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The Right of Innocent Passage of the Warship

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Abstract: The root cause of the territorial water system establishment is the urgent demand of the sovereign states to prevent land-based aggression from the sea so that only harmless ships would be allowed to navigate usually. This Article is about the right of innocent passage and analyzes whether a warship shall be entitled to cross the territorial sea of another country rapidly and continuously. Based on the 1982 United Nations Convention on the Law of the Sea and the controversy of Article 17, this article illustrates the origin and essence of the innocent passage, thus arguing the problem in the jurisprudential dimension, whether warships shall enjoy this right.

Keywords: innocent passage, foreign warship, territorial sea

1. The Evolution of the Innocent Passage

The concept of *the innocent passage* was initially raised in 1876 in the *English King v. Kane case*. In the late 19th century, the right of it had been widely recognized. The fundamental basis of this right is *the principle of freedom of the sea*, which means that the whole ocean is a common good available to all and that no one may claim private rights to it. Although the restrictions on the freedom of navigation have been in place for hundreds of years, both in peacetime and in wartime, in terms of geographical space and the content of rights, the harmless passage through the territorial waters is for the necessity of communication links cross borders and the international trade. Thus its appearance was inevitable as human society developed.

In the domain of international law, the connotation of *innocent passage* is essentially an extension of the customary principle, i.e., the freedom of the seas, the essence of which is freely trading and the most convenient way for a State, that is incapable of feeding itself indefinitely, of establishing links with other places and of constantly replenishing its strength is through the seas. The sea itself does not offer the same conditions for reproduction and survival that land does, so it is difficult for any human community to use it alone for habitation and production, and therefore, with the development of navigation technology and the discovery of new continents, before the advent and the extensive application of aviation technology, the most significant value of the sea to humanity was its ability to act as the easiest route for international trades. It can hence be deduced that, besides the reduction of tariff and non-tariff barriers, the opening of maritime trade routes is also necessary to maintain the openness of the international trading system, as it guarantees the access of countries to the free system of international trade and the smooth exchange of resources [1,2].

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The earliest legally explicit provision of *the right of the innocent passage* should be found in Article 5 of the *Legal Status of the Territorial Sea*, adopted by the *Institute of International Law* in 1894, which allows all ships without distinction to enjoy *the right of innocent passage* through the territorial sea. Subsequently, in 1930, under the heading *of ships of all kinds except warships*, the report on *the Legal Status of the Territorial Sea*, which *the Conference prepared for the Codification of International Law*, stated that the coastal State should not prevent the innocent passage of foreign ships within its territorial waters. The *1958 Convention on the Territorial Sea and the Contiguous Zone* also states in Article 14, paragraph 2, that all ships, whether of coastal or non-coastal States, shall have *the right of innocent passage* through the territorial sea. In this series of repeated affirmations, albeit expressed in different ways, *the right of innocent passage*, as an original concept of international customary law, was widely recognized and observed by the international community and the *1982 United Nations Convention on the Law of the Sea*, which contains most extensively valid till this day, regulates in its Article 17, *Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea* [2,3].

2. The International Controversy over the Right of Innocent Passage

The right of innocent passage is defined as the right of a foreign ship to pass through another country's territorial sea rapidly, expeditiously, and with neither delay nor prejudice to the security, public order, and decency of the coastal State, and no need to request permission from the coastal State is required.

As previously mentioned, this right is inherent in the general principle of international law, which is conducive to commercial trade between States and the development of navigation. However, coastal states' claims to the territorial waters arise out of concern for the security of their coasts and the preservation of their offshore interests [4]. However, excessive claims to the territorial sea will inevitably constitute a certain degree of rights abuse. Suppose the coastal state claims absolute sovereignty over the territorial waters. In that case, it may impede the freedom of navigation and hinder the development of international trade to a certain extent, to the detriment of economic and trade relations between countries.

