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What is Innocent Passage?

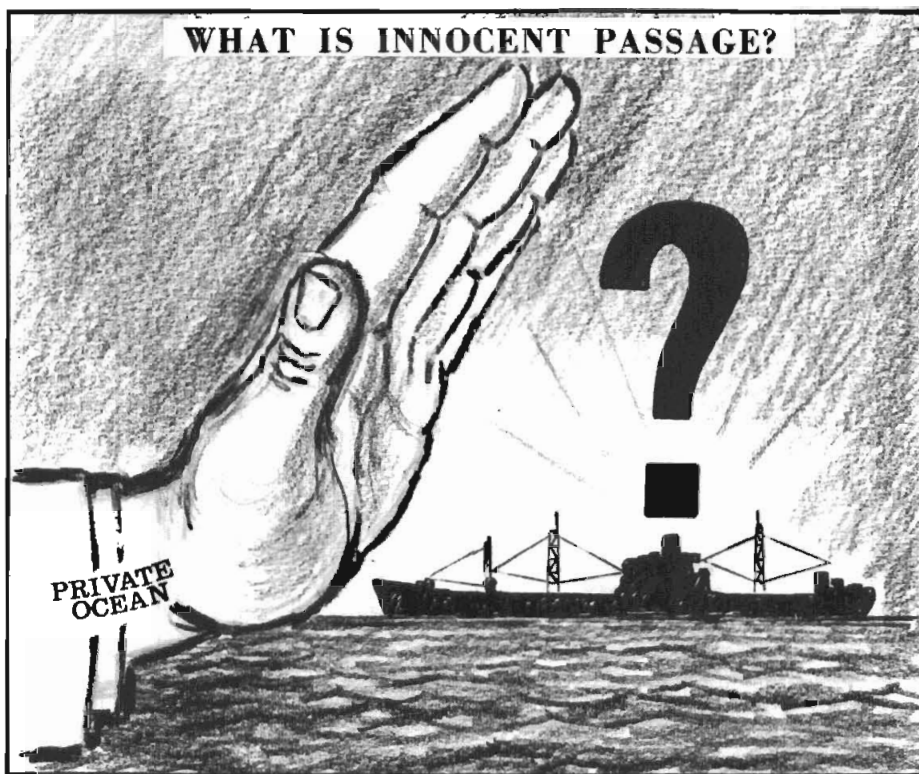
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INTRODUCTION

Although international law text writers, as well as the delegates to the conferences for the codification of international law, are in general agreement that foreign ships may pass freely through the territorial waters of a state, unanimity is lacking as to the specific rules which apply. For example, in May and June 1967, a major issue in the Arab-Israeli war was the matter of innocent passage of Israeli and Israeli-bound ships through the Gulf of Aqaba. In August 1967 the Soviet Union denied the right of innocent passage through the Vilkitsky Straits to two U.S. Coast Guard icebreakers.

It is the purpose of this paper to explore the origins, status, and recent developments in the international law of innocent passage of ships through the territorial seas of foreign countries. It is a timely subject, as the two incidents cited above attest. In view of the modern trend among many countries in the world to claim increasingly wide territorial seas, innocent passage is taking on growing importance in the maritime intercourse of nations. With the background of the current international law of innocent passage established, this paper will then analyze the conflicting national claims in the Gulf of Aqaba and Vilkitsky Straits incidents to determine whether the current concepts re-

main valid or whether new usage is developing, which usage may in time be accepted as customary international law.

I-FREEDOM OF THE SEAS

The concept that the seas should be open to the free use of all peoples is hardly a new one. From ancient Roman times on, such an idea has been proclaimed. Practice, however, has varied considerably from the theory, and for the last 400 years mankind has been attempting to reconcile the competing interests of states into a workable set of customs and rules.

The Middle Ages saw the development of the laws of Oleron and the *Consolato del Mare*. Although these codes restated the commonality of rights under a law of the sea, individual states adopted a position that continual use gave them rights over particular sea areas. Thus the Adriatic was claimed by Venice, the Ligurian Sea by Genoa, and the four surrounding seas by England.

The problem of sovereignty over the seas, however, did not arise until 1455 when Pope Nicholas V granted Portugal exclusive rights of navigation, fishing, and trading in the African waters beyond Capes Boyador and Non. On Columbus' return from his first New World voyage, the Portuguese king maintained that his discovery was in Portuguese waters. Ferdinand and Isabella appealed to Pope Alexander VI, who granted to Spain rights in western oceans similar to those already held by Portugal. While the papal division of the world's oceans between Spain and Portugal was disputed, those two nations finally agreed that the dividing line should be 340 leagues west of the Cape Verde Islands and should circle the globe.

It appears that this partition went unchallenged by most European countries, with the noteworthy exception of France whose Francis I championed the

free use of the seas for French mariners.

Maritime practices during the 16th century ranged from exploration and trade—with the claims of competing countries to exclusive enjoyment of portions of the seas sometimes observed—to outright piracy. Elizabeth I of England ordained that "The use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard to the public use permitteth any possession thereof."¹ Having the greater maritime power to bring to bear, England's use of the seas was more readily enforceable than France's. Drake's Caribbean victories in 1586 effectively terminated Spanish hopes for an exclusive use of western seas, although Spain did cling to her claims to exclusive trade rights with her colonies and exclusive navigation of colonial waters. Although England and France attempted by treaty to acquire trade concessions, they never did acknowledge that Spain had the power to bar ships of other nations from American waters.²

Simultaneous with England's termination of Spanish exclusivity in western oceans, the Netherlands was attempting to destroy Portugal's monopoly in the east. In support of Dutch claims to trade in the East Indies, Hugo Grotius, in 1605, wrote a learned treatise on the law of prize. One chapter was published separately under the title *Mare Liberum* in 1609. In this brief work Grotius made the first formal statement of freedom of the seas as a general principle of international law.³ Grotius' basic premise was that "every nation is free to travel to every other nation, and to trade with it," which he amplified with the observation, "nature has made neither sun nor air nor waves private property; they are public gifts . . . the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all. . . ."⁴

These views were soon contested by the British who claimed and enforced exclusive fishing rights in "British Seas." Supporting such claims were jurists William Welwood and John Selden. Welwood saw the intimacy of the land with its adjacent sea as requiring national retention of the sea and its use for the benefit of the people. Selden amplified on Welwood's work and validly noted that nothing in the nature of the seas prevented either their appropriation or claims to sovereign rights therein.⁵ Thus is presented the origin of a conflict in the interests of nations which exists to this day: the interests in the free use of the world's oceans which all nations share versus the individual interest of a state in protecting its security as well as economic marine resources by exercising sovereignty and, thereby, exclusive control over a belt of water adjacent to its shores.

An accommodation between such competing positions was attempted in 1702 by Cornelius van Bynkershoek, a judge of the Supreme Court of Appeal of Holland, who asserted that "the dominion of the land ends where the power of arms ends," or, "so far as cannon balls are projected."⁶ The cannon shot distance was specified at one sea league by Galiani, an Italian jurist, in 1782. The following year Secretary of State Jefferson noted in diplomatic correspondence that the limit which had gained recognition among nations was the *maximum* range of a cannon ball. Thereafter the United States recognized the sea league, or "three geographical miles" as the extent of its territorial sea. Such limit was also recognized by Great Britain, although her early 19th century "hovering acts" (which authorized her to arrest ships outside her territorial waters, on the high seas, on suspicion of smuggling) ran counter to such position. By the late 19th century the hovering acts had been done away with, and Britain unqualifiedly accepted the 3-mile limit of her territorial sovereignty

in the marginal sea.⁷

From the time of Grotius into the present century, the free use of the seas by ships of all countries has developed into an internationally accepted legal principle. Concomitant with that principle, and developing as a matter of customary practice, is the right of ships to pass through the territorial waters of foreign countries without interference by, or subjection to the jurisdiction of, the littoral state. Although the concept of innocent passage is universally accepted as an abstract principle, the practice of states has not been uniform, and disagreements exist today on its implementation.

Efforts to codify international law began in the 19th century in various fields, but it was not until the 1920's, under the direction of the League of Nations, that an effort was made to codify the Law of the Sea in time of peace. The Conference for the Codification of International Law, held at The Hague in 1930, culminated several years of scholarly preparation. Although a reasonable degree of agreement was reached on other matters, including innocent passage, adoption of a convention failed because the delegates were unable to agree on an internationally acceptable width of the nations' territorial seas.⁸

The 1958 Geneva Conference on the Law of the Sea, however, profiting from the experience of the 1930 Codification Conference, did reach sufficient accord to adopt four conventions, including a Convention on the Territorial Sea and Contiguous Zone. It still failed to reach agreement on a standard width for the territorial sea, as did its successor conference in 1960.

