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THE LAW OF THE SEA:

SOME RECENT DEVELOPMENTS

(With Particular Reference to the United Nations

Conference of 1958)

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The thoughts and opinions expressed are those of the authors and not necessarily of the U.S.

Government, the U.S. Department of the Navy or the Naval War College.
CHAPTER IV

PROBLEM SITUATIONS INVOLVING THE QUESTION OF INNOCENT PASSAGE THROUGH THE TERRITORIAL SEA

For many years State A had claimed a territorial sea of three miles but recently by presidential proclamation had extended it to six miles.* State B, adjacent to and south of State A, has long claimed a six-mile territorial sea. State B did not protest State A’s territorial sea extension; however, other states have filed formal protests.

Ships bound to and from State B, including merchantmen, fishing vessels and warships, customarily used a sea lane located between three and five miles off the southern coast of State A for a distance of about 100 miles. At the northern end of this 100-mile stretch, which was approximately one-third of the length of State A’s coastline, the sea lane veered away from State A’s coast and out into the high seas. Until State A’s recent presidential proclamation this sea lane was entirely high seas opposite State A’s coast, but now it was well within the newly-declared territorial sea.

A recent change in the government of State B brought to power several men who were unfriendly to the leaders of State A, and who, it was widely rumored, had designs on part of State A’s territory nearest State B.

Officials of State A had observed recently an increase in the number of ships of State B which were traversing and occasionally anchoring in the territorial sea of State A, usually between the three and six-mile limits, but often inside of the three-mile limit.

State B was known to have nuclear weapons, a large high seas fishing fleet, and a good-sized navy.

State A took a number of steps to augment her security against possible attack, particularly by State B, including the following:

(1) State A built a number of detection installations along her entire coast, including the northern portion of her territory which was sparsely populated.

(2) State A issued the following regulations to all states:

*See Diagram

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Diagram of problem situations right of innocent passage.

(a) All foreign submarines must navigate on the surface of State A’s territorial sea and show their flags;
(b) All foreign warships must give State A 24-hour prior notification of the intended passage through State A’s territorial sea;
(c) All foreign warships must have their radar equipment secured* when passing through State A’s territorial sea, except when weather conditions make navigation by visual devices hazardous;
(d) All foreign vessels are forbidden to use State A’s territorial sea if they have nuclear weapons aboard;

* “Secure,” as used here, means “to lock up,” “to put away,” or “to make unavailable for use.”
(e) All foreign vessels are forbidden to use State A’s territorial sea if they are transporting any war materiel bound to State B;

(f) All foreign fishing vessels are required to secure their fishing gear when passing through State A’s territorial sea.

Several states officially acknowledged receipt of these regulations but State B did not. However, a discussion of the regulations appeared in the press of State B, including adverse comments by “unofficial sources” who claimed that State A was guilty of aggressive action taken against State B.

Subsequently the following events took place within State A’s six-mile territorial sea. Which, if any, were violations of the right of innocent passage under the provisions of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958? What actions could State A take to prevent or punish what it considered to be violations of the right of innocent passage through her territorial sea?

EVENT I

A submarine, The Sailfish, was observed surfacing approximately five miles off State A’s shore about two miles north of the border between the territorial seas of States A and B. It proceeded south for a short distance without showing its flag, then stopped and anchored. When challenged by a naval vessel of State A, The Sailfish identified herself as belonging to State B and hoisted her flag. When questioned by State A’s vessel as to why she had anchored in State A’s territorial sea, The Sailfish weighed anchor and proceeded into her own territorial sea without responding.

EVENT II

A warship, The El Toro, of State B, without giving prior identification to State A, departed from a port in State B and proceeded into the territorial sea of State A approximately three miles off the coast, heading in a northerly direction in the customary sea lane. The El Toro’s radar equipment was in operation. Instead of following the sea lane out into the high seas at a point about 100 miles from State A’s southern border, as she had done on previous occasions, the El Toro proceeded up State A’s coast within the territorial sea and intensified the use of her radar equipment.

State A’s detection stations observed the El Toro enter her territorial sea and knew that her radar equipment had not been secured in accordance with State A’s regulations. The detection stations and visual observation posts kept the El Toro under constant surveillance as it proceeded along the coast, expecting it to follow the sea lane out into the high seas. When it did not do so, State A signalled the war-
ship to depart from her territorial sea immediately for having failed to give the required 24-hour notification and for failure to secure her radar equipment while in State A’s territorial sea. The El Toro finally left State A’s territorial sea but continued to cruise northward along the coast outside of the six-mile limit. When opposite the northernmost portion of State A’s territory in an area of the high seas little used for navigation or fishing, the El Toro cruised back and forth conducting a gunnery exercise, firing both nuclear and non-nuclear weapons seaward. During this exercise the El Toro was outside the six-mile limit except during one of her maneuvers when she was a short distance inside State A’s territorial sea for a limited period of time.

EVENT III

A merchant ship, The Queen Bee, of State X, following the customary sea lane adjacent to the southern portion of State A, was proceeding in a southerly direction never closer than four miles to State A’s coast toward a port of State B with a cargo which included some military equipment.

Officials of State A had good reason to suspect that The Queen Bee was carrying the military cargo to State B.

State X had long claimed a three-mile territorial sea and was one of the states which had filed a formal protest when State A extended her territorial sea from three to six miles by presidential proclamation.

After travelling a short distance within the territorial sea as claimed by State A, The Queen Bee was challenged by a warship of State A and escorted outside the six-mile limit.

Later State X filed a formal protest with State A claiming (a) that State A’s extension of her territorial sea from three to six miles had no validity under international law, and (b) that assuming, without admitting, the validity of State A’s six-mile territorial sea, State A had no right under the Geneva Convention on the Territorial Sea and Contiguous Zone to deny the right of innocent passage to a vessel carrying military cargo, no matter where it was bound.

EVENT IV

A fishing vessel, The Pelican, of State B, returning from a successful fishing trip in the high seas, was observed by officials of State A late one afternoon about two miles off State A’s coast, approximately one mile to the landward of the customary sea lane, proceeding at about four knots toward her home port.

The Pelican was some twenty miles north of the border between States A and B, in an area of State A’s territorial sea known to be good fishing waters.
Although the fishing nets of The Pelican were not secured in accordance with State A’s regulations they were not in the water. Officials of State A, not knowing that The Pelican’s holds were already full of fish, were suspicious that she might be planning to fish after dark en route to her home port.

State A’s officials, after observing members of the crew of The Pelican taking hand-line soundings and sea bed samples as the vessel cruised southward, ordered a warship to visit and search her in order to determine (a) why The Pelican was proceeding so slowly through State A’s territorial sea, (b) why she was approximately one mile landward of the customary sea lane, and (c) why her crew members were taking soundings and sea bed samples.

During the visit and search which took only thirty minutes, officers of the warship accidentally discovered among the crew a Mr. K., a citizen of State A wanted in State A for several felonies. Mr. K. was arrested and taken aboard the warship, after which The Pelican was escorted outside the six-mile limit for having violated the right of innocent passage.

