

# INNOCENT PASSAGE IN THE TERRITORIAL SEA WITHIN THE FRAMEWORK OF THE LAW OF THE SEA CONVENTION

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## ABSTRACT

From its early stage of development, the ‘right of navigation’ was recognised as one of the key components of the principle of freedom on the high seas, which for centuries dominated the international law of the sea. However, because of the progressive seaward expansion of the coastal States authority, a reconciliation between such a right and the sovereignty of States in their territorial waters soon became necessary. Innocent passage of foreign vessels in the territorial sea is, therefore, an outstanding example of compromise between the territorial sovereignty of coastal States and the right of any vessel to freely navigate across the oceans. Indeed, all ships enjoy the right to traverse the territorial sea of another State as long as they comply with a number of legal and technical conditions, most of which are set out in the framework of the United Nations Law of the Sea Convention (LOSC). This article aims at offering an overarching examination of the body of rules governing innocent passage in the territorial sea in order to identify strengths and shortcomings of the existing legal framework.

**Keyword:** International Navigation; Innocent Passage; Territorial Sea; International Law of the Sea; United Nations Convention on the Law of the Sea.

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# 1. Introduction

For millennia, nations and communities have been using oceans for a multitude of different purposes, including navigation. According to Thucydides<sup>1)</sup>, the Minoans were the first civilization to exercise a supremacy at sea (*Θαλασσοκρατία*) already in the 15th century BC, although Phoenicians, Romans, Vikings and several indigenous populations were also known to be expert navigators. Nevertheless, it was only after the expeditions of Christopher Columbus and Vasco da Gama, respectively in 1492 and 1498, that the history of navigation significantly changed. Following the colonization of the Americas and India, States started competing for the supremacy over the new maritime routes opened to commerce and navigation. That gave rise to a doctrinal debate on the legal status of the oceans while contributing to reinforce the existing dichotomy between the principle of freedom on the high seas and the principle of sovereignty. In this regard, in 1609, Grotius noticed that, since the seas were common to all by their first condition of nature, vessels should be able to traverse them freely<sup>2)</sup>. Thus, the ‘right of navigation’ emerged as one of the key components of the principle of freedom on the high seas, which dominated the development of the international law of the sea until the early 20th century. However, with the introduction of the ‘cannon shot rule’ by Cornelius van Bynkershoek, in 1702, States started embracing the idea that a projection of their jurisdiction over a belt of water (the territorial sea) adjoining the mainland was possible. Thence, because of the progressive seaward expansion of coastal states authority, a reconciliation between the right of navigation and the sovereignty of States in their territorial waters soon became necessary. In this regard, it was in 1758 that Vattel observed that the existence of property over a territory could not deprive nations of the ‘general right of traversing the earth for the purposes of mutual intercourse, of carrying on commerce with each other, and for other just reasons’<sup>3)</sup>. A concept which could easily transposed to any areas covered by property or territorial sovereignty, including the territorial sea. The same jurist referred to that general right with the name ‘innocent passage’. From that moment on, the right of innocent passage consolidated into the practice of States until its first codification, which occurred in 1958 with the adoption of the Convention on the Territorial Sea and Contiguous Zone (TSC). Indeed, Part I, Section III of the TSC Convention consisted of ten articles (from 14 to 23) focusing on the ‘Right of Innocent Passage’. Most of those provisions codified concepts, rules and definitions that were afterward transposed in the text of the ‘Constitution for the oceans’<sup>4)</sup>, adopted in 1982, in Montego Bay, at the 11th session of the third United Nations

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1) S. Hornblower (1996), *A Commentary on Thucydides: Volume II: Books IV-V. 24*, Clarendon Press, Oxford, p. 125.

2) H. Grotius (1609), *Mare Liberum (The Free Sea)*, Natural Law and Enlightenment Classics, Liberty Fund, Indianapolis, p. 80.

3) E. de Vattel (1758), *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (published in English in 1797), Natural Law and Enlightenment Classics, Liberty Fund, Indianapolis, p. 183.

4) T. B. Koh (1983), “*A Constitution for the Oceans*” in *the Law of the Sea: United Nations Convention on the Law of the Sea*, St Martin’s Press, New York, p. xxxiii.

Conference on the Law of the Sea (UNCLOS III).