From these international conferences for the codification of international law one particular trend is apparent: a growing number of nations are claiming territorial waters greater in breadth than 3 miles. A U.S. proposal at the 1960 Hague Conference which would have

established a 6-mile limit to territorial waters with an additional 6-mile contiguous zone for enforcement of fishing and other laws failed of adoption by one vote.⁹ Most of the new, so-called "emerging nations" have proclaimed their territorial waters to be 12 miles wide.¹⁰

How does this affect the maritime nations of the world? Cannot their ships still transit territorial waters of foreign nations in innocent passage? As will be demonstrated in later chapters, a nation may deny innocent passage to foreign ships under certain circumstances. The maritime nations, and especially their shipowners and shippers of cargo, would prefer to sail entirely on the high seas where ships have an absolute right of passage than to rely on innocent passage through territorial waters where the littoral state may, they fear, act capriciously in denying innocent passage. With many nations now claiming territorial waters out to a limit of 12 miles (or more), the area of the high seas available to such unrestricted, unqualified passage—near the shelter and navigational reference points of land—has been significantly reduced. It is for this reason that the attributes of innocent passage have become increasingly important to the maritime world.

II-NATURE AND ATTRIBUTES OF INNOCENT PASSAGE

The nature of innocent passage (absolute or qualified right) is dependent upon the legal status of the waters which border the maritime states. Historically, there has been disagreement on such matters. Relying on the Roman and Grotian concepts that the seas are incapable of appropriation by anyone or any nation, one school postulated that all of the oceans constitute the high seas and that the littoral states had only limited claims in their marginal waters. The opposing school held that the marginal waters were as much property of

the littoral states as their land territory, fully subject to their sovereignty (i.e., exclusive power to control and regulate).¹ International law developments of the 20th century, however, have resolved such conflict. The discussions at the 1930 Codification Conference, the work of the International Law Commission preparatory to the 1958 Geneva Conference on the Law of the Sea, as well as the latter Conference itself, produced a statement expressive of customary international law,² which is embodied in article 1 of the Convention on the Territorial Sea and the Contiguous Zone: "Article 1. 1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea. 2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law."³

It is thus apparent that the sovereign rights of a coastal state in its marginal waters are not absolute. They are subject to limitations imposed by the community of nations by means of international law. One of these is innocent passage, which can be characterized as a qualification of the coastal state's jurisdiction and sovereignty in its territorial waters. Although the draft articles ("Harvard Research") presented to the 1930 Codification Conference did not characterize innocent passage as a right, the accompanying commentary did,⁴ and the draft articles produced by the Conference specified innocent passage as a right.⁵ The 1958 Conference made clear in its discussions and in the Convention on the Territorial Sea and Contiguous Zone that it was indeed a *right* enjoyed by ships. Articles 14 through 23 in section III of the 1958 Convention represented the agreement of the 1958 Conference as to the criteria of innocent passage.

To determine the specific legal attributes of innocent passage, the balance of this chapter will examine the provi-

sions of the 1958 Convention and the legislative intent behind them. While this Convention may be considered as a recent authoritative statement of international law, some shortcomings must be borne in mind. The provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone do not necessarily restate customary international law. Neither the International Law Commission, which drafted a proposed convention, nor the Conference attempted a mere restatement of existing custom, but rather undertook to codify a set of realistic rules for the regulation of international intercourse in the territorial seas and the contiguous zone. The Convention does, of course, embody some rules of customary international law, and to the extent that it does it is binding upon all states whether they be parties to the Convention or not. Those provisions which do not represent prior international law are binding only upon the parties to the Convention (until those provisions receive such general acceptance among the states of the world as to achieve the status of customary international law).

Another shortcoming of the Convention is that it fails to cover several situations of importance such as the width of the territorial sea, whether warships have an unlimited right of innocent passage, and a provision specifically applying to multinational bays such as the Gulf of Aqaba.

Rights of Ships. Basically, ships of all states may exercise the right of innocent passage through the territorial seas of foreign states. Such a provision was included in the International Law Commission's draft articles which were submitted to the Conference for consideration. The original proposal was adopted as article 14, paragraph 1, with only one change.⁶ The words "whether coastal or not" were added to describe further "all states."⁷ This action emphasized that innocent passage was a right accorded to

ships, rather than one which depended upon the reciprocity between coastal states.

In the debates of the Conference, concern arose over the transit of fishing boats and warships in innocent passage. In question was not whether such vessels had the right of innocent passage, but rather the conditions surrounding such passage and the restrictions which the coastal state might place on it.

Having stated the general principle of the right of innocent passage, the Convention goes on to define "passage" in article 14, paragraph 2, as "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." [Emphasis added.] Such action rejects an earlier view that the aims of a foreign vessel transiting the territorial sea for the purpose of entering internal waters are inconsistent with the basis of the right of innocent passage because, it was argued, the status of that vessel was deemed assimilated to that of a ship in port where the jurisdiction of the coastal state is subject to no restriction.⁸

The extension of innocent passage to a ship transiting the territorial sea after leaving internal waters is indicative of development in international law. Although the Harvard Research in International Law, which drafted articles of the law of the sea for presentation to the 1930 Hague Codification Conference, had rejected the concept that vessels entering or leaving a port of the coastal state could be in innocent passage,⁹ the Codification Conference finally adopted the same provision as the 1958 Conference.¹⁰

Thus the basic criterion for innocent passage is movement, and to this extent article 14(2) reflects customary international law.¹¹ The delegates to the Conference were in agreement with the long-established principles that anchor-

ing or "hovering" in the territorial sea broke innocent passage and subjected a ship to the jurisdiction of the coastal state.¹² A specific provision to that effect was introduced in the Conference but was rejected as unnecessary. The exception to the rule that stopping and anchoring, except as incidental to ordinary navigation, will break innocent passage is that of *force majeure*, as embodied in article 14, paragraph 3.¹³ The humanitarian principle that a ship in distress from a *force majeure* may enter foreign territorial waters and anchor or may put into port with complete immunity from local jurisdiction has been long recognized in international law.¹⁴

The most extended discussions at the Conference related to the problem which is basic to all considerations of innocent passage in its relationship to freedom of the seas: the proper balance between the security interests of the coastal state and the overseas states' need to navigate through territorial seas without undue impediment. Such debates centered around the Convention provisions which defined "innocent" and those which spelled out the rights and duties of the coastal states.

Article 14, paragraph 4, first sentence, provides the basic definition: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." The article which the International Law Commission originally proposed had read: "Passage is innocent so long as a ship 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."¹⁵ The proposed amendments to this original provision as well as the ensuing debates are enlightening as to the legislative intent behind the adopted provision.

An amendment proposed by India would have added the words "peace, good order or" prior to "the security,"

since coastal states had greater interests than merely security, which the United States characterized as comprehending only military security.¹⁶ Such additional interests include control of imports, exports, customs and immigration, navigation, and crime.

Romania introduced an amendment which, had it been adopted, would have provided that "Passage is innocent as long as it is for the *normal* course of the ship . . ." [emphasis supplied], expressing the view that departure from such a course was sufficient reason for the coastal state to exercise control. Of particular concern to Romania was the preservation of economic (fishing) interests against the "practice of some fishing vessels of putting nets down illegally while traversing the territorial sea."¹⁷ Against this proposal the argument was raised by several countries that there was no such thing as a "normal" course for a ship, since its exact course was determined by variable factors, including weather, loading conditions, and destination.

The United Kingdom expressed what appeared to be the majority view, that the test of innocence of passage was not the passage itself, but rather the manner in which that passage was carried out. The debates centered on whether particular proposed language adequately conveyed this idea or, instead, permitted the coastal state to claim arbitrarily that the *fact* of passage was prejudicial to its interests. The Chilean delegate's view was that the language finally adopted created a presumption of innocence.¹⁸ In any event, the determination of such issue initially rests with the coastal state. It is in the best position to judge the question of prejudice to its "peace, good order and security." Safeguards against a capricious claim include the reciprocal action that other coastal states may take as well as world public opinion.