ANALYSIS

A. EVENT I (Submarine surfacing within the territorial sea, anchoring, and failing to fly flag.)

It seems clear that when State B’s submarine, The Sailfish, surfaced within State A’s six-mile territorial sea it violated Article 14(6) of the Geneva Convention which provides that “submarines are required to navigate on the surface and to show their flag.” Since The Sailfish surfaced about five miles off State A’s coast, it must have travelled submerged for at least a mile in the territorial sea.

While other states which claim a narrower territorial sea than six miles, say, three or four miles, would not be bound by State A’s extension of her territorial sea of the additional three miles unless there was an implied accession to the extension after ample time for protesting, it would be untenable for State B to object because she herself claims six miles. Therefore, as to State B the extension by State A of her territorial sea from three miles to six miles is binding both because State B claims six miles and because of the implied assent in State B’s failure to file a protest. State B’s submarine is required to navigate on the surface within State A’s six-mile territorial sea.

Rights claimed unilaterally by states vis-à-vis each other are reciprocal in the sense that one state generally may not deny to another state a right which it is claiming for itself unless (a) the right is exclusive to the first state (e.g., the exclusive right to fish in a state’s own territorial sea, or exploit the natural
The failure of The Sailfish to show her flag until challenged to do so was also a violation of the Convention. Although the draft articles of the International Law Commission provided only that "submarines are required to navigate on the surface," without requiring a showing of the flag, the Conference wisely included this latter provision as added protection to the coastal state.

Whether The Sailfish violated the Convention in stopping and anchoring is debatable. Such action is permitted under Article 14(3) "but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress." The Sailfish might be able to show that her stopping and anchoring were in conformity with the provisions of the Convention. However, refusal of The Sailfish to respond to State A's question as to why she had stopped and anchored suggests the absence of any distress, force majeure, or that the submarine's action was in fact incidental to ordinary navigation.

resources of its continental shelf); or (b) the right is predicated upon unusual circumstances which are generally recognized in the world community as giving rise to the special right (e.g., a state such as Norway with a deeply indented coastline may claim the right to use straight baselines from which to measure the breadth of the territorial sea and deny to a state with a smooth coastline the right to use the same basis of measurement). (Anglo-Norwegian Fisheries Case, I.C.J. Reports, 116 (1951); Convention on Territorial Sea and Contiguous Zone, Art. 4); or (c) the right is an "historic" one which has been long recognized (e.g., historic bays, etc.).

But, aside from these major exceptions, one state must accord to other states in the international community the same rights which it is claiming for itself. Hence, a state claiming a six-mile territorial sea under the facts given here would be in an untenable position in denying the validity of an equivalent claim by another state.

It should be emphasized, of course, that although one state may be bound by a fortiori reasoning from denying to another what is being claimed for itself, this fact alone does not bind other states which claim something less. For example, the fact that Chile, Ecuador and Peru have claimed sovereignty over a 200-mile breadth of high seas would preclude their objecting if some other state made a similar claim. However, this fact does not establish the 200-mile claim as the new customary international law of the territorial sea. Similarly, the fact that State B in the problem situation claims a six-mile territorial sea and hence must accord that same right to State A under the facts given, does not mean that the six-mile limit thereby becomes international law. While it is true that widespread state practice develops a customary international law by the process of reciprocal interaction and accommodation of competing claims, the practice must be sufficiently inclusive of the major claimants to justify a finding of the emergence of a new customary international law. In the case of a question involving the law of the sea such as the breadth of the territorial sea, a six-mile limit could not be claimed as the new international law, absent an accession, express or implied, by a majority of the major maritime states.

Hence, unless State B provides a satisfactory answer to State A’s question regarding the reason for the stopping and anchoring by The Sailfish, it may be concluded that this action, like the other two, was in violation of the Convention.

B. EVENT II (Passage of State B’s warship without 24-hour notification.)

The first and foremost question is whether warships have the right of innocent passage through the territorial sea. Clearly the Convention on the Territorial Sea and Contiguous Zone guarantees the right of “innocent passage” to such ships as well as to other types of vessels. Section II of the Convention is headed “Right of Innocent Passage” and Sub-Section A is entitled “Rules applicable to All Ships.”

Moreover, in Article 14 which follows immediately after Sub-Section A, paragraph six relates to a specific type of warship, namely, submarines, expressly providing that “submarines are required to navigate on the surface and to show their flag.” This provision indicates exactly what this particular type of warship must do in two respects in order not to violate the right of innocent passage.

That the International Law Commission intended the right of innocent passage to apply to warships, subject to the express right of the coastal state under Sub-Section D to impose regulations on warships is indicated by the commentary to its final articles which, under the heading, “Right of Innocent Passage,” says that “the general rules laid down in sub-section A . . . apply to the ships referred to in sub-sections C and D, subject to the reservations stated there.”

It is true that the above commentary is somewhat in conflict with Article 24 of the International Law Commission’s final draft articles which would have required prior notification and authorization for warships to pass through territorial seas, indicating that it would not be a right of the flag state but a privilege which could be granted or withheld. Indeed, the last sentence of this Article 24 begins, “Normally it (the coastal state) shall grant innocent passage . . .” However, it will be remembered that this proposal of the International Law Commission was omitted from the Convention, clearly indicating that innocent passage through the territorial sea was considered by the Conference to be a right of warships, as well as for all other vessels, and not merely a privilege which the coastal state might grant or withhold.

Dr. El-Erian of Egypt staunchly maintains that the record of the Geneva Conference indicates that warships do not have the right

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4 Ibid., at Art. 14(6).
5 Ibid., at 22
of innocent passage.\(^7\) Professor Sorensen of Denmark also believes that the majority of delegates did not intend warships to have this right, although he admits frankly that “the actual text of the Convention would therefore warrant the conclusion that warships have the same rights in this respect as other ships. . . .”\(^8\) A careful analysis of the record of the Geneva Conference supports the conclusion that the majority of states favored the right of innocent passage for warships and drafted the provisions of the Convention accordingly. With all due deference to advocates of a contrary view, on this matter they are in error.

Finally, perhaps as strong evidence as any that the Convention does guarantee the right of innocent passage for warships is the fact that members of the Soviet bloc who were most opposed to granting this right to warships,\(^9\) almost uniformly filed reservations to Article 23 of the Convention at the time of signature, the net import of which is to reduce the right of innocent passage to a mere privilege in their own territorial seas. Typical is the reservation of the U.S.S.R. which provides,

“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.”\(^10\)

Similar reservations to Article 23 were also filed by Bulgaria, Byelorussia, Czechoslovakia, Hungary, Romania, and the Ukraine.\(^11\) Colombia filed a declaration regarding Article 23 along the same lines, using a curious and inapplicable analogy to the passage of foreign troops through Colombian territory, saying,

“... [U]nder Article 98 of the Colombian Constitution, authorization by the Senate is required for the passage of foreign troops through Colombian territory and that, by analogy, such authorization is accordingly also required for the passage of foreign warships through Colombian territorial waters.”\(^12\)

It is obvious that if the states indicated above had not felt that the Convention guarantees the right of innocent passage to warships, they


\(^10\) Information supplied by the U.N. Secretariat.

