments were proposed on this question The first was proposed by Gabon. It contained a new subparagraph (b) after art. 21 (1) (a), as follows:

(b) navigation of warships including the right to require prior authorisation and notification for passage through the territorial sea[193]

The second amendment was proposed and supported by 29 states and sought to add the word security after the word immigration in article 21 (1) (h). Under such an amendment

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[192] Informal Single Negotiating Text 1975 Art 29 (2) quoted by O'Connell p. 292
[193] A/CONF.62/L/97, UNCLOS III Off.Rec, Vol XVI, 1984, p.217 quoted by Brown p. 67

the coastal State would have a right to adopt laws relating to innocent passage for all vessels to prevent infringement of its security laws and regulations.[194] The following represents some of the views of delegations. On the introduction of the amendment, the delegate of Gabon said that "...the innocent passage of warships had a bearing on the military security of states, a problem which was not dealt with clearly enough by the 29 states amendment". Hence his delegation introduced a own amendment, because "it is necessary to adopt coercive measures and sanctions against foreign warships which contravened the security, laws and regulations of the coastal state."[195] The Romanian delegation described the right of prior authorisation and notification as "...being based on the principles of the sovereignty and territorial integrity of each state."[196] Also the Filipino delegation indicated that "it would rather prefer in regard to the 29 state amendment an explicit recognition of the competence of the coastal State to require prior authorisation or notification of the passage of warships."[197] Within the group there were also very divergent views. There was for example the Brazilian attitude. Brazil supported both amendments, but "did not consider it essential to have a provision on that point in the convention, since it believed that states were entitled under international law to adopt legislation regulating the passage of warships, through their territorial sea, and the convention would not deprive them of that right."[198] The Iranian attitude was similar. The Iranian delegate pointed out that "Iran had always insisted on prior authorisation for the passage of warships through its territorial sea."[199]

2.6.2.2.3. Withdrawal of attempts and the aftermath

However at the end of the day, the supporters of the amendments withdrew their proposals. In announcing the withdrawal the President of the Conference Ambassador Koh read out the following statement:

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[194] Brown p. 67
[195] UNCLOS III Off. Rec., Vol. XVI pp. 107, para 18, quoted by Brown p. 67
[196] UNCLOS III Off. Rec., Vol. XVI pp. 96-97, para 48 quoted by Brown p. 67
[197] UNCLOS III Off. Rec., Vol. XVI pp. 96-97, at para 24 quoted by Brown p.67
[198] UNCLOS III Off. Rec., Vol. XVI p. 103 para 41 qouted by Brown p. 68
[199] UNCLOS III Off. Rec., Vol. XVI p. 117 para 34 quoted by Brown p. 68

> "Although the sponsors of the amendment in document A/CONF.62/L.117 had proposed with a view to clarifying the text of the draft convention, in response to the Presidents appeal they have agreed not to press it into vote. They would, however, like to reaffirm that their decision is without prejudice to the rights of the coastal States to adopt measures to safeguard security interests, in accordance with the articles 19 and 25 of the draft convention."[200]

The reasons for this withdrawal are not clear. Probably the diplomatic pressure from the marine powers was too strong. They wanted to avoid every vote on this issue to preserve the old status quo from the Geneva Conference. It was a defeat for the developing countries. Nevertheless, the group did not give up. First they made statements. The Albanian delegate stated shortly after the formal adoption that,

> "The text of the Convention violated the sovereign rights of the coastal States. It was essential to bear in mind the danger which the so-called innocent passage presented in current geographical conditions (in the 1980's) in which two super-Powers, the United States and the Soviet Union, had deployed war fleets and installed military, naval airbases in all seas and oceans. The passage of such fleets was always objectionable, threatening and aggressive. The two super-Powers and military blocs had used every possible method to impose their position on the Conference in order to have a free hand to justify the aggressive movements of warships."[201]

Cuba's statement asserted a "right to enact laws and regulations to safeguard its security interests."[202] Romania stated that, "...the territorial sea is an integral part of the national territory and is under the full jurisdiction of the coastal state. That is why nothing could prevent the coastal State from adopting national regulations to protect its security interests."[203] This interpretation is an overemphasis of sovereignty in the territorial sea. The right of innocent passage, as an exception to the sovereignty principle in the territorial waters, is well established in international customary law for the last 100 years.