The second sentence of article 14, paragraph 4, provides that "[innocent]

passage shall take place in conformity with these articles and with other rules of international law." The reason for the split of the International Law Commission's originally proposed single sentence into two separate sentences was to deal with two separate issues: the conditions which had to be fulfilled for innocent passage; and the extent of jurisdiction of the coastal state. A further assurance was desired that a violation of a rule of international law (such as the requirement for smokeless fuel) which did not prejudice the security of the coastal state could not be made the ground for denial of innocent passage.¹⁹ Therefore, the innocence of passage is not determined by the ship's compliance with *all* applicable provisions of international law.

A further concern of the Conference was to insure that fishing boats be permitted innocent passage, but that the coastal state be empowered to prohibit fishing by a ship purporting to pass innocently through the territorial sea. Proposals for a specific paragraph covering fishing vessels were offered. One which would have required that fishing gear be "stowed away" was criticized as placing a burden on fishing vessels which was not required by all countries.²⁰ Further, "stowed away" is ambiguous in that it does not specify where or how gear is to be stowed, and a ship may not have time, before entering territorial waters, to do more than bring its gear aboard.

The United States and United Kingdom felt that a specific provision on fishing vessels was superfluous, since a ship illegally fishing in territorial waters could not be in innocent passage. The provision adopted article 14, paragraph 5, conditions the innocence of passage of fishing vessels upon their observance of "such laws as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea."

The final paragraph of article 14 was

an embodiment of the prevailing views on submarines, as reflected in the 1930 Codification Conference: in order to be in innocent passage, "submarines are required to navigate on the surface and to show their flag."²¹ In such manner, submarines can give evidence of the innocence of passage and not constitute a danger to other ships in the territorial sea by proceeding beneath the surface where they cannot readily be seen. It is significant to note the position of this paragraph among the "Rules Applicable To All Ships," so that all submarines, both civilian and warships, are included.

Duties of Ships. Where rights exist in favor of a party, there exist also commensurate duties, and innocent passage is no exception. Article 17 restates preexisting international law in requiring ships in innocent passage to comply with the laws and regulations enacted by the coastal state.²² The balancing of interests between ship and coastal state is found in the provision that "the laws and regulations enacted by the coastal state [be] in conformity with these articles and other rules of international law." Thus this article would not recognize a duty on ships in innocent passage to comply with a law which denied innocent passage in contravention of international law. Lest coastal states be tempted to require, by law or regulation, levies of duties to be paid by ships in innocent passage, article 18, paragraph 1, specifies that "no charge may be levied upon foreign ships by reason only of their passage through the territorial sea." Paragraph 2 recognizes the inherent right of a coastal state to make charge, without discrimination, for services actually rendered (such as pilotage, towing, et cetera).

Rights of States. The rights of coastal states with respect to ships in innocent passage are set forth in article 16 of the Convention.²³ The first two paragraphs, which recognize a state's power to "take the necessary steps in its territorial sea

to prevent passage which is not innocent" and to deal with ships proceeding to internal waters did not engender controversy at the conference.

Paragraphs 3 and 4, however, revealed differences of opinion of what the law should be with respect to a state's suspension of innocent passage in territorial waters, generally, and in straits, in particular.

The principal international legal precedent for discussion of these points is the decision of the International Court of Justice in the Corfu Channel case.²⁴ The facts of the controversy were as follows: on 22 October 1946, the British destroyers *Saumarez* and *Volage*, in company with two cruisers, left the port of Corfu and proceeded northward through a channel in the North Corfu Strait. *Saumarez* struck a mine, sustaining heavy damage and personnel casualties. While assisting *Saumarez*, *Volage* likewise struck a mine. On 13 November 1946 the British found a moored minefield in Albanian territorial waters, where its two ships had been damaged, and swept it. Earlier, in May 1946, two British cruisers had traversed the strait, and Albanian guns had fired upon them.

The legal issues presented were whether warships could transit the strait lying in Albanian territorial waters in innocent passage without the permission of Albania, whether the fact of their passage prejudiced Albania's security, what duties were incumbent upon Albania to give notice of the navigational hazard (although Albania disclaimed any knowledge of the mining or perpetrator thereof, the Court found constructive knowledge), and whether the United Kingdom violated Albania's sovereignty by resorting to self-help in clearing the minefield without Albania's permission.

Albania contended that the North Corfu Channel did not belong to the class of international maritime channels through which a right of passage existed, since it was a route of secondary

importance and not even a necessary route between two portions of the high seas.

The Court held that the determinative factor was the strait's geographical situation as connecting two portions of the high seas and the fact of its use for international navigation. It specifically rejected the contention that the strait must be a necessary route between two portions of the high seas to establish an international right of passage. After noting the considerable use which had been made of the channel, the court decided that the "North Corfu Channel should be considered as falling under the category of international maritime thoroughfares, through which passage cannot be prohibited in time of peace by a coastal state."²⁵

Albania contended further that the destroyers' passage on 22 October 1946 was not innocent and therefore violated Albanian sovereignty. In support Albania argued, *inter alia*, that the passage took place not for ordinary navigation but in a political mission. Evidence from the United Kingdom had showed that one of the purposes of the passage was to test Albania's attitude (Albania had fired on passing British warships on 15 May 1946); ensuing diplomatic correspondence had revealed Albania's view that warships might not transit her territorial sea without prior notification. The Court therefore analyzed the manner in which the passage was performed. The ships' guns had been placed in their normal stowage position. Personnel, however, were at action stations. Finding that the latter precaution was reasonable, the Court held that the United Kingdom did not violate Albania's sovereignty by sending her ships through Albanian territorial waters on 22 October 1946.²⁶

The Court found, however, that the United Kingdom's "self-help" of sweeping the minefield on 13 November 1946 against the expressed will of the Albanian Government could not be justified.

This show of force by a number of warships, which remained in Albanian territorial waters for some time, could not constitute innocent passage and therefore violated Albanian sovereignty. No payment of damages was required of the United Kingdom, however.

Conversely, the Court found Albania liable in damages to the United Kingdom for breach of its coastal state's duty to warn of a known navigational hazard.

The Court held that warships might enjoy the right of innocent passage without first obtaining permission from the coastal state. Thus the two passages of British warships, in May and October 1946, were innocent inasmuch as the ships were navigating through the strait without prejudicing Albania's security. The British warships' actions of remaining within Albanian waters while sweeping mines in November 1946 were prejudicial to Albania, hence there was no innocent passage.

A further holding was that Albania could not restrict passage through a strait connecting two portions of the high seas.

Thus the Conference had before it a judicial decision which it might confirm by codification or overrule by failing so to do. It chose to codify the decision, in part, in article 16, paragraph 4, which prohibits "suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas. . . ."

The draft proposal of the International Law Commission would have limited the prohibition on suspending innocent passage to "straits normally used for international navigation between two parts of the high seas." The Commission commented that inclusion of the word "normally" reflected the thrust of the ICJ decision in the Corfu Channel case.²⁷ The Conference, however, did not so read the Corfu Channel decision and rejected such wording. The

Netherlands representative explained that "normally" had been dropped because it was considered that "paragraph 4 should apply to sea-lanes actually used by international navigation."²⁸ The Conference's other change was to expand on the Corfu Channel case and to extend the prohibition on suspending innocent passage through straits to those connecting the high seas and the territorial waters of another state. The explanation given was that this "reflected existing usage safeguarding the right to use straits linking the high seas with the territorial sea of a State."²⁹

Saudi Arabia strongly dissented to deletion of the word "normally," maintaining that "innocent passage could be exercised only in recognized international seaways; it could not . . . be invoked by ships using the North-West Passage, which had never been used for regular international navigation."³⁰

Saudi Arabia further contested the proposition that international law provided a right of innocent passage through straits connecting the high seas with an internal sea or the territorial sea of a particular state, citing the Corfu Channel case for support.³¹ The weakness of such argument is that the Court was only dealing with a strait linking two portions of the high seas, therefore had no need to face the further question of straits connecting high seas with territorial seas. The Saudi Arabian delegate concluded: ". . . the amended text no longer dealt with general principles of international law, but had been carefully tailored to promote the claims of one State."³² When article 16 came up for discussion later in plenary session, the United Arab Republic delegate attempted unsuccessfully to obtain a vote on article 16, paragraph 4, separately, in an effort to reinstate the International Law Commission's original draft wording. Such effort was concurred in by the Saudi Arabian delegate, who reiterated his charge that "paragraph 4 had been drafted with one particular case in

view."³³ He obviously was referring to the Israeli claim of innocent passage through the Straits of Tiran and Gulf of Aqaba.