The purpose of this article is to offer an overarching examination of the body of rules governing innocent passage in the territorial sea within the framework of the United Nations Law of the Sea Convention (LOSC). Indeed, to date, the LOSC is the most comprehensive and interdisciplinary source of international law of the sea. Moreover, most of its provisions reflect well-consolidated rules of customary international law, which therefore also bind States who are not contracting parties to the same Convention.

This article develops through six chapters (including this introductory part), that follow as far as possible the systematic structure of Part II, Section 3 of the LOSC. Notably, the following chapters will focus on: the way in which the passage needs to be conducted (chapter 2); the meaning of innocent passage, including activities which are prejudicial to the peace, security and good order of the coastal State (chapter 3); the right of coastal States to adopt and enforce laws and regulation relating to innocent passage (chapter 4); the obligations of coastal States concerning foreign vessels that navigate in their territorial waters (chapter 5), concluding remark (chapter 6).

## 2. Meaning of passage

Under article 2(1) of the United Nations Law of the Sea Convention (LOSC)<sup>5</sup>, coastal States enjoy sovereignty over their territorial waters - including the seabed, subsoil thereof, water column and air space above those waters – up to a limit of 12 nautical miles from the baselines of their territorial sea<sup>6</sup>). This sovereignty is without limitation *ratione materiae*. Therefore, coastal State is entitled to exercise full and exclusive jurisdiction, within the limits of its territorial waters, in all matters, except where otherwise provided for under international law<sup>7</sup>). It follows that no one can enter or undertake any activity in the territorial sea of another State, unless the same State so agreed: tacitly; on a case-by-case basis; or by becoming party to international instruments which restrict its sovereignty.

Ships of all States, whether landlocked or coastal, enjoy the right of innocent passage in the territorial sea of another State<sup>8</sup>). That means coastal States must allow foreign vessels to traverse their territorial waters for the purpose of entering or leaving internal waters and ports (vertical passage) or in order to proceed to other maritime areas, especially to the high seas (lateral passage)<sup>6</sup>. Nonetheless, innocent passage is to be exercised in conformity with the other provisions of the LOSC and in accordance with rules and principle of international law. Whilst the 1982 Convention does not provide any definition for ‘ship’, no doubts exist that the right also extends to vehicles other than vessels *stricto sensu*, such as floating platforms, installations and submarines. However, underwater vehicles have the right

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5) United Nations Convention on the Law of the Sea (LOSC), Montego Bay, 10 December 1982. In force 16 November 1994; 1833 UNTS 31363.

6) LOSC, art 3.

7) Y. Tanaka, *The International Law of the Sea*, Cambridge University Press, Cambridge, 2012, pp. 5-7.

8) LOSC, art 17.

to traverse the territorial sea of another State only on the condition they navigate on the surface of water and show their flag<sup>9</sup>). Furthermore, since the only beneficiaries of the right of innocent passage are ships, aircrafts do not enjoy any corresponding right of overflight in the air space above the territorial sea. And for the same reason, vessels are not allowed to launch, land or take on board aircraft during the passage<sup>10</sup>).

The passage is to be continuous and expeditious<sup>11</sup>). That means vessels have to maintain a regular speed during the navigation and avoid any unnecessary delay in the passage, for instance by navigating in a zigzag<sup>12</sup>). Accordingly, ships are prohibited to stop or anchor during the passage, except:

- when this is incidental;  
when this is necessary to render assistance to vessels, aircraft or people in danger at sea;
- in the event of distress or force majeure.

As for the latter point, some clarification on the legal status of vessels in distress and force majeure is hereunder necessary. Although, to date, there is not any universally agreed definition of 'distress' and 'force majeure', the International Law Commission (ILC) examined the two terms in its Commentaries to the 2001 Draft Articles on 'Responsibility of States for Internationally Wrongful Acts'<sup>13</sup>). The examination showed how a distinctive element between the condition of distress<sup>14</sup>) and that one of force majeure<sup>15</sup>) is the component of 'voluntariness' at the basis of the conduct of the author. Indeed, only in a situation of force majeure there is a supervening impossibility to comply with a specific obligation, as the author is materially dominated by the unfolding of events (e.g. because of a lightning that destroyed the engine of the ship). On the other hand, in event of distress the author is still in the material possibility to act otherwise, which means - as it was mentioned above - the conduct of the author is on a certain extent voluntary. However, the same ILC Commentaries also make clear that in event of distress the 'voluntariness' is actually nullified by the threat that the event poses to the author's life or to the lives of other persons entrusted to the author's care<sup>15</sup>). Thus, in event of distress, such a threat is so irresistible that the impossibility to comply with the obligation results not from a material limitation, but from a psychological constraint. It follows that, except when the event is predictable

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9) *Id.*, art 20.