Another possibility for parties to an international treaty to declare this opposition, is by making a reservation. The legal effect of such a reservation is that the content of the res-

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[200] UNCLOS III Off. Rec., Vol. XVI p. 131 para 3 quoted by Brown p. 67
[201] UNCLOS III Off. Rec., Vol. XVI p. 155, para 35 quoted by Brown p. 68
[202] UNCLOS III Off. Rec., Vol. XVIII p. 37 para 158 quoted by Brown p. 69
[203] UNCLOS III Off. Rec., Vol. XVIII p. 62 para 124 quoted by Brown p. 69

ervation is not applicable to the reserving state. The situation under LOSC is quite different, because under art 309 reservations are not allowed. There are only some exceptions allowed, for example in regard to the settlement of disputes. Hence, a reservation in regard to innocent passage is not possible. Nevertheless there are also other possibilities to express disagreement. This can be done by a declaration[204]. A number of states made declarations when they signed, ratified or acceded to the Convention. The most extreme assertion of the alleged right of a coastal state to require previous authorisation was made by the Yemen Arab Republic, when it signed the Convention.

> "The Yemen Arab Republic adheres to the concept of general international law concerning free passage as applying exclusively to merchant ships and aircraft, nuclear-powered craft, as well as warships and warplanes in general, must obtain the prior agreement of the Yemen Arab Republic before passing through its territorial waters, in accordance with the established norm of general international law relating to national sovereignty."[205]

In another paragraph of this declaration Yemen stated that its signature is subject to the provisions of this declaration.[206] This formulation comes close to an illegal reservation according to art. 309 LOSC. Sao Tome and Principe went further and declared at the time of its signature to the convention :

> "The Government of the Democratic Republic of Sao Tome and Principe *reserves* the right to adopt laws and regulations relating to innocent passage of foreign warships through its territorial or its archipelagic waters and to take any other measures aimed at safeguarding its security."[207]

This declaration was not however repeated, when Sao Tome and Principe ratified the Convention in 1987.[208] Egypt also declared when it ratified the Convention, that the pas-

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[204] The legal effect of a declaration is that it can be used for interpreting state practice to the convention.
[205] The Law of the Sea, Status of the United Nation Conference on the Law of the Sea 1985 p. 29 quoted by Brown p. 70
[206] Brown p. 70
[207] The Law of the Sea, Status of the United Nation Conference of the Law of the Sea 1985 p. 24 quoted by Brown p. 70 [italics added]
[208] Brown p. 70

sage of warships is subject to previous notification.[209] Yugoslavia did the same way and declared at the time of ratification, that:

> "..a coastal State may, by its laws and regulations, subject the passage of foreign warships to the requirement of previous notification to the respective coastal State and limit the number of ships simultaneously passing, on the basis of the international customary law and in compliance with the right of innocent passage (articles 17-32 of the Convention)."[210]

The declaration of Iran, made at the time of signing the Convention was similar to the declaration made by Yemen. It asserted that Iran is entitled to adopt laws and regulations regarding, inter alia the requirement of prior authorisation for warships wishing to exercise the right of innocent passage through the territorial sea.[211] Romania as traditional opponent of the right of innocent passage declared that "..the coastal State is entitled to adopt measures to safeguard their security interests, including the right to adopt national laws and regulations relating to the passage of foreign warships through the territorial sea."[212] Romania was the only Eastern European state which made, as in 1958, a declaration on the innocent passage of warships. Democratic Yemen and Oman declared that they would require prior permission for the innocent passage of warships.[213]

The advocates of a right of innocent passage for warships also made statements. For example the Ukrainian delegate, as the representative of the Warsaw Pact Bloc pointed out that both amendments, if adopted would disturb the existing balance and it would destroy the package of deal:

> "The unlimited right to establish an authorisation regime governing the passage of ships along traditional ship routes.... could be abused by States claiming an al-

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[209] LOS Bull Special Issue March 1987, p. 3 quoted by Brown p. 70
[210] LOS Bull Special Issue March 1987, p. 8 quoted by Brown p. 70
[211] LOS Bull Special Issue March 1987, p. 104 quted by Brown p. 70
[212] LOS Bull Special Issue March 1987, p. 23 quoted by Brown p. 70
[213] LOS Bull 10 November 1987 p. 8 and LOS Bull 14 December 1987 p. 4 quoted by Brown p. 71

leged threat to their security. To protect their security interests, coastal States would even be able to prevent the passage of foreign merchant vessels. However , no agreement was necessary, since the articles 18 to 21 together with the articles 29 to 32, which established rules applicable to warships, created the necessary system of guarantees for the security and other interests of the coastal state."[214]