Notwithstanding the Arab challenge, paragraph 4 of article 16 was adopted in the First Committee by a close vote, 31 to 30, with 10 abstentions. Voting against were the Arab countries of North Africa and the Middle East, as well as Communist bloc countries. In plenary session, article 16, as a whole, was adopted by a 62 to 1 vote, with 9 abstentions.³⁴

With regard to paragraph 3 of article 16 (suspension of innocent passage in territorial waters), there was a disagreement over the word "temporarily." Romania introduced a proposal to delete it; the effect would thus have been to give the coastal state latitude in denying innocent passage through its territorial waters without any time constraint. This proposal was not put to a vote; "temporarily" therefore remained.³⁵

The International Law Commission draft of article 16, paragraph 3, was extensively reworded, but such changes merely constituted improvements in the wording and did not make any changes of substance. As adopted, it provides for the temporary suspension of innocent passage by the coastal state in the territorial sea if such action is "essential for the protection of its security." In the First Committee the United Kingdom delegates noted the desirability of wording this provision in such a way as to create an "objective" standard for the determination of prejudice to the security of the coastal state. In reply, the Indian delegate noted that security questions should be determined by the coastal state, since it is in the best position to have access to and to evaluate the relevant evidence. This view prevailed, and although there was some further disagreement on the question of which wording best accommodated the interests of coastal states and interna-

tional shipping, the present wording of article 16, paragraph 3, was adopted by the First Committee by a vote of 31 to 27, with 5 abstentions.³⁶

Thus it can be seen that article 16, while stating the rights of coastal states to protect their security interests with respect to innocent passage, does limit such rights: innocent passage cannot be suspended through straits connecting the high seas with either the high seas or the territorial waters of a foreign state; in other territorial waters, it may only be temporarily suspended in specified areas, and due publication of such fact must be made.

Duties of States. The legislative effort of the Conference regarding the duties of the coastal states served to limit their liability. The International Law Commission's draft proposal, which represented an effort to codify a novel area of international law, would have required the coastal states to "ensure respect for innocent passage through the territorial sea and . . . not allow the said sea to be used for acts contrary to the rights of other states."³⁷ This provision was seen as placing the coastal state under a duty to police its territorial waters so that one foreign state might not impinge upon the rights of another, and to remove obstacles to innocent passage. The International Law Commission believed that that provision reflected the International Court of Justice ruling in the Corfu Channel case, but such view was contested by the United States as *obiter dictum* and not intended to state a codifiable rule of law.³⁸

Fearing an absolute liability which could impose an undue economic burden on coastal states, the United States proposed deletion of this provision. The U.S. proposal was adopted,³⁹ and the first paragraph of article 15, dealing with duties of coastal states, reads simply: "The coastal State must not hamper innocent passage through the territorial sea."

The second paragraph of article 15, as proposed by the International Law Commission reads, "The coastal State is required to give due publicity to any danger to navigation of which it has knowledge." The Conference feared that this requirement, as well, was too broad and imposed the duty on coastal states to give notice of dangers no matter where they be located. Such a burden was deemed inordinate and the limitation "within its territorial sea" was added.⁴⁰

The Conference thus incorporated the thrust of the Corfu Channel decision into the Convention, as the International Court of Justice had in large measure predicated the Albanian liability on the failure to give appropriate publicity to a known danger to navigation within its territorial waters.

Article 18, which prohibits coastal states from levying charges on ships in innocent passage except for services actually rendered, is identical to the article drafted by the Second Committee at the 1930 Codification Conference.⁴¹ It acknowledges the economic value of the right of innocent passage to the commercial ships of the world and emphasizes again the policy that coastal states not interfere with passing ships.

Warships. May warships enjoy the right of innocent passage in time of peace? Is such right dependent on either prior notification to, or the permission of, the coastal state? No other aspect of innocent passage is more controversial. One view is that warships should "not enjoy an absolute legal right to pass through a state's territorial waters any more than an army may cross the land territory." The rationale behind this view is that foreign warships by their very nature pose a threat whereas merchant ships do not, and that the world interests which exist in the case of freedom of the seas for merchant ships are absent in the case of passage of

warships.⁴²

The opposing view, espoused by the United States and less than a majority of the states represented at the Conference, is that warships do have a right of innocent passage, as was held in the Corfu Channel case.

The 1930 Codification Conference draft proposals on warships reflected the more liberal view,⁴³ the International Law Commission, however, proposed an article which would have made the passage of warships "subject to previous notification or authorization," and the First Committee reported such a provision.⁴⁴ The words "or authorization" were deleted from the article by separate vote, with the U.S.S.R. voting to retain them on the basis that every state, in the exercise of its sovereignty, should be able to require prior authorization of foreign warships.⁴⁵ Saudi Arabia voted to retain the requirement for prior authorization of warship passage, noting that "a warship could not be regarded as a vehicle of peaceful communication, and unauthorized passage was tantamount to violation of the rights of coastal states and to aggression against them." The proposed article 24, as amended to require only prior notification for the innocent passage of warships, failed of adoption (43 for, 24 against, 12 abstentions) because it did not receive the requisite two-thirds majority. The "no" votes included the Communist bloc and Arab countries, which had so vociferously supported the requirement for prior authorization. Thus the Convention contains no provision according states the right of innocent passage for their warships.

(Article 23, originally article 25 of the International Law Commission's draft convention, is the only rule applicable specifically to warships. It requires warships to comply with the regulations of the coastal state. For failure of compliance with such regulations and the coastal state's request for compliance, the warships may be

ordered to leave the territorial sea. This provision was adopted by a 76-0-1 vote.)

However, the International Court of Justice based its Corfu Channel case holding that warships do enjoy a right of innocent passage, without the necessity for either prior notification or authorization from the coastal state, upon evidence that such was the general practice of states.⁴⁶ Notwithstanding the failure of the 1958 Law of the Sea Conference to include prior notification or permission as a prerequisite to the innocent passage of warships, a considerable number of states favor such a rule. Included in this group are the Soviet bloc and Arab states, as demonstrated by the vote on the International Law Commission's proposed article 24 and the reservations lodged by several states at the time of signing the Convention.⁴⁷

Accordingly, it would appear that the present attitude of a majority of states accepts a right of innocent passage for warships—but only if it be subject to a greater measure of regulation than is the case with nonwarships.

Coastal State Sovereignty, Flag State Jurisdiction, and Ship Immunity. Like the 1930 Codification Conference, the International Law Commission in its draft articles 20 and 21 (criminal and civil jurisdiction) sought not to promulgate specific rules resolving the conflict between the inherent jurisdiction of the coastal state over its territorial waters and the jurisdiction of the flag state over its ships while they transit foreign territorial waters. Instead, established principles were set forth for guidance: that the coastal state would, as a general rule, refrain from exercising criminal jurisdiction over a passing ship unless the impact of the crime affected the coastal state or disturbed its peace, order, and tranquility, or unless its assistance was requested by the ship captain or consul of the flag country. A

new provision was included for the suppression of drug traffic. These rules recognized, however, the power of the coastal state to exercise its jurisdiction and in no way restricted it. The same philosophy applied to the exercise of civil jurisdiction: the coastal state *should not* (but still may) stop or arrest foreign ships except insofar as civil obligations attach to the *current voyage*, or in the case of a ship leaving internal waters or lying in the territorial sea (article 20).

Government civilian vessels in commercial service are assimilated to the status of merchant vessels by article 21; Government civilian vessels not operated for commercial purposes are governed by the provision of articles 14 through 19 but are not subject to the civil jurisdiction of article 20 (articles 21, 22).

In sum, the 1958 Convention recognizes the jurisdiction of the littoral sovereign over vessels in his territorial sea and, consistent with an accommodation between that sovereign's power and the free use of the seas, does not forbid the littoral state to exercise jurisdiction, but merely exhorts him not to do so in accordance with the stated guidelines.

Innocent Passage in Time of War. The 1958 Convention fails to state whether it is applicable in both war and peace. The International Law Commission's commentary on its draft Convention on the Law of the Sea stated that the draft articles it developed were to apply only in time of peace.⁴⁸ Although there was some discussion at the Conference to the effect that the articles considered had only peacetime application, the Convention on the Territorial Sea and Contiguous Zone is silent on this point.