10) LOSC., art 19(2)(e).

11) *Id.*, art 18(2).

12) D. R. Rothwell and Sam Bateman (2000), *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff Publishers, The Hague/London/Boston, p. 5.

13) International Law Commission (ILC), *Draft articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two; supplement No. 10 (A/56/10).

14) The occurrence of an event that threat the author's life or the lives of other persons entrusted to the author's care and that thus precludes the author from performing the obligation; *Id.*, art 23. 13 The occurrence of an irresistible force or of an unforeseen event that makes materially impossible to perform the obligation; *Id.*, art 24.

15) *See 13*, pp. 79-80.

or self-inflicted, a vessel in distress or force majeure is always acting beyond any real human control: in event of force majeure, because of a material constraint; in event of distress, due to a psychological constraint. And it is the lack (material or psychological) of human control over the vessel that would ‘excuse’, under article 18(2) LOSC, a passage which is not continuous or expeditious. This clarification is primarily important to understand when the conditions to apply article 18(2) occur in practice.

### 3. Meaning of Innocent Passage

We discussed how passage needs to be conducted and who is entitled to conduct it. Now it is time to understand what makes passage ‘innocent’. Article 19(1) LOSC underlines that passage is innocent ‘so long as it is not prejudicial to the peace, good order or security of the coastal State’. Moreover, to be innocent, passage shall take place in conformity with the LOSC and with other rules of international law. Article 19(2) LOSC lies down a list of activities which have the effect of prejudicing the innocence of passage, such as any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State; any act of wilful and serious pollution<sup>16</sup>; any fishing activities<sup>17</sup>; the carrying out of research or survey activities<sup>18</sup>). That list covers most of the activities that would be technically or legally in contrast with the sovereignty of coastal States over their territorial waters. However, the same list is not an exhaustive one at least for two reasons:

- (i) according to the language of article 19(1) the passage must be in conformity with the Convention and other rules of international law. Therefore, the same provision does not exclude that other grounds exist, beyond those listed into the LOSC, for prejudicing the innocence of the passage;
- (ii) in article 19(2), letter (l) refers to ‘any other activity not having a direct bearing on passage’, thus also extending the scope of the provision to other activities than those specifically mentioned in the list.

Nonetheless, the author takes the view that the material scope of article 19(2)(l) LOSC should sometimes be interpreted in a restrictive way. This is something that reconnects with what discussed in chapter 2 about the definition of distress or force majeure. More in details, we already observed how article 19(2) LOSC refers to a number of activities which prejudice the innocence of the passage, i.e. they can turn the passage from innocent to non-innocent. For instance, so long as the passage is continuous and expeditious, a fishing vessel is certainly allowed to traverse the

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16) LOSC., art 19(2)(h).

17) *Id.*, art 19(2)(i).

18) *Id.*, art 19(2)(j).

territorial sea of another State. However, if the same vessel engages in fishing activities during the passage, it prejudices the peace, good order or security of the coastal State and then, according to article 19(2)(i) LOSC, it loses the presumption of innocence, which is precondition for the passage. It can therefore be argued that to prejudice the innocence of passage an 'active' participation of the vessel is necessary. That might consist, *inter alia*, in the act of fishing, in the act of collecting information or in the act of causing a wilful and serious pollution. And this is also in line with the wording of article 19(2)(l) LOSC, which expressly refers to 'any other activity not having a direct bearing on passage (emphasis added)'. Thus, we can agree that when the 'active' participation is lacking, for instance due to an event of distress or force majeure, the vessel does not lose the right of innocent passage, since the psychological or material impossibility to comply with an obligation results in a 'passive' (instead of an 'active') conduct, which is therefore beyond the scope of article 19 LOSC. And this is something very important to bear in mind, especially when it comes to determine whether the coastal State is entitled to exercise enforcement jurisdiction against vessels traversing its territorial sea. Indeed, as it will be discussed later, it is the non-innocence of the passage that justifies in general the right of coastal States to take actions against foreign vessels.