\(^11\) Ibid.

\(^12\) Ibid.
would not have made a reservation to the Convention to deny the right by making passage subject to prior authorization by the coastal state.

**EVENT II (Passage of warship without giving prior notification)**

The next question is whether the warship, the El Toro of State B, violated the Convention by not giving prior notification to State A of its intention to enter State A's territorial sea.

The final articles of the International Law Commission contained a provision which made the passage of warships through the territorial sea subject not only to prior notification but also previous authorization. However, the Convention contains no such provision. Therefore, it would appear that State B had no duty to State A to give prior notification.

On the other hand, Article 23 of the Convention gives the coastal state the right to impose regulations concerning the passage of warships as follows:

"If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea." 13

Except for a slight change in wording, this article is the same as Article 25 of the final draft of the International Law Commission. 14 The question then arises as to whether a coastal state may include among its regulations one requiring prior notification since the Convention eliminated that specific provision from its articles, along with the one permitting the coastal state to require previous authorization.

It could be argued that since this specific provision as to prior notification was placed in a separate article by the International Law Commission, the more general article permitting the coastal state to impose regulations was not intended to go so far as to permit a regulation requiring prior notification (and authorization). If the general article permitting regulations had contemplated such safeguards to the coastal state as prior notification and authorization, it would have been superfluous to have stated them in a separate article.

14 U.N. Doc. A/3159, 23 (1956). The commentary by the I.L.C. following this Article (25) is not at all helpful in indicating why the Article was drafted as it was, nor in explaining the kinds of regulations contemplated. The commentary merely says: "The article indicates the course to be followed by the coastal State in the event of failure to observe the regulations of the coastal State."
On the other hand, it seems more logical to argue that the right of a coastal state to impose regulations concerning passage of warships through its territorial sea includes the right to impose whatever regulation is *reasonable*, considering all of the circumstances in context. The question, therefore, is whether the requirement promulgated by State A requiring a 24-hour notice prior to passage of warships through its territorial sea is reasonable, even though the Conference did not include it in the Convention as a specific right of the coastal state.

At this point it seems desirable to distinguish clearly between the right of a coastal state to demand *notice* from another state of the intended passage of a warship through the territorial sea and the right of a coastal state to grant or withhold *authorization*. The matter of giving notice imposes a slight duty upon the warship state, but the right to the innocent passage is guaranteed if the prior notice is given. The only act involved is that of the warship state in giving notice.

On the other hand, the requirement of *prior authorization* places a serious burden and limitation on the warship's right of innocent passage, reducing it to a mere privilege which the coastal state may negate by denying authorization. The right to the innocent passage is made subject to a judgment and an act by the coastal state—i.e., the decision whether to grant or withhold authorization and the granting of the authorization, plus the corollary right to refuse authorization or to withdraw it after it has been given. Hence, the matter of prior authorization contemplates an act by both states; the act by the warship state in requesting permission, and the act by the coastal state in granting (or withholding) the permission.

It was because this requirement of prior authorization would have eliminated the right of innocent passage for warships that it was rejected in the plenary meetings of the Conference.\(^\text{15}\)

Since the general requirement of prior notice does not affect the right of innocent passage, inflicting no more than a slight inconvenience on the state which has to file notice, and since the specific

\(^{15}\) The United States introduced a proposal in the First Committee to delete the article (Art. 24) requiring prior notice and authorization on the ground (a) that it contradicted Art. 15 which provided that ships of all States shall enjoy the right of innocent passage through the territorial sea and (b) that it was unnecessary in view of the definition of "innocent passage" which gave the coastal State all the protection it needed. The United States proposal was withdrawn before being voted upon (3 Official Records 127) because other similar proposals such as that of the Netherlands (A/CONF. 13/C. 1/L. 51) were before the Committee. Although the requirement of prior notification and authorization was approved by the First Committee (3 Official Records (Annexes) 258, 260), this requirement was eliminated in the plenary meetings and omitted from the Convention.
requirement of 24-hour notice invoked by State A appears to be reasonable, especially in the case of State B of whom she has certain justifiable fears of possible aggression, it follows that State A had a right under Article 23 of the Convention to issue the regulation.

Inasmuch as the warship of State B did not give the requisite notice, the question then arises as to what action may be taken by State A. The language of Article 23 is not entirely clear on this question in the following respect. The article says that “the coastal State may require the warship to leave the territorial sea.” However, this sanction is conditioned by a dual provision: “if the warship does not comply with regulations . . . and disregards any request for compliance. . . .” Since this language is conjunctive rather than disjunctive, it could be argued that State A is entitled to ask the warship to leave the territorial sea only (1) after failure to comply with the regulation, which failure has occurred, and (2) after disregarding a request for compliance. The facts indicate that State A made a request for the departure of the El Toro, but did not make a request for the compliance with the 24-hour notice prior to this request for the departure. Thus, if one interprets the language strictly it could be contended that State A could not request the departure from the territorial sea following the failure of the El Toro to comply with the 24-hour notice until State B had also received and disregarded State A’s requested compliance.

However, a more logical conclusion would seem to be that State A could request the departure from the territorial sea of the El Toro for the non-compliance with the 24-hour notice without also having to make a subsequent request for compliance because once the El Toro entered the territorial sea of State A it became impossible, at least for this trip, for State A to get or for State B to give the 24-hour prior notice. Hence, it would be illogical to require State A to request compliance by State B once the territorial sea of State A had been entered as a condition precedent to State A’s right to require the warship to leave the territorial sea.

The language of Article 23 was probably written in its present form in order that a warship which had inadvertently or unknowingly violated some regulation of the coastal state concerning innocent passage through the territorial sea would not be required to leave until and unless she disregarded a request for compliance. However, the kind of compliance contemplated by the framers of Article 23 was surely that which would still be possible after the warship was in the territorial sea, such as securing of radar equipment, and not some act such as the giving of 24-hour notice which after entrance of the territorial sea was no longer possible.
EVENT II (Passage of warship without securing radar equipment)

The failure of the El Toro to secure her radar equipment was a clear violation of State A's regulation unless the weather conditions were such as to make navigation by visual devices hazardous. Since the facts indicate that State A’s visual observations were able to keep the El Toro under constant surveillance, it seems logical to assume that weather conditions were sufficiently good to enable the El Toro to see the shoreline and thereby navigate free from danger without using the radar equipment. Moreover, the fact that the El Toro navigated the full length of the coastline of State A and subsequently conducted a gunnery exercise is further evidence that the use of the radar was unnecessary for safe navigation.