It should be noted, however, that article 10 of Hague Convention XIII of 1907, concerning the rights and duties of neutral powers in time of war, recognizes that a right of passage of

belligerent warships through a neutral's territorial waters exists.⁴⁹ Although such passage is not qualified with the adjective "innocent," the construction placed upon "mere passage" indicates that it is intended to apply as "innocent passage."

The *Altmark* incident in World War II illustrates the problems and some practice with regard to innocent passage in time of war.⁵⁰

In 1940 the *Altmark*, a German naval auxiliary, was returning to Germany from the South Atlantic with about 300 British prisoners of war. She took a circuitous route which brought her within Norwegian territorial waters for a distance of several hundred miles. The *Altmark* was hailed by a Norwegian torpedo boat and in reply to inquiry stated that it had no citizens or members of armed forces of any belligerent aboard. Subsequently, still within Norwegian waters, a British destroyer boarded the *Altmark* and liberated the prisoners. Norway protested the infringement of her sovereignty and violation of her neutrality.

This situation presented the issues of whether a belligerent warship enjoys a right of innocent passage through neutral waters and, if so, whether such passage is subject to any restrictions. In exchanges of diplomatic correspondence,⁵¹ Britain contended that the *Altmark* was making belligerent use of Norway's territorial waters and therefore could not have been in "mere passage" and that Norway had a duty to ascertain whether the *Altmark*'s passage constituted belligerent activity in violation of Norway's neutrality. Norway had respected the immunity enjoyed by the foreign warship and took no action to impede its passage beyond verifying its character as a warship.

Britain conceded that "mere passage" in article 10 of Hague Convention XIII denoted innocent passage but construed the distance and duration involved in *Altmark*'s passage as defeating

its innocence, inasmuch as this Convention prohibits belligerents from engaging in military operations in neutral territorial waters. Britain contended that the result of *Altmark*'s choice of route was to obtain a shield against attack by virtue of Norway's neutrality.

Notwithstanding the different inferences drawn by Britain and Norway from the factual situation presented by the *Altmark*'s passage, both agreed that customary international law permitted a belligerent warship to navigate in innocent passage through neutral territorial waters.⁵² Despite the provisions of article 12 of Hague Convention XIII,⁵³ neither Britain nor Norway regarded the fact that *Altmark*'s passage through territorial waters exceeded 24 hours as a violation of the Convention but rather as evidence bearing on the innocence of the passage.

Since learned writers on international law accord to the coastal neutral state the right to deny innocent passage in its territorial waters to all belligerents without discrimination if it so chooses, and Hague Convention XIII is inexplicit, it appears that belligerent warships enjoy only a conditional right of innocent passage.⁵⁴ The position of the U.S. Navy on this matter appears in article 443 of the *Law of Naval Warfare*: "a. Passage Through Territorial Sea. A neutral state may allow the mere passage of warships, or prizes, of belligerents through its territorial sea."⁵⁵ The amplifying footnote to this provision reads, in part:

... Thus, the 'mere passage' that may be granted to belligerent warships through neutral territorial waters must be of an innocent nature, in the sense that it must be incidental to the normal requirements of navigation and not intended in any way to turn neutral waters into a base of operations. In particular, the prolonged use of neutral waters by a belligerent warship either for the purpose of avoiding combat with the enemy or for the purpose of evading capture, would appear to fall within the prohibition

against using neutral waters as a base of operations.⁵⁶

With respect to the passage rights of belligerents *inter se*, a belligerent is entitled, as a matter of customary international law, to prevent the passage of an opposing belligerent's ships or of cargo destined for him.⁵⁷

III-RECENT INCIDENTS INVOLVING INNOCENT PASSAGE

With the recent legal history of innocent passage thus set forth, this chapter will undertake an analysis of the two 1967 events of international significance in which the issue of the practical application of the foregoing rules and principles arose: the United Arab Republic's denial of innocent passage to Israeli shipping through the Straits of Tiran and Gulf of Aqaba, which proved to be a *casus belli* for the ensuing war, and the Union of Soviet Socialist Republic's denial of innocent passage through the Vilkitsky Straits to two U.S. Coast Guard icebreakers.

Straits of Tiran and Gulf of Aqaba.

On 22 May 1967, President Nasser of the United Arab Republic announced that his country would prevent Israeli ships and other ships carrying strategic cargo from transiting the Straits of Tiran at the entrance to the Gulf of Aqaba.¹ This action followed withdrawal of the United Nations Expeditionary Force (UNEF) from the Egypt-Israel border and from Sharm-El-Sheikh, a fortification overlooking the Straits of Tiran from which that waterway can be militarily controlled.² (Previously, Egypt had blockaded the Gulf of Aqaba to Israeli shipping from 1948 to 1957.)

This action by Egypt, which had been coupled with a massing of armed forces along her border with Israel, evoked consternation and protest from the major maritime nations of the world, the United Kingdom and the United States, and the issues were de-

bated in the Security Council of the United Nations in late May 1967.³ The basic issue posed by the Egyptian blockade was the legality of such action, in opposition to the claim of Israel to the right of innocent passage through the Straits of Tiran and Gulf of Aqaba to her southern port of Elath.

The legal arguments of the United Arab Republic and Israel were expressed in the U.N. debate. As will be seen, they are based upon two different sets of operative facts.

The position of the United Arab Republic is twofold. First, the Gulf of Aqaba is an Arab "closed sea" and therefore constitutes internal waters of the littoral states. International law recognizes a right of innocent passage through the territorial sea, but no such right exists as to a state's internal waters. Apparently aware of the provisions of article 16, paragraph 4, of the Convention on the Territorial Sea and Contiguous Zone, prohibiting the suspension of innocent passage through international straits connecting the high seas with the territorial sea of another state, the United Arab Republic maintains that Israel has no territorial sea in the Gulf of Aqaba because her presence at Elath was the product of aggression. Such aggression, it is argued, occurred after the Egypt-Israel Armistice Agreement in 1949, and the applicable international law doctrine is that belligerent occupation cannot be legally converted into sovereignty, unless the state of war was concluded by a peace treaty.

The second part of the U.A.R. position is that the Armistice Agreement of 1949 served only to end hostilities between Egypt and Israel and did not terminate the state of belligerency between the disputants. Therefore, Egypt was perfectly within her rights as a belligerent to blockade Israeli shipping and goods from the Straits of Tiran and Gulf of Aqaba, and Israel had no right of innocent passage therein.⁴ This latter argument, if the underlying basic as-

sumption of continued belligerency since 1948 is accepted, does not depend upon the validity of the "internal waters" claim.

In support of its claim that the Gulf of Aqaba consists entirely of the internal waters of the three littoral states (U.A.R., Jordan, Saudi Arabia) having a *legitimate* sovereign presence on the gulf, the United Arab Republic cited the example of the Gulf of Fonseca and the judicial decision thereon.

The Gulf of Fonseca case was an action brought in the Central American Court of Justice to set aside a Nicaraguan grant to the United States of a 99-year right to operate a naval base on Nicaraguan territory bordering the Gulf of Fonseca.⁵ El Salvador and Costa Rica, both littoral on the gulf, objected to the grant. Although there was no dispute between the parties that the waters of the gulf were jointly owned and were a "closed bay," Nicaragua claimed that they should be divided by extending the land boundaries, whereas Costa Rica claimed that the three states had joint, undivided ownership. In sustaining the Costa Rican claim, the Court determined that the Gulf of Fonseca "belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua." Its rationale was that the Gulf of Fonseca

... combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense.⁶

The Court held that the gulf waters were jointly owned internal waters, subject to the territorial sea of each coastal state.⁷

Before the Security Council the U.A.R. related the historical facts that the Gulf of Aqaba had been under continuous Arab control for over 1,000 years and constituted an inland waterway subject to absolute Arab sovereignty, and argued that it therefore fell within the category of historical gulfs which are governed by national internal law rather than by international law. The Gulf of Fonseca decision was claimed to be in point, since it concerned a multinational bay; furthermore, the United States had not disputed the position that the Gulf of Fonseca is part of the internal waters of the littoral states and had accepted the Court's decision.

In support of its argument for a continuing status of belligerency, the United Arab Republic maintained that Israel had constantly violated the armistice agreement and had committed acts of aggression against the Arab states and that the 1956 war had not altered the U.A.R. rights in its waters; furthermore, Britain recognized the blockade in 1951, and U.S. ships observed it until 1956.