2.6.2.3. Conclusion

It was surprising that only 15 years after Geneva 1958 the main adversaries on this issue pleaded for a right of innocent passage of warships through the territorial sea. What could be the reason for the Soviet Union to reverse its policy? The reason for this is the same as for the traditional naval powers. After UNCLOS I the Soviet Union and its allies were forced, because of the armaments race with the NATO to build a large naval fleet. This development is similar to that of the USA. The USA used to be a traditional opponent of the right of innocent passage for warships. They became a big naval power through the large scale naval battles with Japan in the years 1941-45. The reason for the antagonism between USA and Soviet Union at UNCLOS I was, that the Soviet Union did not have a big naval fleet. This changed during the 1960's and 1970's. After UNCLOS I the opposition to innocent passage of warships shifted to a group of developing states In naval matters these states are like the USA 80 years ago and the Soviet Union 50 years ago. They have small naval or coastguard fleets or nothing. From this point of view the opposition to the right, was understandable. During the negotiations at UNCLOS III it became apparent for the superpowers, that it was impossible to establish an article, which confirmed equal passage right for merchantships and warships. Hence the Informal Single Negotiating Text of 1975 which confirmed such a right, was dropped. The tactic of the naval powers (UK, France, USA, USSR) was now to avoid any discussion or at least any vote on this problem and to preserve the unregulated situation of TSC to the topic. The usage of States which required authorisation or notification, to contact the naval attaches in the case of

[214] UNCLOS III Off. Rec., Vol. XVII p.86, para 47 quoted by Brown p. 71

intended passage, worked quite well and without problems. Any change would disturb the understanding between the superpowers.

At UNCLOS III this system seemed to be in danger. The proposed amendments would disturb the delicate negotiating balance reflected in the formulation of art. 21 and might if adopted, oblige leading maritime powers to decline to sign the convention. The difficulty was put bluntly by the Italian delegation, commenting on the two amendments. It stated that if the questions of navigation and overflight were to be reformulated a number of maritime powers, including the United States[215], would not sign the Convention.[216]. The statements of France and the United States at the Montego Bay session showed satisfaction in that art. 21 had survived unscathed. The French delegation pointed out that a compromise between the coastal States and the marine powers was reached and "... that the right of innocent passage of all vessels through territorial waters is unambiguously confirmed."[217] The United States delegation declared : "... the Conference record supports the traditional United States position concerning innocent passage in the territorial sea."[218]

There is also the privately stated view of the former President of the Conference Ambassador Koh, which is not part of the official Conference record. He stated at an academic symposium six months after the Conference:

> "I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State."[219]

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[215] The United States have not signed the Convention yet, but the reason for this was the unsatifatory situation in regard to Deep Seabed Mining.

[216] Brown p. 71

[217] UNCLOS III Off. Rec., Vol. XVII, p. 86 para. 47 quoted by Brown p. 71

[218] UNCLOS III Off. Rec., Vol. XVII, p. 117, para 8 quoted by Brown p. 71

[219] Address by Ambassador T.T.B. Koh, Duke Symposium on the Law of the Sea 24 Virginia J.I.L. 1984 p. 854 quoted by Brown p. 72

2.6.3. Development in the late 1980's

2.6.3.1. Changes in the Soviet legislation

In 1983 the Soviet Union adopted new regulations on the innocent passage of foreign warships in Soviet territorial waters[220]. The new rules seemed to be a significant departure from the old Soviet position in regard to foreign warships in territorial waters and reflected the new Soviet attitude during the negotiations at UNCLOS III. Most strikingly absent was the previously maintained requirement for prior authorisation. The decree of the USSR Council of Ministers had the following content:

"... innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without entering internal waters and ports of the USSR shall be permitted along routes normally used for international navigation :

- in the Black Sea according to the traffic separation in the area of Kypy Peninsula and the area of the Porkkala lighthouse

- in the Sea of Okhotsk according to the traffic separation schemes in the area of Cape Aniva and the fourth Kurile strait

