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Evolve, Teeter, and Reinvigorate: Analyzing the Innocent Passage Through a Comprehensive Perspective

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Abstract: Facing an anarchy world who tries to reach a consensus of peaceful and legalized governance, it's unavoidable to discuss the actual effectiveness of international law, yet such discussion shall be continuous, taking long-term efforts in order to get closer to its goal before a cooperative world come into being. Starting from the vital case of *Corfu Channel* that shaped its sphere of application, this article aims to discuss the innocent passage principle in the international law system, emphasizing its characteristics, flaws and the reasons behind. The article mainly used the methods of regulatory research and case study. The analysis stressed that the flaws of innocent passage regulations was on account of its nature of being a part of soft laws, but similar principles performed well in some other areas, such as the arctic and the outer space. Eventually, the article suggested that the soft laws like the innocent passage can be commendably applied in areas that was unexploited and without obvious military threats.

Keywords: innocent passage, soft law, international law, *corfu channel* case

1. Introduction

Innocent passage, such phrase mainly refers to a legal concept in the United Nations Convention on the Law of the Sea (UNCLOS). Article 17 to 25 provided a clear and detailed description of it, defining it as a kind of "continuous and expeditious" passage conducted by ships from foreign neutral countries "through the territorial sea", and the action itself shall be "not prejudicial to the peace, good order or security" of the coastal state [1].

When discussing the principle, it's unavoidable to look back to the 1946 *Corfu Channel* case, which set a significant example for applying innocent passage in the international legal system after WW2. In 1946, some British warships suffered severe damage from mine explosion while passing through the the Albanian territorial waters in the Corfu Channel, and the United Kingdom seised the International Court of Justice (ICJ) for the dispute [2]. In the pending process, the United Kingdom rejected the Albanian claim which said the damaged British warships were "not innocent when passing through the Corfu Channel" [2]. Instead, UK stressed that the passage of British warships was "neutral and peaceful" [2]. The interpretation made by the United Kingdom was judged to be valid.

One important contribution of the *Corfu Channel* case was the forceful statement about innocent passage made by the UK. Before the UNCLOS was born, many rules and problems remained vague when dealing with international maritime disputes, and the passage of foreign warships through

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territorial waters was one of these controversial issues. To support their standpoints, UK spared no effort to clarify the standards of "innocent passage", claiming that even for warships passing through the territorial waters of neutral States, as long as they generally met the conditions of "innocent passage restrictions" and "not contrary to the coastal States' publicly promulgated regulations on territorial waters", are entitled to exercise the right of "innocent passage" under common law [2]. Eventually recognized by the ICJ, this statement became one of the basics of relevant laws in the present UNCLOS.

This article plan to examine the two basic characteristics in the formalization and application of the innocent passage in territorial seas, and explain the essential paradox in between using the concept of soft law. Moreover, a path of referring innocent passage of vehicles in other kinds of special areas, including the arctic and the outer space, was employed to search for a possibility of resolving the paradox.

2. Past, Present and Future Possibilities of Innocent Passage

The innocent passage is a principle that has been long recognized, but it has received suspects and even oppositions in its application. Such situation reflected a general problem of the international law system, which can be concluded as ambiguity in expression and powerlessness in real governance, especially those showing a negative attitude towards major power actions. However, there are cases that innocent passage was rather successfully applied in space other than the ocean, provoking new thoughts about redefining its position in the present world.

2.1. Previous Researches of Innocent Passage

Among the field of international law, researches and discussions about innocent passage is not an emphasized topic.

A small boom of relevant studies appeared in the late 20th century, when the Third United Nations Conference on the Law of the Sea brought the latest edition of UNCLOS to the world in 1982, in which innocent passage was formally settled as a legal principle. What need to mention is that as one of the great powers, US refused to ratify the convention and remained a non-signatory of UNCLOS until now. Such choice could led to heated discussions, in which American and European scholars raised critical analysis about the contents of this new-born law.

The principle of innocent passage, particularly those conducted by warships or in conflict zones, gained part of their attention.