## 4. Rights of the Coastal States

As mentioned at the beginning of this article, coastal States enjoy full and exclusive jurisdiction in their territorial waters. Jurisdiction is a key element of State sovereignty under international law, as it recognises States, *inter alia*, the power to adopt, amend or repeal rules of law (prescriptive jurisdiction) and take actions to ensure their compliance (enforcement jurisdiction)<sup>19</sup>.

### 4.1 Prescriptive Jurisdiction

Coastal States are entitled to exercise prescriptive jurisdiction in a number of matters relating to innocent passage<sup>20</sup>) including, the conservation of the living resources<sup>21</sup>), the preservation of the marine environment<sup>22</sup>), the prevention of any violation of their customs, fiscal, immigration and sanitary laws and regulations<sup>23</sup>) or the safety of navigation<sup>24</sup>). Once laws and regulations are publicised, they are immediately compulsory to foreign vessels which intend to navigate through the territorial waters of the coastal State<sup>25</sup>). However, according to article 21(2) LOSC,

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19) M. N. Shaw (2003), *International Law*, Cambridge University Press, Cambridge, p. 572.

20) LOSC, art 21(1).

21) *Id.*, art 21(1)(d).

22) *Id.*, art 21(1)(f).

23) *Id.*, art 21(1)(h).

24) *Id.*, art 21(1)(a).

25) *Id.*, arts 21(3); 22(4).

prescriptive jurisdiction cannot be exercised for the adoption of laws and regulations regarding the construction, design, equipment and manning (CDEM) of ships, unless they have the effect of giving efficacy to general accepted international rules and standards (GAIRS). The rationale behind this limitation is to avoid foreign vessels from being in fact precluded from enjoying the rights of innocent passage due to the difficulty to comply with different - and potentially conflicting - technical standards adopted by coastal States for their territorial waters. Although, some scholars argued that the real reason for the inclusion of the limitation on CDEM standards into the LOSC was to accommodate the interests of the shipping industry, because of the high costs that would involve complying with a multitude of different national standards<sup>26</sup>). Given that, the fact that article 21(2) LOSC refers to GAIRS instead of mentioning some specific instrument is pivotal, as it allows the LOSC to automatically assimilate the most updated international rules and standards without amending from time to time the text of the convention. On the other hand, as Jakobsen outlined, neither the LOSC nor the jurisprudence of international courts and tribunals ‘define or provide any guidance as to how the concept of GAIRS should be understood’<sup>27</sup>). In this regard, it is largely agreed that to be ‘generally accepted’ rules and standards at least require a widespread and consistent implementation by the majority of members of the international community, regardless of whether States who implement them also are contracting parties to the agreements which set out such rules and standards<sup>28</sup>). An example of a CDEM rule that gives efficacy to GAIRS standards is Regulation 13G(6) of Annex I to the International Convention for the Prevention of Pollution from Ships (MARPOL)<sup>29</sup>), which obligates oil tankers of 5,000 tons or above and older than 15 years to comply with the ‘double-hulls’ requirement.

In addition to what stressed above, coastal States enjoy special prescriptive jurisdiction:

- To ensure the safety of navigation - Coastal States are entitled to designate sea lanes and traffic separation schemes<sup>30</sup>) as long as they are duly publicised and take into account: (a) the recommendations of the competent international organizations, namely the International Maritime Organization (IMO); (b) any channels customarily used for international navigation<sup>31</sup>); (c) the special characteristics of particular ships and channels; (d) the density of traffic<sup>32</sup>).

26) A. Khee-Jin Tan (2006), *Vessel-Source Marine Pollution: the Law and Politics of International Regulation*, Cambridge University Press, Cambridge, p. 205.

27) I. U. Jakobsen (2016), *Marine Protected Areas in International Law: An Arctic Perspective*, Brill Nijhoff, Leiden/Boston, pp. 349-350.

28) T. Dux (2011), *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ). The Regime for the Protection of Specific Areas of the EEZ for Environmental Reasons under International Law*, Lit Verlag, Berlin, p. 190.

29) International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), 11 February 1973. In force 10 October 1983; 1340 UNTS 184.