The next question—one which must always be asked with respect to all regulations imposed by the coastal state upon warships (and other ships) exercising the right of innocent passage through the territorial sea—is whether the regulation relating to the securing of all radar equipment was reasonable. The requirement of reasonableness is not only implied in order to balance the equities between the need for a coastal state to maintain its security, and the need of the overseas state to navigate through territorial seas without undue impediments, but is clearly expressed as a duty of the coastal state in Article 15 which provides that: “The coastal State must not hamper innocent passage through the territorial sea.”

Nothing in the facts indicates that State A’s requirement that all warships secure their radar equipment when passing through the territorial sea, except when weather conditions would make navigation by visual devices hazardous, in any way contravenes the provision of Article 15 that the coastal state must not hamper innocent passage. Hence, State B would be required to abide by the regulation, absent some evidence that it was either unreasonable or in some way hampered innocent passage.

From the standpoint of State A, since it is possible for State B’s shipboard radar equipment to be used for mapping State A’s coast, and in view of the known animosity of State B and the possibility of invasion by State B in pursuance of its claim to some of State A’s territory, State A’s regulation that all radar equipment be secured appears to be a reasonable security measure.

One final question remains: whether under Article 23 State A could order the warship out of territorial waters for violating the regulation regarding the securing of radar equipment without first making a request for compliance and having it disregarded. As previously indicated, in the discussion of the 24-hour prior notification provision, the most plausible reason for requesting compliance, following
a violation, before invoking the sanction of requiring the warship to leave the territorial sea is to prevent the hampering of innocent passage in the case of a ship which inadvertently or unknowingly violates a regulation and which would thereupon be asked to depart from the territorial sea without first being given a chance to comply.

In the present case, although State B had not officially acknowledged receipt of State A’s regulations, it may be assumed that they were received and known to the officials of State B because of the discussion in the press. Hence, the violation could hardly have occurred “unknowingly.”

Could the violation have occurred “inadvertently?” This also does not seem likely in view of the manner in which the radar equipment was being used.

Thus it would follow that in a case like the present one the violation of the regulation, without the further requirement of the request for compliance, would be all that State A would have to show in order to justify the demand that El Toro depart from State A’s territorial sea. Of course, since the El Toro did depart, although it re-entered later during the maneuvers, State A could not impose any further sanction under the Convention since the right of the coastal State to require the warship to leave the territorial sea is the only sanction provided.

EVENT II (Passage of a warship through the territorial sea carrying nuclear weapons)

The next question is whether State A has the right to forbid the passage through her territorial sea of all foreign vessels which have nuclear weapons aboard.

One way to approach this question is to inquire whether the Conference included such a right in the Convention, either specifically or under a general provision permitting the coastal state to insure that the passage of foreign vessels through the territorial sea is “innocent.” If the Convention does not contain a provision granting to the coastal state the specific right, did the Conference exclude this right which the coastal state is now trying to invoke?

A proposal by Yugoslavia was introduced in the First Committee of the Conference, but defeated by an overwhelming vote, which directly relates to this question. Yugoslavia proposed that,

“The coastal State may deny the exercise of the right of innocent passage through its territorial sea to any ship carrying any kind of nuclear weapon.” 16

The delegate from Yugoslavia said that the proposed new para-

graph was self-explanatory and reflected his government’s belief that nuclear energy should be applied solely to peaceful ends and that international law did not authorize its utilization for military purposes.17

Before being voted upon the proposal was changed at the suggestion of the Yugoslav delegate so that the word “ship” read “warship.” Despite this change which would have limited the right of prohibition by coastal states to warships carrying nuclear weapons through the territorial sea, rather than all ships, the proposal was decisively rejected by 33 votes against, 7 in favor, with 22 abstentions.18

By refusing to adopt this proposal, the First Committee clearly indicated that the mere carrying of any kind of nuclear weapon on board a warship within the territorial sea of another state could not be prohibited. Therefore, it could be argued that the coastal state could not promulgate such a prohibition under the general provisions of the Convention which give the coastal state the right to do what is necessary to insure the innocence of passage of vessels through the territorial sea because to do so in light of the Conference action on the Yugoslav proposal would be to permit the inclusion of a specific right to a coastal state (under a general provision of the Convention) which the Conference emphatically excluded.

Although this argument is persuasive, it is by no means conclusive. That which is omitted from this or any other convention is significant, but parties to a convention are only bound by what is included therein, not by what was excluded. Moreover, it is well recognized that the various committees of the Conference on the Law of the Sea, as well as the plenary meetings, often eschewed the inclusion in the conventions of a specific right or duty because it felt that the matter could be treated more judiciously by incorporating a general right or duty. Such is the case with the articles in the Convention on the Territorial Sea and Contiguous Zone which give the coastal state the right to “take the necessary steps in its territorial sea to prevent passage which is not innocent,”19 without specifying exactly what those necessary steps may include (or not include). Also the general rule of the Convention applicable to warships gives the coastal state the right to pass “regulations” with which the warship must comply,20 without indicating either the extent of those “regulations” or the limitations thereof.

17 3 Official Records (A/CONF. 13/39, 129 (1958)).
18 3 Official Records (A/CONF. 13/39, 131 (1958)).
19 Art. 16 (1).
20 Art. 23.
It may be concluded therefore that although the Conference rejected a specific proposal which would have given the coastal state the blanket right to prohibit all warships from carrying nuclear weapons through its territorial sea, under certain circumstances involving danger to security the coastal state may include such a prohibition as a part of the general rights which the Convention accords to the coastal state to regulate the passage of warships through the territorial sea.

It will be remembered from the previous discussion of another defeated proposal, the one which would have given the coastal state the right to require prior notification and authorization before foreign warships could pass through the territorial sea, it was concluded that the coastal state could require prior notification because such notification would not constitute such a burden upon innocent passage as to hamper it, which the coastal state is obligated not to do under Article 15(1). On the other hand, it was concluded that to permit the coastal state to require prior authorization of foreign vessels desiring to traverse the territorial sea would in fact place too great a burden on the basic right of innocent passage.

The fundamental and pervasive test in determining the kind and extent of regulations which a coastal state may impose upon vessels passing through its territorial sea is that "simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is reasonable as between the parties." The parties in the present situation are (1) the coastal state with its justifiable demand for security, as well as peace and good order, and (2) the overseas state with its equally justifiable demand for the right of innocent passage through the territorial sea because, without this right "freedom of the high seas for navigation" becomes an empty phrase. Since one of the primary purposes of navigation is to reach a destination requiring passage through some state's territorial sea, the right of innocent passage is vital.

Leaving aside for the moment the action of the Conference in rejecting the Yugoslav proposal which would have given the coastal state the kind of right which State A is now trying to invoke against the warship of State B, the question is whether the attempt of State A to prohibit the use of its territorial sea to all vessels, or at least all warships, carrying nuclear weapons is reasonable. To answer this question it is necessary to emphasize again the right-duty relationship of the coastal state with all overseas states. The coastal

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state has the right, among others, to take necessary steps in its territorial sea to prevent passage which is not innocent and to promulgate rules for foreign warships. Among its various duties the coastal state is charged by Article 15 of the Convention with not hampering innocent passage of any ship, merchant vessel or warship, through the territorial sea.