On the other side of the dispute, Israel claimed that the Gulf of Aqaba is an international waterway, and, consequently the Straits of Tiran are an international strait in which the right of innocent passage cannot be suspended. In addition, Israel saw the 1949 armistice agreements as terminating the belligerency between herself and Egypt and Jordan; therefore, Egyptian action to interfere with shipping in the Straits of Tiran violated international law.⁸

Supporting the Israel position on the juridical status of the waterway is an *aide-memoire* from U.S. Secretary of State Dulles to the Israeli Ambassador, Abba Eban, of 11 February 1957. In this document the United States recog-

nized that Israel was still in occupation of areas stipulated by the armistice agreements to be occupied by Egypt but went on to declare that "... the United States believes that the Gulf [of Aqaba] comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto."⁹ Israel also contended that the international character of the gulf was attested to by its use by a significant amount of shipping under many different flags, and that such character had been confirmed in the General Assembly in March 1957.

With regard to the belligerency claim of the Arab states, Israel argued that the Security Council resolution of 1 September 1951 recognized that the armistice agreements had legally terminated the belligerency: "... since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent. . . ."¹⁰ Thus, disagreement centered on two issues that need further analysis: the status of the Gulf of Aqaba and the alleged status of belligerency. Concerning the first issue, the Arab claims to a closed sea (internal waters) in the gulf show several weaknesses. Although the Gulf of Aqaba had been under continuous Ottoman control for about 1,200 years, no joint closed-sea claim was made by the coastal Arab states at the time they gained sovereignty in the present century. Such a claim was apparently not asserted until 1957, by Saudi Arabia.¹¹ No Arab protest was heard against the use of the gulf by Israeli shipping during the period from 1957 to 1967. Nor have the Arab states agreed to a joint control over the gulf, as the coastal states had done in the Gulf of Fonseca. In any case, unlike the Gulf of Fonseca regime, the Arab closed-sea claims have not achieved general international acceptance. Moreover, Saudi Arabia and

Egypt claimed only 6-mile territorial waters until 1958, and an argument could have been made that, since the Gulf of Aqaba exceeded 12 miles in width, it contained portions of the high seas. In 1958 both countries extended their territorial sea claims to 12 miles, thus eliminating, from their standpoint, the possibility of a claim of high seas in the gulf.¹² Yet, throughout the disputes between Israel and Egypt (U.A.R.), the latter has pledged to guarantee [to the states of the world] "free and innocent passage according to international law," which does not include such a commitment to an opposing belligerent.¹³ Such a position is, of course, inconsistent with a closed-sea claim.

Israel's legal position on the Gulf of Aqaba likewise contains some weaknesses. The Dulles *aide-memoire* cited above appeared to condition the recognition of the international character of the gulf upon Israel's withdrawal of troops from Egyptian territory. The 1 September 1951 Security Council resolution dealt with the Suez Canal only and could be characterized as political in nature and not intended to make a legal determination of the status of nonbelligerency. Finally, the Arab claim that Israel's presence at Elath on the Gulf of Aqaba lacks legitimacy fails to take into account the fact that such occupancy was clearly set forth in the Israel-Jordan Armistice Agreement, which followed the occupation in question.¹⁴

The U.S. position on the U.A.R.'s denial of passage through the Straits of Tiran was expressed both by President Johnson in a statement released 23 May 1967 and by Ambassador Goldberg in the Security Council debates. The President stated that:

... The United States considers the gulf [of Aqaba] to be an international waterway and feels the blockade of Israeli shipping is illegal. . . . The Right of free, innocent passage of the international waterway is a vital interest of the entire international community.¹⁵

Ambassador Goldberg echoed these views, noting that the "rights of all trading nations under international law" were at stake and cited article 16, paragraph 4, of the 1958 Convention on the Territorial Sea and Contiguous Zone as expressive of that law.¹⁶ Although the U.A.R. representative might have argued, in rebuttal to the U.S. position, that article 16, paragraph 4, had no applicability to the Arab states since they had not ratified the Convention, he instead argued that it was inapplicable to situations involving armed conflict.¹⁷ Thus the U.A.R. appears to have conceded that article 16, paragraph 4, is expressive of customary international law in time of peace.

What then is the status of the Gulf of Aqaba? As noted in chapter II, the 1958 Conference on the Law of the Sea did not attempt to codify the law with respect to multinational bays. After extended debate on the wording of article 16-4, it set forth a general principle of freedom of international sea transit which guarantees innocent passage through straits connecting the high seas with a state's internal waters.

As to gulfs and bays bordered by more than one state, a rule of general acceptance has been that:

... all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations, including men-of-war...¹⁸

In light of this criterion, the recency of the Arab claim to a closed sea, and the lack of international recognition of such claim, it is submitted that the facts underlying the Gulf of Fonseca decision are distinguishable from the facts of the instant case. The waters of the Gulf of Aqaba do not constitute internal waters of the littoral Arab states, and the Straits of Tiran are not subject to

suspension of the right of innocent passage.

The final portion of the U.A.R. legal justification for blockading the Straits of Tiran to Israeli shipping was that a state of belligerency existed between that state and Israel, since the armistice agreements then effective merely terminated hostilities. This position does not depend upon the juridical nature of the waters of the gulf, since a belligerent is entitled to prevent the passage of the vessels of an opposing belligerent, or cargo bound for him. The opposing Israeli position--supported by the United States--hold that the armistice agreements of 1949 with Egypt and Jordan terminated belligerency as well as hostilities and that the U.N. Security Council had so recognized in its resolution of 1 September 1951 and discussions in 1957. In any event, it is beyond the scope of this paper to explore the merits of the conflicting views as to the legal effect of an armistice. That portion of the U.A.R. claim will be determined with reference to rules other than the Law of the Sea.

Vilkitsky Straits Incident. In August 1967 the United States announced a planned scientific expedition by two Coast Guard icebreakers, *Edisto* and *Northwind*, to circumnavigate the Arctic Ocean. The original itinerary would have taken the ships north of several Soviet islands, including Severnaya Zemlya, and they would thereby have traveled entirely on the high seas.

Ice conditions, however, prevented the icebreakers from going to the north of Severnaya Zemlya; the U.S. Embassy in Moscow so notified the Soviet Ministry of Foreign Affairs on 24 August, stating that it would be necessary for the two ships to transit the Vilkitsky Straits between Severnaya Zemlya and the mainland. The Soviet Ministry of Foreign Affairs replied to the U.S. Embassy that the straits were Soviet territorial waters.

On 28 August the Soviet Ministry, responding to a message from the U.S. ships to the Soviet Ministry of the Maritime Fleet, reaffirmed its earlier declaration and stated further that the U.S.S.R. would claim that transit of the ships through the Vilkitsky Straits would violate Soviet frontiers. The United States then determined not to send the icebreakers through the Vilkitsky Straits and changed their assignments. The U.S. Embassy in Moscow sent a note of protest on 30 August which stated, "that the Soviet law cannot have the effect of changing the status of international waters and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and Contiguous Zone . . . to which the Soviet Union is a party." The note apparently went on to point out that the right of innocent passage existed through straits used for international navigation between two parts of the high seas whether or not they be characterized as having overlapping territorial waters and that an unlimited right of passage exists in straits comprising both high seas and territorial waters.¹⁹ (The Vilkitsky Straits are about 20 miles wide at the narrowest point; the U.S.S.R. claims a 12-mile territorial sea.)

From the cited State Department account, the Soviet legal position is not clear. It could have been based on any of the following three theories: the passage of the U.S. ships was prejudicial to Soviet peace, good order, or security; the ships in question being warships (within the definition of article 8 of the 1958 Geneva Convention on the High Seas), their passage would not be in conformity with the requirements of Soviet domestic legislation; finally, it might have been claimed that Vilkitsky Straits are not an international waterway, through which a right of innocent passage exists for foreign ships.

With regard to the possible prejudice

to Soviet security, it is difficult to envision how a scientific expedition would be thusly prejudicial absent some hostile action by the ships themselves. The fact of passage itself must not be sufficient ground for the coastal state to deny innocent passage.