30) LOSC, art 22(1).

31) This is to be read in accordance with article 37 LOSC, which sets the criteria (functional and the geographical) to identify a strait used for international navigation.

32) LOSC, art 22(3).

- When it is essential for security reasons - Coastal States have the power to suspend innocent passage in specified areas of its territorial sea as long as the closure is temporary, duly publicised and non-discriminatory (in form or in fact)<sup>33</sup>). The suspension is not per se discriminatory if it only addresses certain categories of vessels (e.g. ships transporting noxious substances). However, coastal States are not allowed to suspend innocent passage to single vessels or groups of vessels belonging to any of those categories.
- To regulate the passage of foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances - Coastal States are entitled to adopt more stringent precautionary measures, as well as to ask for supplementary documents to be carried by those vessels during the passage<sup>34</sup>). Any measures adopted for this purpose needs to be duly publicised and shall not jeopardise in form or in fact navigation<sup>35</sup>).

As for this last point, ever since the LOSC was adopted, a number of States, including Algeria, China, Bangladesh, Egypt, Malaysia<sup>36</sup>), subjected the right of innocent passage of certain categories of foreign vessels (e.g. warships, nuclear-powered vessels or vessels carrying hazardous, noxious or other dangerous substances) to a compulsory prior authorisation. Those same States argued that, under international law, they would have the right to prevent foreign vessels from innocently traversing their territorial waters when passage may pose a risk to a number of national interests, including security, safety or environmental conservation. However, that practice does not seem to be in conformity with the international law of the sea<sup>37</sup>). That that was also underlined by Germany, Italy, the Netherlands and United Kingdom in declarations and statements made pursuant to article 310 of the LOSC. Notably, those Countries pointed out that none of the provisions of the LOSC, which on this matter reflects customary international law, would entitle coastal States ‘to make innocent passage of particular categories of foreign ships dependent on prior consent [or authorization]’<sup>38</sup>), and this mainly because according to Subsection A of Part II, Section 3 of the LOSC the rules laid down therein indiscriminately apply to all ships<sup>45</sup>. Nonetheless, the same cannot be argued when innocent passage is subjected to a prior notification, rather than an authorisation. Indeed, the prior notification is consistent with the provisions of the LOSC so long as it does not preclude foreign vessels from exercising their right of innocent passage. For instance, the notification may be necessary to redirect certain categories of vessels to sea lanes and traffic separation schemes<sup>39</sup>)

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33) *Id.*, art 25(3).

34) *Id.*, art 23.

35) *Id.*, art 24(1).

36) D. R. Rothwell and T. Stephens (2010), *The International Law of the Sea*, Hart Publishing, Oxford/Portland, p. 76.

37) Y. Tanaka in J. E. Noyes in D. R. Rothwell, A. G. Elferink, K. N. Scott and T. Stephens (2015), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, Oxford, pp. 547-549.

38) United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), Declarations and Statements to the Law of the Sea Convention; [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm)

39) LOSC, art 22(2).

or inform them of special precautionary measures adopted pursuant to article 23 LOSC. And this is also the approach pursued by several regional instruments, such as the Izmir Protocol on the Prevention of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, which at article 6(4) underlines that, for technical reasons <<[t]he transboundary movement of hazardous wastes through the territorial sea of a State of transit only takes place with the prior notification by the State of export to the State of transit [...]>><sup>40)</sup>.

#### 4.2 Enforcement Jurisdiction

According to article 25(1) LOSC, when passage is not innocent coastal States can take ‘the necessary steps’ to prevent it. The 1982 Convention does not lay down any exhaustive list of actions that coastal States would be entitled to take for the purpose of preventing the passage which is not innocent. Nevertheless, an accurate examination of the provisions spread down into the LOSC can help to identify some of the measures that coastal States would be entitled to take.

In this regard, by virtue of a combination of articles 27, 28, 30 and 220 LOSC, coastal States would at least have the right to: request information; visit, board and inspect the vessel; tow the vessel into port or force it to leave the territorial sea; arrest people on board and institute proceedings, including the detention of the ship. Furthermore, although the LOSC, unlike other international instruments, such as the 1995 Fish Stocks Agreement (FSA)<sup>41)</sup>, does not make any reference to the possibility to use the force, according to international jurisprudence, coastal States would be entitled to use the force to prevent the passage that is not innocent, on the condition that the use of force is *necessary and reasonable*<sup>42)</sup>.