It should also be emphasized that the Convention relates the question of innocence of passage to the nature of passage itself without regard to any acts actually committed in the territorial sea. This being the case the basic question is: How could the mere carrying of nuclear weapons on a warship passing through the territorial sea prejudice the "peace, good order or security" of a coastal state, absent rather weighty evidence that some overt act against the coastal state was contemplated or that the mere carrying was ultrahazardous?

It is difficult to see how State A could establish that carrying nuclear weapons through the territorial sea would endanger her security. If a warship is traversing the territorial sea en route to the high seas to conduct gunnery exercises, which is what State B ultimately did, the mere passage through the territorial sea hardly endangers the security of the coastal state. Of course, because of the known animosity of State B toward State A it might be suspected that State B contemplated hostile actions against State A either now or at some later date. However, this suspicion alone would hardly justify a denial of the right of innocent passage to B's warships just because they were carrying nuclear weapons.

Several difficult subsidiary questions come quickly to mind:

(1) If the coastal state may forbid warships carrying nuclear weapons to use its territorial sea, may this prohibition be invoked at the whim of the coastal state, or only after some objectively-verifiable showing of need for the prohibition in order to avoid jeopardizing the "peace, good order or security of the coastal State?" Since the Conference voted against giving the coastal state the right of a blanket prohibition, it seems clear that the coastal state could forbid warships carrying nuclear weapons to use its territorial sea only if it were determined to be reasonably necessary for its own protection. The important fact to remember is that the passage must be innocent.

Under the Convention passage is deemed to be innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State."22

(2) Assuming that the mere carrying of nuclear weapons by a warship automatically destroyed its innocence of passage through the territorial sea, thus justifying the coastal state in prohibiting such

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22 Art. 14(4).
passage, what steps may be taken to see that the prohibition is effective? May the coastal state require a certification from the warship prior to passage, reserving the right to grant or withhold authorization of the passage? May the coastal state search the warship in case it doubts the validity of the certification, or merely order the warship out of the territorial sea on the basis of unconfirmed doubts?

These and other questions suggest that an attempt to administer a prohibition against warships merely carrying nuclear weapons while passing through the territorial sea of another state might seriously hamper innocent passage. In the final analysis the coastal state would have no way of knowing in most cases whether nuclear weapons were being carried by a warship without some sort of inspection. Such inspection on the high seas is not possible under Article 9 of the Convention on the High Seas which accords warships “complete immunity from the jurisdiction of any State other than the flag State.”

While the Convention on the Territorial Sea and Contiguous Zone does not contain a similar provision, it is unlikely that any State would permit a boarding and inspection of its warships by a coastal State while passing through the territorial sea. It is obvious that the determination by the coastal state of the presence of nuclear weapons on board a warship is much more difficult than the determination of whether a ship’s radar is in use, or secured, during passage through the territorial sea. In the latter case, if the radar equipment is being used, shore detection devices can determine this fact.

Hence, the Conference reached a logical and correct conclusion in denying the coastal state the absolute right to forbid the passage through the territorial sea of warships carrying nuclear weapons. Moreover, because of the range and destructive power of such weapons, little if anything is added to a coastal state’s security by insisting that a warship with nuclear weapons remain 3.1 miles off the coast with a three-mile territorial sea, or 6.1 miles off the coast of a state which claims a six-mile limit.

Notwithstanding the above conclusion, it should be acknowledged that under unusual circumstances the coastal state might justifiably prohibit the passage of warships carrying nuclear weapons through its territorial sea. The Convention gives the coastal state the right to “take the necessary steps in its territorial sea to prevent passage which is not innocent,” and the further right “to 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.”

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24 Art. 16(1).
25 Art. 16(3).
While this latter right of suspension is not permitted in the territorial sea of straits which are used for international navigation, it would apply in our present hypothetical situation which does not involve a strait.

Assuming that all of the conditions of the right of temporary suspension of innocent passage are present, especially a showing that such suspension is essential for the protection of the coastal state's security, the right of suspension would include lesser rights such as exclusion of warships for the carrying of nuclear weapons. It is clear, however, that the coastal state would have to produce strong evidence which would reasonably support the security need of temporary suspension, or exclusion for carrying nuclear weapons, in order for such drastic action to be lawful under the Convention or, apart from the Convention, under the recognized principle of the inherent right of self-defense.

Conclusion: Since the facts of the present case do not indicate any serious danger to the security of State A by the passage of vessels (including warships) of foreign states through State A's territorial sea with nuclear weapons aboard, the blanket regulations of State A in this regard are invalid. Therefore, State B was within her rights in having nuclear weapons aboard her warship and the innocence of her passage through State A's territorial sea was not destroyed by the mere presence of such weapons.

EVENT II (Gunnery exercise of warship partly within territorial sea of State A)

The next question is whether State B's warship violated certain provisions of the Convention on the Territorial Sea and Contiguous Zone by conducting a gunnery exercise, firing both nuclear and non-nuclear weapons seaward, in an area of the high seas (except for one maneuver into the territorial sea) adjacent to a remote and sparsely inhabited portion of State A's territory.

In order to focus attention on the relationship between State A and B, we may exclude from consideration the rights and duties of State B to other states which might be navigating through, fishing in, or otherwise using the area of the high seas affected by the gunnery exercise. As a general principle State B would have the right to use this area of the high seas for gunnery exercises, subject only to the duty to accommodate her use to the inclusive uses of other states.

26 Art. 16(4).
in order that no user would be unreasonably endangered or impeded.\textsuperscript{27} Also, we may put aside consideration of any possible duties which State A might have had to all other states for the acts of State B in State A’s territorial sea if the Convention had adopted the article proposed by the International Law Commission requiring, among other things, that the coastal state not allow the territorial sea to be used for acts contrary to the rights of other states.\textsuperscript{28}

It seems clear that any use by State B of State A’s territorial sea for a gunnery exercise, whether intentional or unintentional, was a violation of the Convention’s definition of passage, even though the exercise may have been quite innocent in not prejuling the “peace, good order or security” of State A.

The maneuver of the battleship within State A’s six-mile limit, even though of short duration, does not constitute “passage” under the Convention which provides,

“Passage means navigation through the territorial sea \textit{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.”\textsuperscript{29} (italics added)

\textsuperscript{27} A claim of right to use an area of the high seas for military exercises (i.e. gunnery exercises, nuclear weapons testing, ballistic missile firing, etc.) constitutes the equivalent of an exclusive use for a limited period of time of an area of the high sea because the danger to navigation, fishing, scientific research, and other uses of the area during the military exercises is such that all states other than the State conducting the exercises will, as a rule, stay clear of the area.

The claim of right to use the designated area for the military exercises is justified on the ground that this is as valid a use of the high seas as the historic ones of navigation and fishing contemplated by Grotius over three centuries ago.