The degree of tolerance of freedom of navigation by coastal States varies with distance from the territory in different waters. It is inversely proportional to the distance of the waters from the territory. Territorial water is the shortest distance to the mainland; therefore, the State holds the lowest tolerance for the freedom of navigation here. Thus, it can be concluded that the Convention's regime on innocent passage is the culmination of a delicate balance and reconciliation between the domestic interests of navigation (i.e., the interests of the flag State) and the sovereignty of the coastal State based on the premise of the severe opposition of these two interests [5]. Therefore, the scope of this right has become a controversial topic on account of the insufficient explicitness of the Convention about this provision; in particular, the question of whether warships can be classified as belonging to the ships referred to in Article 17 has been frequently debated in international practice.

For example, the United States and China have had many confrontations over *freedom of navigation* and *innocent passage* in the past few years. This issue is also a classic dilemma in traditional international law; up to now, no consistent international practice on it has been made yet [6]. Consequently, there is rarely a unanimous decision on this issue. At the same time, the different claims of states reflect the diverse demands of international law subjects with various strategic interests in maritime rights and interests. Therefore, it is crucial to explore this issue with specific research significance.

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3. Jurisprudential Analysis on Whether Warships Enjoy the Right of Innocent Passage

3.1. Whether this Right of Warships Constitutes International Customary Law

While innocent passage as an extension of the freedom of the high seas indeed constitutes international customary law, the issue of *innocent passage* of warships in the territorial water of other States is controversial and, by its very nature, unclear and controversial, shall not constitute the international customary law. International customary law itself is akin to a generalized legal principle of a general nature, inherently macro, rather than an unambiguous legal provision that can be applied directly without interpretation.

The Report on the Legal Status of the Territorial Sea (Annex I), compiled by the *Hague Conference on International Law* in 1930, provides the requirement to request official permission from the coastal state for warships to sail through the territorial waters of another state [2]. According to *the 1st United Nations Conference on the Law of the Sea in 1956*, Article 24 of the draft Convention established that a coastal State could ask foreign warships to pass through the territorial sea under prior permission or notification. However, the *innocent passage right* should usually be granted. Although this provision was vehemently opposed by several maritime powers and was not adopted in the subsequent vote, this does not mean that warships are already granted the same right as other vessels by the current Convention. It is instead a side that indicates that the international community has not been able to reach a consensus on whether warships should be entitled to pass through other countries territorial waters innocently, thus making it an unresolved issue.

Meanwhile, the Soviet Union, for instance, has changed its domestic law regarding *the right of innocent passage* of foreign warships in its territorial sea. In 1931, the Soviet Union promulgated *the Temporary Regulations on Visits of Foreign Warships to Soviet Waters*, which required prior authorization of the Soviet government when foreign warships passed through its territorial waters. Nonetheless, in the Soviet Union's Navigation Rules enacted in 1983, *the innocent passage* of foreign warships was permitted, provided they sailed strictly in compliance with the designated shipping lanes. After the 1988 Black Sea collision, the Soviet Union once again changed its position on this issue, favoring the idea that foreign warships may undoubtedly be granted the right [7].

It shall be noted that this *innocent passage* issue may be regulated by foreign relations and the external policy of a State. Therefore there is no *opinio juris*, which is one of the indispensable elements to identify whether the object could be deemed an international norm. It follows that *the right of innocent passage* of warships possesses no general recognition of the international society. Thus it shall not be regarded as a part of the international customary law.

3.2. Whether the Distinctive Nature of Warships Shall be Treated Differently

On the other hand, the sovereign state has a specific closed nature, and the openness to the outside world, as well as the links it establishes with other countries, are subject to confident strategic choices based on its domestic interests. That is why the differentiation between civil and military matters would not be practically uncommon in the international law domain. Historically, international law has been structured in a dichotomy of private and public law matters. For private law matters, which generally involve none of the political affairs and military security of sovereign States, nations are likely to hold an open, tolerant and cooperative attitude; whereas for public law matters, which refer to fundamental matters such as national sovereignty and territorial security, countries tend to be conservative, cautious and guarded.

Since the protection of a State's territory must be a sovereign state's first priority, the claim to maritime rights derives, in part, from the purpose of protecting land territory. Though the

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Convention gives no explicit requirement of peculiar treatment for warships, it does not explicitly prohibit States from giving them a certain degree of special consideration.