However, no action, except the formal request to leave the territorial sea immediately<sup>43)</sup>, can be taken against warships<sup>44)</sup> or other government ships operated for non-commercial purposes, since those ships are covered by immunity<sup>45)</sup>. Moreover, pursuant to article 236 of the LOSC, laws and regulations adopted by coastal States for the purpose of protecting and preserving the marine environment do not apply to warships and government ships operated for non-commercial purposes<sup>46)</sup>. Despite

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40) K. Hakapaa and E. J. Molenaar (1999), *Innocent Passage – Past and Present*, Pergamon, Marine Policy, Vol. 23, No. 2, p. 142.

41) Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), art 22(1)(f); 2167 UNTS 3.

42) <<[...] Although the [LOS] Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires States to avoid as far as possible the use of force and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances>>; *The M/V Saiga (No.2)*, Saint Vincent and the Grenadines v Guinea, Merits, Judgment, ITLOS Case No.2, ICGJ 336 (ITLOS 1999), para 155.

43) LOSC, art 30.

44) *Id.*, art 29.

45) *Id.*, art 32.

46) A. M. Lewis (2017), *Navigational Restrictions within the New LOS Context: Geographical Implications for the United States*, Brill Nijhoff, Leiden/Boston, p. 23.

that, flag States are responsible for any loss or damage caused by their vessels during the passage<sup>47</sup>). As well as, coastal State would be in any case entitled to use the force against any vessel, including a vessel covered with immunity, within the limits of the right of self-defence as recognised under international law<sup>48</sup>).

As for the right of coastal States to exercise criminal and civil jurisdiction on merchant ships and government ships operated for commercial purposes while they are in the territorial sea<sup>49</sup>), the LOSC dedicates the whole Subsection B of Part II, Section 3 to that topic<sup>50</sup>). More in details:

(*Criminal jurisdiction*) According to article 27(1) LOSC, the coastal State should not arrest any person or undertake any investigation over a foreign ship during the passage for crimes committed on board the ship (internal affairs), except when the vessel enters or leaves internal waters<sup>51</sup>) and save in the following cases:

- when the consequences of the crime extend to the coastal State;
- when the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- when the master of the ship or the flag State requested the assistance of the local authorities;
- when it is necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances<sup>52</sup>).

The language of article 27(1) of the LOSC is not compulsory ([...] should not). That means coastal States would keep a certain degree of discretion in deciding whether or not to exercise criminal jurisdiction over foreign ships traversing their territorial sea. On the other hand, according to article 27(4) LOSC, coastal States *shall* have due regard to the interests of navigation in exercising an arrest<sup>53</sup>). Moreover, they *shall not* exercise (save where otherwise provided for by the LOSC)<sup>54</sup>) criminal jurisdiction for crimes committed before the vessel entered the territorial sea, except for those crimes committed in internal waters<sup>55</sup>).

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47) LOSC, art 31.

48) T. Treves (2009), *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, EJIL vol. 20 No.2, pp. 412-413.

49) Y. Tanaka, op. cit., pp. 94-95.

50) According to Papanicolopulu, since the provisions dealing with criminal and civil jurisdiction are included into an autonomous Subsection (B), they would apply only to ships in innocent passage and not to all ships navigating in the territorial sea of the coastal State. I. Papanicolopulu (2018), *International Law and the Protection of People at Sea*, Oxford University Press, Oxford, note 196.

51) LOSC, art 27(2).

52) LOSC, art 27(1).

53) Noyes refers to the obligation at article 27(4) LOSC as the expression of ‘a general test of reasonableness for the exercise of enforcement jurisdiction’. Which means local authorities, in deciding whether or not arrest should be made, must have ‘due regard’ to the impact of that on navigation. J. E. Noyes in D. R. Rothwell, A. G. Elferink, K. N. Scott and T. Stephens, op. cit., p. 100.

54) Article 27(5) LOSC excludes from the scope of the prohibition those violations of laws and regulations adopted in accordance with Part V and Part XII (e.g., art 211(4) LOSC).