But, it should be recognized that as the weapons increase in magnitude the area of the high seas required for the testing also increases enormously. Hence, serious impairment of other uses such as navigation, fishing, scientific research, etc., may occur unless (a) the period of the tests is reduced to a few weeks, or even to a few days, (b) the area is kept to the absolute minimum consistent with the safety of other concurrent users of the general area, (c) the area is selected in relatively isolated parts of the high seas little used for navigation, fishing, etc., and (d) the military exercises, especially nuclear weapons testing, does not result in substantial and continued deprivation of other uses because of lingering after effects upon the conclusion of the exercises.

It follows, therefore, that although it appears that the other inclusive users are having to do the accommodating to the state conducting the military exercises, the latter is burdened with a number of responsibilities to all other users as indicated above, plus the obvious duty to accommodate the other users by giving them adequate advance notice of the planned military exercises.

\textsuperscript{28} Article 16(1) of I.L.C. final draft articles (A/3159, 6 (1956)).

\textsuperscript{29} Art. 14(2).
Navigation of the El Toro in connection with a gunnery exercise as in the present case was not for the purpose of traversing the territorial sea. The warship was not traversing State A’s territorial sea to get through it or to proceed to or from internal waters; instead, she was using the territorial sea for another purpose—a gunnery exercise. True, during the gunnery exercise the El Toro entered the territorial sea at one point and left it at another and hence navigated through it. But, the navigation was not for the purpose contemplated by the Convention in summarizing the purpose which originally gave rise to the right of innocent passage, namely, to achieve freedom of navigation through the territorial seas in order to permit ships to reach their destinations with the least possible burden on their passage consistent with need of the coastal state to protect itself.\(^\text{30}\)

Even more important than the fact that the use by State B of State A’s territorial sea was a violation of “passage” as defined under the Convention on the Territorial Sea and Contiguous Zone, is the fact that it was a clear violation of State A’s sovereignty. This sovereignty, derived from more than two centuries of state practice and universally recognized, notwithstanding disagreement as to the precise breadth of the territorial sea, provides the coastal state with the exclusive use of the territorial sea, the subsoil and the airspace above the waters, subject only to the right of other states to “innocent passage.” No other state, without express permission of the coastal state, may exploit any use or take any action within the territorial sea, whether harmful to the coastal state or not. Thus, an overseas state may not fish within the territorial sea, carry on perfectly innocent scientific research, or do anything therein except to navigate innocently for the specific purpose of traversing the sea.

Hence, the action of State B in conducting part of its gunnery exercise within the territorial sea of State A, however inadvertent it may have been and quite aside from whether it did the slightest damage to the territorial sea or the sparsely populated coast of State A, was a violation of State A’s sovereignty. Therefore, State A would be entitled to protest the breach of sovereignty and demand that it not be repeated. The facts do not indicate any damage to State A,

\(^{30}\) Colombos, *International Law of the Sea* 98 (3rd rev. ed. 1954) and citations therein. Jessup contends that the right of innocent passage historically had nothing to do with the passage of ships bound to or from a port of the State and that the right of access to ports should be distinguished from the right of innocent passage. Jessup, “The International Law Commission’s 1954 Report on the Regime of the Territorial Sea,” 49 A.J.I.L. 221, 226 (1955). Whatever the historical origin of the right of innocent passage, the Convention on the Territorial Sea and Contiguous Zone now includes the right of access to internal waters under the right of innocent passage.
but if any did occur in connection with the breach of sovereignty, State B would be liable.

C. EVENT III (Merchant ship carrying military cargo through extended territorial sea which extension the flag State has not recognized.)

The first question relates to the effect of an attempt by a coastal state to extend its territorial sea through unilateral action and the duty, if any, of an overseas state to recognize such an extension when the overseas state claims a narrower territorial sea and has filed a formal protest against the extension.

In oft-quoted language of the *Anglo-Norwegian Fisheries Case*, the International Court of Justice said,

"The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.”

It follows from the above language which succinctly summarizes the international law on the point, that whereas State A may by unilateral act claim an extension of her territorial sea from three to six miles, the claim is not binding upon other States. State X, which claims a three-mile limit, is not required to recognize the extension. Of course, if State X had failed to protest against State A’s claim of an additional three miles of territorial sea, it might be argued after the lapse of a reasonable length of time that State X had tacitly agreed to the extension. However, in the present case State X filed a formal protest with State A.

Also, it should be noted that if State X claimed a six-mile territorial sea, it follows that she could not object to the extension by State A from three to six miles. A state generally may not deny to other states rights which it claims for itself. Here, however, the fact that State X has long claimed only a three-mile territorial sea justifies her protest to State A.

Thus it may be concluded that as far as State X was concerned her merchant ship, The Queen Bee, was travelling in high seas rather than in the territorial sea of State A. This being the case, State A had no jurisdiction over The Queen Bee and was committing an unlawful act in escorting the merchant ship outside the six-mile limit.

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32 See footnote 1.
Therefore part (a) of State X’s protest was justified. However, that part of the protest which asserted that State A’s extension has no validity under international law, is too broad. State A’s extension of her territorial sea from three to six miles would be valid under international law as to states now claiming a territorial sea of six miles, and as to states claiming less than six miles but which failed to protest after the lapse of a reasonable time.

Part (b) of State X’s protest assumes, without admitting, the validity of State A’s extension of the territorial sea to six miles and then challenges the right of State A under the Geneva Convention on the Territorial Sea and Contiguous Zone (1958) to deny the right of innocent passage to a vessel carrying military cargo through said territorial sea.

The question here is whether passage through the territorial sea loses its innocence by the mere transportation of military cargo when no act has been committed by the ship which is prejudicial to the “peace, good order or security” of the coastal state.

The language of the Convention defining innocent passage is somewhat different from the language proposed by the International Law Commission. The Convention defines innocent passage in the following terms,

“Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.” 33

On the other hand, the International Law Commission phrased its article in terms which placed emphasis upon the commission of acts, not the mere passage itself, concluding,

“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.” 34

It is clear that the Passage of The Queen Bee through State A’s territorial sea was innocent under the definition of the International Law Commission because she did not commit any act during the passage which in any way could be considered prejudicial to State A’s security.

The question remains as to whether the passage of The Queen Bee was prejudicial to the “peace, good order or security” of the coastal

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33 Art. 14 (4).
What constitutes prejudicial passage is not defined in the Convention, nor is there any indication as to whether there must be a direct causation between the passage and the prejudice to the "peace, good order, or security" of the coastal state. If States A and B were at war, then it would be logical to assume that the passage of a ship through State A's territorial sea with military cargo bound for State B would be prejudicial to State A's "peace, good order or security" (quite likely to all three).

Here, however, despite certain frictions between the two states, there is no indication that the military cargo on The Queen Bee bound for State B is to be used at some future time against State A and is therefore prejudicial, though remotely so, to the "peace, good order or security" of State A. This being the case, it is difficult to see how State A can lawfully forbid the passage of all ships through her territorial sea carrying military cargo bound for State B.