- in the Sea of Japan according to the traffic separation system in the area of Cape Kril'on"[221]

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[220] The act calls 'Law of the State Boundary Of The U.S.S.R.' [Entered into force, March 1, 1983]. Art. 13 'Foreign warships, and also submarines means of transport, shall effectuate innocent passage through the territorial waters (territorial sea) of the USSR in the procedure established by the USSR Council of Ministers. In so doing, submarines and other submarine means of transport should navigate on the surface and under their own flag'.; Source: International Legal Materials Vol. XXII 1983 p. 1060

[221] Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters of the USSR and the Internal Waters and Ports of the USSR; art. 12 (1) quoted by Juda p. 112

This was not a general recognition by the USSR of a right of innocent passage of warships in the territorial waters, but a step forward.

2.6.3.2. The "Jackson Hole" statement

The USA soon challenged the Soviet position as part of its freedom of navigation program.[222] The freedom of navigation program involved the use of US ships and aircraft to reassert rights under international law off the coast of foreign countries which made objectionable claims. In February 1988 the USA sent two cruisers to the twelve nautical mile territorial sea of the Soviet Union near the Crimean Peninsula in an area what was not mentioned in the decree of the USSR Council of Ministers. Shortly after entrance the American ships were approached by Soviet destroyers. After a while the Soviet vessels bumped the American warships. The United States Government reacted to this event with a diplomatic protest.[223]

As a result of the policy of *Perestroika* many Soviet positions changed. On September 23, 1989, Secretary of State Baker and the Soviet Foreign Minister Schevardnadze issued a "Joint Statement With Attached Uniform Interpretation Of The Rules Of International Law Governing Innocent Passage" the so-called the "Jackson Hole" statement. That documents reflects a common understanding of the United States and indicates a significant modification in the Soviet policy on the right of innocent passage of foreign warships in the territorial waters of the Soviet Union.[224] The relevant provisions regarding innocent passage of warships are:

> 2. 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 is neither prior notification nor authorisation is required.

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[222] Juda p. 112
[223] ibid.
[224] ibid.

> 3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render the passage not innocent. A passing ship through the territorial sea that does not engage in any of these activities is in innocent passage.[225]

This was a huge step forwards. For the first time the superpower USSR recognised a right of innocent passage of foreign warships. The provisions of the understanding should serve and still serve to reduce the potential for violent confrontations between the two biggest naval powers.

3. Right of innocent passage for submarines and military aircraft

3.1. Submarines

The issue, whether submarines have a right of innocent passage or not is not so old as the same issue for warships. Submarines, as an invention, are much younger than warships. They were brought into action in the first world war as a military weapon. Hence, after World War I the discussion about submarines started. The discussion since 1925 went more in the direction that submarines should navigate on the surface in the territorial sea.

> "In 1925, Diena proposed that a draft on the territorial sea under the consideration by the Institut de Droit International should incorporate a provision to this effect, on the argument that the coastal state could not verify the pacific character of the passage unless the submarine was on the surface. Schücking adopted this proposal in his report to the Preparatory Commission."[226]

Hence art. 12 of the Hague Codification Conference provided: "Submarines shall navigate on the surface."[227] In the ILC discussion, this sentence was adopted without difficulties.

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[225] International Legal Materials Vol.XXVIII 1989 p. 1446
[226] O'Connell p. 295
[227] quoted by De Vries p.46