(*Civil jurisdiction*) Under article 28(2) LOSC, coastal States may not levy execution or arrest the ship for the purpose of any civil proceedings except:

- for obligations or liabilities assumed or incurred by the ship in the course or for the purpose of its voyage<sup>55</sup>). In this regard, Aquilina noticed that the scope of the provision would also extend to any obligations or liabilities assumed or incurred by the ship when it was in the coastal State's port<sup>57</sup>);
- for vessels entering or leaving internal waters<sup>58</sup>).

Furthermore, article 28(1) LOSC underlines that coastal States *should not* stop or divert a foreign ship during the passage for the purpose of exercising civil jurisdiction on people on board of the vessel. In a way similar to what observed for article 27(1) LOSC, also this provision makes use of a non-compulsory wording ([...] *should not*). However, it is worth noticing that article 28(1) LOSC transposes almost verbatim the text of article 21 of the 1958 Territorial Sea and Contiguous Zone Convention (TSC)<sup>59</sup> for which, therefore, the 1956 Commentaries of the International Law Commission (ILC)<sup>60</sup> play a fundamental role as travaux préparatoires<sup>61</sup>). In this regard, the ILC Commentaries notice that <<[a] ship which is only passing through the territorial sea without entering internal waters may *in no circumstances* be stopped for the purpose of exercising civil jurisdiction in relation to any person on board (emphasis added)>>. Therefore, even though *prima facie* the language of article 28(1) LOSC seems to recognise the power of coastal States to decide whether or not to stop or divert a foreign ship during the passage for the purpose of exercising civil jurisdiction, article 28(1) LOSC should instead be considered as a concrete prohibition.

## 5. Duties of the coastal State

Part II, Section 3 of the LOSC formally reserves only one provision (article 24) to duties of the coastal State in the context of foreign ships' innocent passage. In this regard, article 24 requires States not to hamper the passage that is innocent (except where the LOSC provides otherwise, such as in the event of a temporary closure)<sup>62</sup>) and warn vessels of any danger to navigation of which it has knowledge.

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55) LOSC, art 27(5).

56) *Id.*, art 28(2).

57) K. Aquilina in D. J. Attard, M. Fitzmaurice and N. A. Martínez Gutiérrez (2014), *The IMLI Manual on International Maritime Law, Volume I, Law of the Sea*, Oxford University Press, Oxford, p. 54.

58) LOSC, art 28(3).

59) United Nations Convention on the Territorial Sea and the Contiguous Zone (TSC), Geneva, 29 April 1958. In force 10 September 1964; 516 UNTS 205.

60) Yearbook of the International Law Commission 1956, Vol. II, p. 275.

61) J. Harrison (2011), *Making the Law of the Sea: A Study in the Development of International Law*, Cambridge University Press, Cambridge, pp. 31-37.

*See* p. 9.

Notably, the duty to warn was discussed by the International Court of Justice (ICJ) in the *Corfu Channel* case<sup>63</sup>), where the ICJ noticed that the duty to notify ships of the danger to which they are exposed during the passage is something required by international law<sup>64</sup>). In the merits of the same case, the Court examined an important precondition of such a duty, which is also clearly stressed at article 24(2) of the LOSC, namely the fact that the coastal State is obliged to inform the vessel or its flag State of any danger to navigation so long as it has *knowledge* of the danger. In this regard, the ICJ noticed that:

<<It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors [...] But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.>><sup>65</sup>)

Therefore, even though the duty to warn undeniably reflects customary international law, what we observed above shows how the real challenge in its concrete implementation is to prove, in practice, that the coastal State had knowledge of the danger, especially considering that the burden of proof would be in any case on the claimant.

Beyond that, article 24 LOSC needs to be read in accordance with other rules of international law. Indeed, beside the duty not to hamper the passage and the duty to warn, coastal States must comply with a number of international obligations, most of which are laid down within the framework of the 1982 Convention. Hereunder a general list of those obligations is offered. In particular, coastal States shall not:

- impose any requirements on foreign ships, which have the practical effect of denying or impairing the right of innocent passage<sup>66</sup>);
- discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State<sup>67</sup>);
- deliberately avert to inform foreign vessels about any danger to navigation, of which it has knowledge, within its territorial sea<sup>68</sup>);
- levy discriminatory charges upon foreign ships passing through the territorial sea<sup>69</sup>);

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63) *Corfu Channel* (United Kingdom v. Albania) case, I.C.J. Reports 1949, p. 4; General List No. 1.