D. EVENT IV (Coastal state's jurisdiction in territorial sea over foreign fishing vessel.)

A number of questions are involved in Event IV. First, did the fishing vessel, The Pelican, violate its right of innocent passage in State A's territorial sea by (a) traversing the territorial sea approximately one mile landward of the customary sea lane, (b) proceeding slowly, (c) with fishing nets on board but not secured in accordance with the regulations of State A, and (d) taking handline soundings and sea bed samples?

It appears that The Pelican was conforming to the provisions of the Convention in accordance with the definition as provided in Article 14 (2) in that she was navigating through the territorial sea for the purpose of traversing that sea without entering internal waters. Nothing in the convention, or in international law regarding the right of innocent passage requires that the overseas ship follow a particular sea lane within the territorial sea or be a certain distance from the shore, absent specific regulations of the coastal state to insure safety of navigation, or for some other justifiable purpose. The facts do not indicate the presence of any such regulations. Nor does "passage" require that the ship travel at a minimum speed. In fact, it may even stop and anchor if such is incidental to the passage.

Therefore, the real question is whether the passage of The Pelican was "innocent," in view of (a) the fact that the fishing nets, although on board, were not secured in accordance with the regulations of State A and/or (b) the fact that crew members were taking soundings.
The Convention contains a specific provision relating to the “innocence” of foreign fishing vessels, as follows:

“Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.”\(^{35}\) (emphasis added.)

Two things should be noted about this provision. First, it was added at the Conference partly at the urging of Yugoslavia\(^ {36} \) and the United Kingdom,\(^ {37} \) both of whom introduced proposals for an amendment to the International Law Commission’s draft articles. The Yugoslav delegate pointed out that fishing vessels presented a special problem in relation to the right of innocent passage because some were equipped with very modern gear that could be lowered and taken up rapidly, so that it might be difficult to prevent their fishing in the territorial sea of another State while ostensibly traversing it for navigational purposes only.\(^ {38} \)

Secondly, it should be noted that Article 14 (5) of the Convention establishes a special requirement for “innocence” of fishing vessels and in doing so it creates confusion regarding the provision immediately preceding in Article 14 (4) which says that “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.” If fishing by a foreign vessel in the territorial sea is considered to be prejudicial to the “peace, good order or security” of the coastal state then the special requirement regarding the “innocence” of fishing vessels is redundant. (It would certainly seem that fishing by a foreign vessel in the territorial sea of a coastal State, which is a violation of sovereignty, is definitely prejudicial to the “good order” of the coastal State.) On the other hand, if fishing by a foreign vessel by some semantic choreography is not considered to be prejudicial to the “peace, good order or security” of the coastal state, then it would have been less confusing if the basic definition of “innocence” had been broadened to include “economic well-being” along with “peace, good order or security.”

Despite this confusion in and inadequacy of draftsmanship the important fact for our purpose is to note that the reason for the special provision in the Convention regarding passage of fishing vessels through the territorial sea was to prevent them from fishing, since the coastal state has the universally-recognized exclusive right to fish in those waters.

\(^{35}\) Art. 14(5).
\(^{38}\) 3 Official Records (A/CONF. 13/39, 76 (1958)).
The question then is to decide whether The Pelican violated its right of innocent passage just because she did not conform to the exact regulations promulgated by State A, even though its nets were on board and hence not in a position to fish. This is a hard question. On the one hand the coastal state has the right under the Convention, and apart therefrom, to insure that foreign vessels do not fish in its territorial sea. Reasonable regulations of a coastal state requiring the securing of fishing equipment are a means for accomplishing that end. Hence, if the regulations are reasonable a material violation thereof would constitute a breach of innocent passage.

On the other hand, if the foreign vessel in fact has her nets out of the water, with her holds full of fish and no indication of intention to fish, should it be considered a violation of innocent passage merely because of what might be a "technical" violation of a precise regulation of the coastal state regarding the securing of fishing gear?

It would appear somewhat more just to conclude that The Pelican was not violating the right of innocent passage. She had made an effort to secure her fishing nets even though not conforming exactly to the regulations prescribed by State A to prevent fishing in the territorial sea. This conclusion appears more valid than holding that The Pelican violated the rule of "innocent passage," notwithstanding some justifiable suspicions on the part of State A resulting from the actions of The Pelican in traversing the territorial sea one mile landward of the customary sea lane and cruising slowly late in the afternoon.

The next question is whether the taking of hand-line soundings was a violation of "innocent passage." It is submitted that it was not because the taking of soundings either in the manner indicated here or by some other mechanical or electronic device is a normal incident to navigation. Thus, the fishing vessel was within its rights in taking the soundings, notwithstanding the suspicious circumstances surrounding the action.

On the other hand, it seems reasonable to conclude that The Pelican was violating "innocent passage" in having her crew take sea bed samples since this action is not a normal incident to navigation. Moreover, under the circumstances in the case, the sea bed samples were probably being taken for the purpose of mapping the submarine terrain or some other ulterior purpose unconnected with mere passage.

Of course, it might be argued that the sea bed samples were being taken for purposes of "fundamental oceanographic or other scientific research carried out with the intention of open publication," in accordance with Article 5(1) of the Convention on the Continental Shelf. The two rather obvious counter arguments are (a) that the above Article applies only to such research outside of the territorial
sea, and (b) that it is somewhat unlikely that such research would be conducted by the crew of a fishing vessel.

Therefore, State A was justified in escorting The Pelican outside the six-mile limit.

The next question is whether State A had the right under the Convention to visit and search The Pelican in order to determine whether there was a breach of the rules of innocent passage.

As a general rule during peacetime the vessels of one country may not be visited and searched by the warships of another country on the high seas. In the territorial sea such visit and search may occur only if there exists “probable cause” for suspicion. During war the rule is contrary as to the high seas; the belligerent is entitled to visit and search all merchant ships, “the right growing out of, and ancillary to, the greater right of capture.”

However, the Convention on the Territorial Sea and Contiguous Zone contains an express provision that “the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.” The question then narrows down to whether the action of State A was a “necessary step” to prevent what she suspected was not “innocent” passage.

The facts do not indicate whether State A’s warships first communicated to The Pelican, prior to the boarding, in an attempt to ascertain why the fishing vessel was taking soundings and otherwise doing things which gave rise to suspicions regarding the innocence of her passage. Normally, the action of boarding for a visit and search would be justified only after the vessel refused to answer questions as to her actions which appeared to be violative of innocent passage.

Here again we find that the coastal state must reach a proper balance between its right to take necessary steps in its territorial sea to prevent passage which is not innocent and its duty not to hamper innocent passage through the territorial sea.

In the present instance, since The Pelican was delayed by State A’s warship for only thirty minutes, during which time she would have traversed only two additional miles at her slow cruising speed at the time, it may be concluded that the visit by the warship did not hamper The Pelican’s innocent passage, assuming for the moment that it was innocent. Hence, even though the boarding of The Pelican normally should not have been made until she had re-

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40 Art. 16(1).
fused to answer satisfactorily questions as to her actions, State A’s action in making the visit may be justified as a “necessary step” to prevent passage through her territorial sea which, we concluded earlier with respect to the taking of sea bed samples, was not innocent.