At the time of signing the Convention on the Territorial Sea and Contiguous Zone, the Soviet Union entered two reservations, one of which concerned article 23: "The Government of the Union of Soviet Socialist Republics considers that a coastal state has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters."²⁰ In pursuance of such position, the U.S.S.R. has enacted laws which require prior consent for the innocent passage of warships. Such consent must be requested through diplomatic channels 30 days in advance.²¹ Article 23 of the Convention provides that, "if any warship does not comply with the regulations of the coastal state concerning passage . . . the coastal state may require the warships to leave the territorial sea." The "regulations . . . concerning passage" are deemed to be rules of navigation.²² Further, the Soviet regulations cannot be such as to deny innocent passage, in view of the provision of article 17 and discussions held thereon at the 1958 Law of the Sea Conference. In the present case, the United States did not and could not foresee, at least 30 days in advance, that its ships would be forced by ice to transit Soviet territorial waters. Hence, if noncompliance with the authorization provisions was part (or all) of the basis for denying passage, that denial was improper.

Whether the Vilkitsky Straits are an international strait, through which innocent passage cannot be suspended, is not free from doubt. The text writers generally agree that a strait in the geographical sense is not necessarily one in the legal sense.²³ The International

Court of Justice found the Corfu Channel to be legally an international strait on the bases that it connected two portions of the high seas and was used for international navigation. The Court rejected the idea that the strait be a necessary one for shipping. Though the Corfu Channel case decision is cited as the leading authority on the point, differing conclusions are drawn from it as to the legal test for an international strait. Oppenheim states that "It is sufficient that [the strait] has been a useful route for international maritime traffic."²⁴ Professor Baxter, concurring generally in the foregoing view, warns that "It is impossible to answer in the abstract how many straits meet the requirement of being 'useful' for international navigation, for the test applied by the Court lays more emphasis on the practices of shipping than on geographic necessities."²⁵

A third view is that expressed by Judge Azevedo in his dissenting opinion in the Corfu Channel case: "...the notion of an international strait is always connected with a minimum of special utility, sufficient to justify the restriction of the rights of the coastal State--which rights must be assumed to be complete and equal to those of other States."²⁶ From this O'Connell deduces that the "correct approach is to balance the interest which the coastal state has in its own territorial sea against that which the international maritime community has in traversing that passage."²⁷

In view of the location of the Vilkitsky Straits, north of Siberia, where they are closed by ice for most of the year, it is doubted whether the international maritime community has, in the past, made use of them. On the other hand, if the test be one of present usefulness, in times of icing to the north of Severnaya Zemlya the Vilkitsky Straits are indeed the only means of transiting the Arctic Ocean at that point. Applying the "balancing of inter-

ests" test, it is submitted that the interests of the maritime nations in navigating the Arctic regions, though possibly slight today, certainly outweigh the even slighter security interests of the U.S.S.R. in denying passage to ships which desire to pass peacefully.

When considering the foregoing, together with the action of the 1958 Law of the Sea Conference in expanding the rights of nations for their ships to pass innocently through straits in article 16, paragraph 4, of the Convention on the Territorial Sea and Contiguous Zone, it is concluded that the Vilkitsky Straits are international and that the U.S.S.R. should not have denied innocent passage through them on that account.

Whatever the Soviet legal theory may have been in its denial of usage, it should be noted that the United States preserved its legal position by its note of protest which asserted the international nature of the Vilkitsky Straits.

IV--CONCLUSIONS

The action of the United Arab Republic in denying Israeli shipping innocent passage through the Straits of Tiran and Gulf of Aqaba in no way detracts from the internationally recognized right of innocent passage. Arab declarations expressly recognized the existence of such right. Innocent passage was only denied by the U.A.R. insofar as it benefited a claimed opposing belligerent. Whether such denial comported with international law will depend solely on the legal effect one may attribute to the armistice agreements between Israel and Egypt and Jordan. If they terminated belligerency, as Israel and the United States claim, then Egypt was not legally justified in denying Israel the right of innocent passage. But at all times Egypt did recognize that a right of innocent passage through the Straits of Tiran and Gulf of Aqaba existed as to nonbelligerent nations.

The U.S.S.R. denial of innocent passage through the Vilkitsky Straits is consistent with the Soviet position regarding the innocent passage of warships. She has continuously maintained that such passage is subject to the prior approval of the littoral state, and her internal laws require her approval of 30 days in advance.

It is concluded that no new international legal usages have been initiated as a result of the denial of innocent passage to Israel in the Gulf of Aqaba and Straits of Tiran: the legal positions of Israel and the Arab states have remained materially unaltered for the last decade. With regard to the Vilkitsky Straits incident, it appears that the traditional Soviet position with regard to innocent passage of warships was maintained. There was one possibly novel aspect to that case, however. In attempting the passage of its ships through Vilkitsky Straits, the United States was asserting the international legal character of those waters, a position which the U.S.S.R. apparently contested. Although the author favors characterizing the Vilkitsky Straits as international straits in which the right of innocent passage exists, the issue is by no means free of doubt. If the Vilkitsky Straits are not deemed international straits, then the United States has taken the first step toward changing that regime.

The factor common to these two cases and reflected in the discussions at the 1958 Law of the Sea Conference is that the determination of the innocence of passage initially rests with the coastal state.

The discussions on the Convention on the Territorial Sea and Contiguous Zone demonstrated that each state approaches the codification and development of international law from the standpoint of promoting such legal rules or principles as will serve its own perceived best interests. Any specific national goal may not, however, be in accord with what the community of

nations conceives to be in the best interest of all states. One may expect that a state's natural, initial inclination, when judging possible prejudice to its peace, good order, or security, will be to apply a purely subjective standard. The discussions on the Convention recognized this situation and made it clear that the coastal state's determination of prejudice to its security will be subject to review by the flag state of a ship which suffers a denial of innocent passage and by world opinion. Diplomatic protest and the seeking of reparations (apology and/or compensation) are avenues by which a state may seek redress for a denial of innocent passage to a ship of its flag when it deems the denial to have been improper. Just such measures were taken by the United Kingdom in the Corfu Channel incident. The additional step of seeking redress before the International Court of Justice was undertaken in that case, and the Court then had occasion to hear evidence and render an objective judgment on the merits of the competing claims.

Thus the coastal state's determination of whether a particular passage is

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prejudicial to its security must be made objectively: if it is challenged it will be subject to review in a manner similar to that in the Corfu Channel incident. A concern that the coastal state's basis for judgment be as objective as possible was amply demonstrated in the discussions of the Territorial Sea Convention. Even though each state's evaluation of its security will be a reflection of its individual personality, which in turn is the product of its historical heritage as well as present world conditions, the only workable standard for the deter-

mination of a state's denial or suspension of innocent passage in its territorial sea is one of objectivity: is such a denial really necessary, and are the circumstances such that the community of nations, in retrospect, would approve?

If there is not such an objective test to be applied to suspensions or denials of innocent passage in practice, the community of nations will be subject to the arbitrary denial of passage by states which consider, subjectively, only their own parochial interests.

FOOTNOTES

I-FREEDOM OF THE SEAS

1. Queen Elizabeth I, quoted in Herbert A. Smith, *The Law and Custom of the Sea*, 3d ed. (London: Stevens, 1959), p. 59.
2. Louise F. Brown, *The Freedom of the Seas* (New York: Dutton, 1919), p. 3-17.
3. Smith, p. 59.
4. Hugo Grotius, *The Freedom of the Seas* (New York: Oxford University Press, 1916), p. 7, 32, 34.
5. Teruo Kobayashi, *The Anglo-Norwegian Fisheries Case of 1951 and the Changing Law of the Territorial Sea* (Gainesville: University of Florida Press, 1965), p. 6.
6. *Ibid.*, p. 7.
7. Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: Jennings, 1927), p. 6.
8. Conference for the Codification of International Law, "Report of the Second Committee," *The American Journal of International Law*, July 1930 Supplement, p. 234-239.
9. United Nations Conference on the Law of the Sea, 2d, 1960, *Official Records*, A/CONF. 19/8 (Geneva: 1960), p. 30.
10. *Ibid.*, p. 158-163.