Warships exercise the functions of organs of the State, embody the nature of State sovereignty, and naturally have a different status in international law from other ships. This has become customary international law, as they enjoy diplomatic immunity in preference to other ships. The Convention also specifies that a warship belongs to the military armed forces of a sovereign country, bearing external indications of its nationality, Wholly under the command of the Government of this State, and crewed by armed military personnel. This implies that warships possess characteristics and status separate from civilian vessels and that the tasks they carry do not belong to the realm of private law but are usually linked with the State's affairs [8].

The right of innocent passage for merchant's vessels is naturally undoubted, as there is an international consensus that only a presumption of innocence can be made in respect of ships engaged in merely civil and commercial acts in general. In the case of warships, by their distinctive nature, such as their hull structure, equipment, and personnel composition, which are entirely distinguished from those of ordinary ships and are not used for other needs but rather for military activities, which are also generally presumed to be harmful and prohibited in the practice of international law, a presumption of harmfulness may well be established [9].

Thus, it is manifest that warships, by their unique nature and status, warrant a distinction from civilian vessels and should be treated like the conservative, cautious and guarded manner in matters of public international law.

3.3. Conclusion on the Right of Innocent Passage of Foreign Warships

As stated above, the controversy of whether the war crafts own this right to pass innocently without prior approval has been a long-standing debate in the international navigation regime. *The right of innocent passage* is essentially a concern of the trade freedom, and this right, as Grotius from the Roman jurists is essentially for the ships in a state of non-war, shall not certainly include the armed ships. Moreover, by examining the claims and practice of States, judicial decisions, international conventions (as well as drafts), and the views of public jurists, the conclusion can be drawn that a general phenomenon exists in the customary law; it consists of two similar regulations on *the innocent passage* of warships. This entails that a foreign warship exercising such a right should comply with regulations and laws imposed by coastal countries [10].

In the *United Nations Convention on the Law of the Sea*, this right itself shall not be precisely defined for all ships, the attribution of warships to it has not yet been resolved, and there is not yet extensively and substantially consistent international State practice, so it remains highly controversial. Moreover, while the Convention does not appear to leave the determination of harmlessness entirely to the discretion of the member country (considering the enumeration of violations of this right in Article 19(2)), the State itself has inherent powers in matters of sovereignty and should therefore have a degree of autonomy in it other than those provided for in the Convention, i.e., to make other provisions based on the Convention as to what types of conduct are not permitted.

Due to the unique nature of warships themselves, it is a matter of sovereign self-determination for coastal States to create a harmful presumption against them based on general principles of international law and to regulate the compulsory request for permission from the authorities of the coastal State before the foreign war crafts pass through its territorial sea.

The Convention neither expressly restricts nor, indeed, can substantially make restrictions on the policies of the member countries since the sovereign power of a State is conferred by none of the international conventions or treaties but rather enjoyed by the State itself. Thus, it shall be total ab initio and inherent in the original attributes of the sovereign State, and concluding an international

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convention or treaty is intrinsically a cession of the absolute sovereign power, which the State initially owned. It follows that international conventions can only impose certain limitations on the sovereign powers of the Member States based on their consensus but possesses no capacity to confer any. The rights of territory for a country are naturally entitled to its sovereignty [4].

It may be thus inferred that warships do not ipso facto enjoy *the innocent passage right* but can be granted by certain coastal States. In contrast, for others, their innocent passage is subject to prior notification with permission or other specific requirements.

4. Conclusion

The trend in modern society has been to move from the *sea* to the *sky*, and the meaning of the development of the sea freedom principle has gradually changed; with shipping still dominating international transport, its vital importance, however, is, diminishing as commodities become lighter and more air routes are opened up. Thus, while the guarantee of the development of international trade remains an essential element of *the right of innocent passage*, it has become more of a declaration and assertion of an ancient practice in the law of the sea.

The right of innocent passage of warships to the territorial waters of other countries, not recognized as a norm of the international customary law, remains controversial, as there is no uniform international perspective of *the right of innocent passage* of warcraft due to its unique characteristics.

Hence, States should actively promote international negotiations and consultations, with a combination of reasonable judicial practices and theoretical interpretations of the Convention, to reduce international maritime disputes and maintain the long-term harmony and stability of the international maritime order.

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