64) T. Phimolsathien (2015), *Customary International Law and General Principles of Law and the Protection of the Environment*, International Journal of Social Science and Humanity, Vol. 5, No. 9, September 2015, p. 820.

65) *Corfu Channel* (United Kingdom v. Albania) case, I.C.J. Reports 1949, p. 4; General List No. 1, p. 18.

66) LOSC, art 24(1)(a).

67) LOSC, art 24(1)(b).

68) *Id.*, art 24(2).

69) *Id.*, art 26(2).

- suspend the passage beyond the scope of article 25(3) LOSC;
- adopt CDEM measures that are more stringent than those giving efficacy to GAIRS<sup>70</sup>);
- violate the immunity of warships and other government ships operated for non-commercial purposes<sup>71</sup>);
- exercise criminal and/or civil jurisdiction beyond the scope of articles 27 and 28 LOSC<sup>72</sup>);
- exercise their powers of enforcement as to endanger the safety of navigation or otherwise create any hazard to a vessel, including bringing it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk<sup>73</sup>).

Furthermore, coastal States must promptly notify the flag State of any actions taken against a vessel flying its flags when the same vessel has committed violations concerning the prevention, reduction and control of pollution from vessels during the passage across the territorial sea<sup>74</sup>). The duty to promptly notify the flag State also applies, by request of the master of the ship, for actions taken in accordance with article 27(1) and (2) of the LOSC<sup>75</sup>). As well as, in addition to what mentioned above, the coastal State must duly publicize any laws and regulations adopted in conformity with the LOSC<sup>76</sup>), including laws and regulations adopted for the designation of sea lanes and traffic separation schemes<sup>77</sup>) or those suspending temporarily the passage in specified areas of the territorial sea<sup>78</sup>).

## 6. Concluding remarks

Ships of all States enjoy the right to traverse the territorial sea of a foreign Country as long as their passage complies with a number of legal and technical conditions and is not prejudicial to the peace, good order or security of the coastal State. Innocent passage in the territorial sea is probably the greatest example of compromise between the freedom of navigation on the high seas and the sovereignty of the coastal State over its territorial waters. Although the first appearance of the right of innocent passage date back hundreds of years ago, the establishment of an organic body of rules to regulate such a right is a relative young achievement. In this regard, Part II, Section 3 of the United Nations Law of the Sea Convention (LOSC) represents the main legal framework in place to govern innocent passage

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70) *Id.*, art 21(2).

71) *Id.*, art 32.

72) E.g., LOSC arts 27(5); 28(1).

73) LOSC, art 225.

74) *Id.*, arts 220(2); 231.

75) *Id.*, art 27(3).

76) *Id.*, art 21(3).

77) LOSC., art 22(4).

78) *Id.*, art 25(3).

globally. Most of the provisions included therein reflect well-consolidated rules of customary international law and, therefore, they bind all States, including those who are not contracting parties to the 1982 Convention. Such provisions cover various aspects of the right of innocent passage, such as the beneficiary of the right, the way the passage is to be conducted, the factors which influence the innocence of the passage, rights and obligations of coastal States. However, the current system is far from being flawless. Indeed, as it resulted from the examination of the previous chapters of this article, there still are many controversial issues that would need to be addresses more clearly by legislators. Most of them are matters of interpretation, as for the definitions of ships, GAIRS, distress or force majeure, but others are issues of more substantive nature which can affect the stability of the whole legal framework, such as in the case of passage subject to a prior authorisation or the material scope of article 19 LOSC from which the use of enforcement jurisdiction depends. It follows that a revision of the body of rules in force or, in alternative, the adoption of a new multilateral legal instrument to deal with innocent passage in the territorial sea would be desirable. After all, considering that many of the provisions of the LOSC referring to innocent passage have been transposed almost verbatim from the text of the 1958 TSC Convention, the current system includes elements and definitions formulated more than sixty years ago. Many things have changed during that lapse of time, including the amount of traffic at sea and the size and threat posed by vessels navigating worldwide. It is time to recognise that innocent passage, as other areas of the law of the sea, needs to be 'refreshed' to take into account those changes. That is the only way to ensure a peaceful use of the seas and oceans for the benefit of the present and future generations.

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