The same happened at the Geneva Conference in 1958. Art. 14 (6) states: "Submarines are required to navigate on the surface and to show their flag."[228] After this it was clear, that submarines enjoyed right of innocent passage. The same provision was adopted without difficulties at UNCLOS III as art. 20 LOSC. The discussion has gone rather in the direction whether breach of the requirement to remain on the surface negates the right of innocent passage. Some naval circles believes that art. 14 (6) is to be read in connection with art. 14(4) and art. 16 TSC, which allows the coastal state to take necessary steps in its territorial sea to prevent passage which is not innocent and hence it is possible to attack a submerged submarine.[229] This in my opinion is exaggeration. Art. 16 does not entitle the coastal State to use force. The use of force is forbidden under the UN Charter art. 2 (4). Self-defence under art. 51 of the Charter would only be allowed if a submerged submarine attacks the coastal State. However it could be difficult to decide, whether a submerged submarine has peaceful purposes in the territorial waters or not. Fitzmaurice argues: "A submarine that traverses in the territorial sea submerged, or not showing her flag, may possibly not be in innocent passage, but this will not be because she is submerged or not showing her flag."[230] He says that innocent passage is not dependent on navigation on the surface and according to art. 23 TSC, the coastal State can only require the warship to leave. There is also another phenomenon. Submarines are allowed to traverse territorial waters. For warships the right is disputed. In my opinion it would be possible to rely the threat argument also in the case of surfaced submarines, because it is possible to build huge submarines with a lot of military equipment. Hence it is argued that because submarines have the right to traverse on the surface in innocent passage in the territorial sea, there should be the same rule for warships too. Another argument would be that most of submarines are of a military nature. However, the right of innocent passage of submarines is established in art. 14 (6) TSC and art. 20 LOSC.

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[228] This sentence was adopted under the general rules for innocent passage in the territorial sea, sec III. Right of Innocent Passage.
[229] O'Connell p. 295
[230] Fitzmaurice, Some results ... in 8 ICLQ (1959) p.98

3.2. Military aircraft

Innocent passage of aircraft in this content is to understood as the right to overfly over the territorial sea. The Paris Convention 1919 confirmed the identity of airspace above with the national territory. That means also territorial waters were included.[231] Art. 1 TSC and art. 2 of LOSC confirm this principle. Hence it is necessary to get permission from the coastal State for a right of overflight. The question whether the operation of naval aircraft is an incident of innocent passage was foreclosed by the Chicago Convention which prohibits overflights by military aircraft.[232] LOSC prohibits in art. 19 para 2:

> (e) the launching, landing or taking on board of any aircraft
>
> (f) the launching, landing or taking on board of by any military device

from a ship in innocent passage to be prejudicial to the peace, good order or security of the coastal state.

Hence, there is no right of overflight for aircraft over the territorial sea.

4. Concluding observations

The dispute about foreign warship's right of innocent passage in territorial waters is old. It started when ironclad warships began to navigate near the shore in the territorial waters of coastal States, not being dependent on wind and currents. The arguments in favour and against were the same from the beginning of the dispute in the 19th century to the present time. The main argument against was, and still is the threat to the security of the coastal State. The main argument in favour was, and still is "freedom of navigation" and the equal

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[231] O'Connell p. 297
[232] O'Connell p. 297

treatment of warships and merchant ships. The dispute was dealt with in detail in the early literature and in early state practice.[233] The early attempts at codification of the law of the sea dealt with this topic too. The culmination was reached at the Geneva Conference 1958, where neither the advocates nor the opponents were victorious and the situation was still unresolved. Nothing changed at UNCLOS III. The text of LOSC is nearly the same as that of TSC. However one big change occurred at UNCLOS III. The opponents of the right lost a big ally and supporter, the Soviet Union. The reason for this is that it became a naval superpower and needed passage rights for warships. Only developing countries still objected. The dispute came to a preliminary end in 1989, when the naval superpowers both recognised the right.

Is the dispute now over? Is the joint statement enough to assert that a new rule of international customary law is born, which says that warships enjoy a right of innocent passage too? A rule of international customary law is born, when nearly all states participate in a similar practice over a certain period of time. At the time when the USA and the Soviet Union concluded the joint statement, a respectable number of states (mostly developing countries) still required previous notification or authorisation. These included also the big naval power People's Republic of China which still insists on prior authorisation.[234] Under these circumstances is it doubtful to speak about a new trend in general international customary law. The "Jackson Hole" statement is rather the end point of a convergence in regard to this topic between the superpowers USA and USSR which started at UNCLOS III. It is also doubtful, whether the agreement between the Soviet Union and the USA has the same value as in 1989. The Soviet and now the Russian naval fleet is in decline, especially the nuclear-powered vessels and submarines in the port of Murmansk. The Russian government does not have the money for maintenance. The Black Sea fleet is partly claimed by the Ukraine, as an inheritance from the Soviet Union. Under these circumstances it would not be surprising, if Russia reverted to its 1958 position. Hence we can say the dispute is still open and new developments are certainly to be expected.

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[233] see pages before and statement of Elihu Root

[234] Declaration of 1958 quoted by Shao Jin p. 66

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