II-NATURE AND ATTRIBUTES OF INNOCENT PASSAGE

1. Jessup, p. 115-119.
2. Lassa F.L. Oppenheim, *International Law*, 8th ed. (London: Longmans, Green, 1955), v. I, p. 487; Smith, p. 46.
3. United Nations Conference on the Law of the Sea, 1st, 1958, *Official Records*, A/CONF. 13/1.52 (Geneva: 1958), v. II, p. 132. [Note: Articles 14 through 22 of the Convention on the Territorial Sea and Contiguous Zone correspond to the International Law Commission's draft articles 15 through 23 respectively; article 23 of the Convention corresponds to the I.L.C. draft article 25. For ease of reference, and unless otherwise specified, all references to both the draft articles and the Convention articles will use only the numbers of the articles as they now appear in the final Convention.]
4. "The Law of Territorial Waters," *The American Journal of International Law*, April 1929 Special Supplement, p. 295.
5. Conference for the Codification of International Law, "Report of the Second Committee (Territorial Sea), Annex 1." *The American Journal of International Law*, July 1930 Supplement, p. 240.
6. Article 14. 1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

7. *First Conference on the Law of the Sea*, v. II, p. 259.

8. Jessup, p. 120, 123.

9. "The Law of Territorial Waters," p. 295 (article 14 and comment thereon).

10. Additional restrictions on the exercise of innocent passage in cases of ships proceeding to or from internal waters were, however, included in articles 17(2), 20(2), and 21(3). Article 14(2) reflects the basic policy behind according a right of innocent passage: the desirability of promoting the widest and freest use of the seas for all nations, while maintaining in proper balance the interests of coastal states.

11. Smith, p. 46.

12. Jessup, p. 123.

13. "3. Passage included stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary for *force majeure* or by distress."

14. *Force majeure* may be a storm, action of mutineers or pirates, or shortage of food or other essential supplies not caused by the ship's own improvidence. "Judicial Decisions Involving Questions of International Law; General Claims Commission--United States and Mexico, *Kate A. Hoff v. United Mexican States*," *The American Journal of International Law*, October 1929, p. 860.

15. United Nations, International Law Commission, *Yearbook, 1956*, A/CN.4/Scr.A/1956/Add. I (New York: 1957), v. II, p. 272.

16. *First Conference on the Law of the Sea*, A/CONF. 13/39, v. III, p. 85.

17. *Ibid.*, A/CONF. 13/C.1/L.23, p. 76.

18. *Ibid.*, p. 83.

19. *Ibid.*, p. 85.

20. *Ibid.*, p. 87, 229.

21. "Report of the Second Codification Committee," p. 241, 246.

22. International Law Commission, *Yearbook, 1956*, v. II, p. 274. "Article 17. Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation."

23. Article 16. 1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters, the coastal State shall also have the right to take necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

24. The Hague, International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (Leyden: Sijthoff, 1949), p. 4.

25. *Ibid.*, p. 29. English translation by the author.

26. *Ibid.*, p. 32.

27. International Law Commission, *Yearbook, 1956*, v. II, p. 273.

28. *First Conference on the Law of the Sea*, v. III, p. 94.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*, p. 93, 95.

32. *Ibid.*, p. 96.

33. *Ibid.*, v. II, p. 65.

34. *Ibid.*, v. III, p. 100; v. II, p. 65.

35. *Ibid.*, v. III, p. 100; A/CONF. 13/C.1/L.44, p. 222.

36. *Ibid.*, p. 95, 100.

37. International Law Commission, *Yearbook, 1956*, v. II, p. 273.

38. *First Conference on the Law of the Sea*, v. III, p. 77-78.

39. *Ibid.*, p. 220.

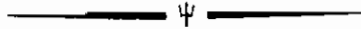
40. *Ibid.*, p. 218. "Article 15. 2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea."

41. "Report of the Second Codification Committee," p. 243.
42. Jessup, p. 120.
43. "Report of the Second Codification Committee," p. 243.
44. International Law Commission, *Yearbook, 1956*, v. II, p. 256.
45. *First Conference on the Law of the Sea*, v. II, p. 67.
46. The Hague, International Court of Justice, *The Corfu Channel Case* (Hague: 1950), v. II, p. 292-293.
47. U.S. Treaties, etc., *United States Treaties and Other International Agreements* (Washington: U.S. Govt. Print. Off., 1964), v. XV, pt. 2, p. 1645, 1646, 1655, 1665, 1669, 1670.
48. International Law Commission, *Yearbook, 1956*, v. II, p. 256.
49. U.S. Naval War College, *International Law Situations, 1908* (Washington: U.S. Govt. Print. Off., 1909), p. 216.
50. U.S. Naval War College, *International Law Situations and Documents, 1956* (Washington: U.S. Govt. Print. Off., 1957), p. 4-48.
51. *Norway No. 1 (1950), British Command Paper No. 8012*, reproduced *Ibid.*, p. 30-48.
52. Hague Convention XIII has generally been held to express the customary international law applicable to World War II. *Ibid.*, p. 11-12.
53. "Article 12. In the absence of special provisions to the contrary in the legislation of a neutral power, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said power for more than 24 hours, except in the cases covered by the present Convention." U.S. Naval War College, *International Law Situations, 1908*, p. 216.
54. U.S. Naval War College, *International Law Situations and Documents, 1956*, p. 15.
55. U.S. Naval War College, *International Law Studies, 1955*, p. 303.
56. *Ibid.*, p. 391.
57. Richard R. Baxter, *The Law of International Waterways*, (Cambridge: Harvard University Press, 1964), p. 205.

III-RECENT INCIDENTS INVOLVING INNOCENT PASSAGE

1. United Nations, Security Council, *Official Records, Debates of 24 May 1967*, S/PV. 1342 (New York: 1967). (In the Security Council debates this action was referred to as a "blockade.")
2. The Gulf of Aqaba is a long, narrow gulf on the east side of the Sinai Peninsula, bordered by the United Arab Republic on the west, Saudi Arabia on the east, and by Israel and Jordan at the northern end. Length of the gulf is about 96 miles; breadth at entrance, about 5-3/4 miles; maximum width, about 15 miles. Entrance is by means of two navigable channels through the Straits of Tiran, of maximum widths of about 1,300 yards and 950 yards. *First Conference on the Law of the Sea*, v. I, p. 208.
3. United Nations, Security Council, *Official Records, Israel and United Arab Republic*, S/PV. 1341 through S/PV. 1345 (New York: 1967).
4. *Ibid.*, S/PV. 1343, p. 31-38.
5. "The Republic of El Salvador v. the Republic of Nicaragua (1917)," *The American Journal of International Law*, July 1917, p. 674-730.
6. *Ibid.*, p. 705.
7. *Ibid.*, p. 700.
8. United Nations, Security Council, S/PV. 1343, p. 67-68.
9. "Department Announcement, February 17." *The Department of State Bulletin*, 11 March 1957, p. 392-393.
10. United Nations, Security Council, *Official Records, Resolutions and Decisions of the Security Council 1951*, S/INF/6 Rev. I (New York: 1956), p. 11.
11. Charles B. Selak, Jr., "A Consideration of the Legal Status of the Gulf of Aqaba," *The American Journal of International Law*, October 1950, p. 676-677, 692.
12. *Second Conference on the Law of the Sea*, A/CONF. 19/A, p. 162.
13. United Nations, Security Council, S/PV. 1343, p. 41.
14. Selak, p. 680.
15. "The United States Calls for Restraint in the Near East," *The Department of State Bulletin*, 12 June 1967, p. 870-871.
16. United Nations, Security Council, S/PV. 1343, p. 17.
17. *Ibid.*, S/PV. 1344, p. 47.
18. Oppenheim, v. I, p. 500-509; Leo Gross, "The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba," *The American Journal of International Law*, July 1959, p. 576.

19. "Soviet Union Bars Completion of U.S. Scientific Voyage," *The Department of State Bulletin*, 18 September 1967, p. 362.
20. U.S. Treaties, etc., *U.S. Treaties and Other International Agreements* (Washington: U.S. Govt. Print. Off., 1964), v. XV, pt. 2, p. 1670.
21. William E. Butler, "The Legal Regime of Russian Territorial Waters," *The American Journal of International Law*, January 1960, p. 68.
22. Baxter, p. 168.
23. Baxter, p. 3; Daniel P. O'Connell, *International Law* (Dobbs Ferry, N.Y.: Oceana, 1965), p. 563.
24. Oppenheim, p. 512.
25. Baxter, p. 9.
26. International Court of Justice Corfu Channel Decision, p. 106.
27. O'Connell, p. 563.



There is nothing in the world more soft and weak than water, yet for attacking things that are firm and strong, nothing surpasses it.

Lao Tze, fl. 6th century B.C.