As to the search by the officers of State A’s warship, this action appears to have been unjustified under the facts of the case. It was hardly necessary to search The Pelican in order to find out why the soundings and sea bed samplings were being taken and why the vessel was cruising more slowly than normal one-mile landward of the customary sea lane. This information probably could have been secured by asking questions during the visit unless officers of The Pelican refused to answer, or gave what appeared to be false or evasive answers.

Of course, it is possible that a search might have been required to determine whether the fishing gear had been secured as required by State A’s regulations, and whether the suspicions that The Pelican was planning to fish in State A’s territorial sea after dark were justified. However, even here it would appear that proper interrogation during the visit would have sufficed, without a physical search of the vessel. This is not to say that a boarding party is limited to a visit and may never search. On the contrary, a search would be justified and lawful whenever the boarding party has not received satisfactory answers to its questions or, despite the answers, it honestly believes that a search is a “necessary step” to determine whether the vessel is in fact violating the right of innocent passage.

Under the facts presented here it may be concluded that the search of The Pelican was not justified under international law or under the Convention as a “necessary step” to prevent a violation of innocent passage.

EVENT IV (Jurisdiction of Coastal State over a criminal, citizen of coastal state, aboard foreign vessel).

The final question is whether State A had any right to exercise criminal jurisdiction on board The Pelican in arresting Mr. K., a citizen of State A, who had committed prior crimes.

Here the language of the Convention indicates emphatically that State A was without jurisdiction, even though Mr. K. was a citizen of State A.

“The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing
through the territorial sea without entering internal waters." (emphasis added)

Since the crimes of Mr. K. had been committed before the ship entered the territorial sea, the officers of the warship were not entitled to exercise criminal jurisdiction on board The Pelican.

Moreover, in order to indicate generally the strict limitations under the Convention of the coastal state’s right to exercise criminal jurisdiction on board a foreign ship passing through the territorial sea it should be noted that even if Mr. K. had committed a crime on board the ship during its passage, criminal jurisdiction could not be exercised except in the following cases:

“(a) If the consequences of the crime extend to the coastal State; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.”

It may be concluded that State A violated the Convention on the Territorial Sea and Contiguous Zone in arresting Mr. K. on board The Pelican and removing him. It matters not that the presence of Mr. K. on board the fishing vessel was accidentally discovered. State A’s exercise of criminal jurisdiction would have been equally in violation of the Convention even though it had been known that Mr. K. was aboard The Pelican.

E. GENERAL CONCLUSION WITH RESPECT TO THE RIGHT OF INNOCENT PASSAGE THROUGH THE TERRITORIAL SEA

It is often difficult to strike an equitable and just balance between the coastal state’s right to prevent passage through its territorial sea which is not innocent and the competing right of overseas states to enjoy the right of innocent passage, both for their merchant vessels and their warships. In the troubled, insecure world in which we now live interpretations of the Convention on the Territorial Sea and Contiguous Zone by writers, and by judicial and other decision-makers in case of disputes, such as the hypothetical situations given above, will probably tend to favor the coastal state’s regulations and actions if they appear at all reasonable as a security measure.

41 Art. 19(5).
42 Art. 19(1).
While one may understand the present tendency to weight the scales slightly in favor of the coastal state in this matter of the right of innocent passage, one may hope, without predicting that in time tensions among competing claimants in the world arena will have eased to the extent that all disputes will be settled at the negotiation table, in an arbitral tribunal, or in the International Court of Justice. In such a period of relaxed world tension the "necessary steps" which the coastal state would have to take in order to prevent passage which is not innocent but instead is prejudicial to its "peace, good order or security" would be minimal and the scales could then be weighted in favor of the overseas state's right to enjoy innocent passage free from numerous protective regulations and actions by the coastal state which in varying degrees are bound to hamper passage through the territorial sea.

Stated another way, given world conditions in which passage through the territorial sea both for merchant vessels and warships is more likely to be "innocent" than is the case today, the coastal state will have far less need to take as many, or as severe, "necessary steps" to prevent non-innocent passage, even though the right of the coastal state to take those steps must always be recognized and guaranteed either under a Convention or under the inherent right of self-defense.

That the articles of the Convention on the Territorial Sea and Contiguous Zone tend to favor the coastal state in regard to the "right of innocent passage" can be documented. It is hoped that the analysis of the problem situations has served as a partial documentation. Similarly, as discussed elsewhere, the record of the entire Conference, including the other three Geneva Conventions of 1958, indicates a rather decided tendency to favor the coastal state on many other matters.43

This tendency is understandable in view of a variety of motivating forces in the world, some of them inimical to the free world, but, by and large, it is an unfortunate trend because in the long run the maximum utilization of the world's greatest common resource—the seas—can be achieved only by what has been wisely and succinctly sum-

43 Note, for example (a) the strong sentiment toward increasing the breadth of the territorial sea to six miles, (b) the vote of the First Committee in favor of a 12-mile exclusive fishing zone even though this proposal failed in plenary meetings, (c) the recognition of the special interests of the coastal state in the Convention on Fishing and Conservation of the Living Resources of the High Seas, (d) the exclusive rights accorded the coastal state to explore and exploit continental shelf resources and (e) the increase in the closing line for bays from the widely accepted ten miles, at least prior to the dictum in the Anglo-Norwegian Fisheries Case (see footnote 1), to fifteen miles in the I.L.C. draft articles, to twenty-four miles in the Convention on the Territorial Sea (Art. 7(4)).
marized as an “explicit weighting of the balance of decision in favor of inclusive rather than exclusive uses.”

Every time the coastal state is accorded, or attempts to usurp, the right to push seaward “a new extension of state competence,” there must be of necessity a corresponding diminution in the vigorous, productive principle of freedom of the high seas which has served for three centuries to keep the channels of navigation, communication, and commerce open to all users in a shrinking world whose increasingly interdependent states can survive and prosper only when such channels are open.

Whether one is concerned with the application of the right of innocent passage to a problem situation, or with some other article of one of the four Geneva Conventions of 1958, it is well to scrutinize carefully every regulation promulgated and every action taken by the coastal state to see that the overriding principle of freedom of the seas suffers the least possible infringement commensurate with the justifiable need of the coastal state to protect itself. As with human liberty, the price of freedom of the seas is eternal vigilance, particularly vigilance against duly constituted authority.


45 Garcia Amador, The Exploitation and Conservation of The Resources of the Sea, 13 et. seq. (1959). I have borrowed his apt expression, “new extensions of state competence” but not his conclusions which are generally contrary to mine. Note, for example, his attempt to justify the Santiago Declaration of Chile, Ecuador and Peru claiming “exclusive sovereignty and jurisdiction” over a 200-mile belt of high seas adjacent to their coasts. (Ibid., at 76.)