In these articles about innocent passage, most scholars used a historical view, focusing on its evolvement in the international law (IL) system after WW1. Originated from the idea of "navigation freedom", the concept was first formalized into literature in the Hague Convention 1930, and later experienced a series of modification and redefinition [3]. During this period (approximately 1958-1982), the "innocent passage" not only experienced changes in literal expressions, being related to or even referred to concepts like "transit passage" and "unimpeded passage", but also become highly controversial in a few specific contexts, for example, when the subject was a warship or a submarine, or when the passage took place in seas of archipelatic states and straits states [4,5].

According to scholars, the divergence in opinions about innocent passage are mostly based on different national interests. Larson stressed that the straits states held an reservations view due to their "national security and pollution control", while maritime great powers tended to support the principle for their interest in "international commerce and strategic security" [4]. The ideology confrontations, as well as the oppositions between camps during Cold War, was also considered to be in charge of some disputes about the innocent passage [6].

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In the 21st century, the scholars from developing countries, especially from those who have strategic interests about the ocean, became the major power to research and discuss this problem. A kind of view holds that the international law nowadays still carries characteristics of European imperial expansions, thus some contents, like the innocent passage, are not equal and universal enough for "the third world" [7]. Chinese researchers also held a relevantly critical view to innocent passage in UNCLOS, stressing that in accord with China's law and regulations, the passages through China's territorial seas should be informed and approved by the government before conducting, which reflected domestic restrictions based on the international law [8].

Even if throughout the history, the ocean as a whole have been possessing the attribute of an resource storage open for every state, with no privatization of any state or other international actors permitted, "the recent history of the law of the sea continues to reflect conflicts between states seeking unhampered navigation and utilization of resources and other states seeking exclusive control over adjacent seas" [9]. The aim of this article is to fill the blank of present researches by looking into the origin of innocent passage, finding its inner contradictions, and providing suggestions for its future application by analyzing a few exceptions.

2.2. Inherent Nature of Innocent Passage

As Jessup stated in 1927, "the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law", this fundamental concept was deeply rooted in the history of international maritime law [10].

Different from the land, ocean has long been acknowledged as an area open to all explorers. It's "under shared competence, to the widest common use by all who possess the initiative, imagination and resources required for the sometimes formidable tasks of such use" [11].

In International regulations about maritime affairs, the proposition of "the sea being an open area" continued to exist and evolve. Among all relevant ideas, the most famous one should be Hugo Grotius's *mare liberum*. In his book, *Commentary on The Law of Prize and Booty*, Grotius stated that since "seas were boundless and their resources unlimited", the requirements for demarcating private property didn't exist at seas, thus navigation and fisheries conducted on seas should be opened to all states [7]. Some conceptual ideas in his claims later evolved into "navigation freedom", indicating that the basic function of the sea, communication and traverse, stood a firm status in customary laws [12]. The right of innocent passage was first formalized into the international law system in the Hague Convention in 1930, and later the UNCLOS inherited most of its relevant definitions.

In the twentieth century, as a number of nation states came into independence, new requirements of redistributing the ocean and guarding national security caused an unprecedented resurgence of the *mare clausum*. The contradiction between claims calling for a close or an open ocean reached a climax when formalizing and applying the international laws of territorial seas and navigation. Debates were drastic in relevant international conferences.

The conflicts reflected itself in the *Corfu Channel* case. Right after the primary reconstruction of international system, a case involving foreign warships passing territorial seas appeared, inevitably bringing the issue to the forefront. The International Court eventually accepted the evidence saying that the British warships "were not proceeding in combat formation", and admitted that the warships' passage through Albanian territorial waters could be considered as innocent, as long as "the character of the passage itself" remains neutral and harmless [10]. To judge from the result, *Corfu Channel* case actually confirmed the inherent nature of innocent passage in the IL system. Consequent to the judgement of this case, the principle remained relatively unquestioned when written into the 1982 edition of the UNCLOS, but a number of details and vague descriptions has accompanied it, bringing out its flaw of vulnerability in practice.

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2.3. Vulnerability of Innocent Passage in Legal Practice

In a view of geopolitics, it should be widely recognized that seas not only serves as "avenues of communication and transmission between territories and cultures", but also as "barriers for shielding and isolating certain territorial communities" from power transitions and armed conflicts, especially for strong maritime powers as well as medium coastal states who have vital strategic concerns about the ocean [11]. When the international environment is tense or regional conflicts are intense, the warship's right of innocent passage through the territorial sea cannot be guaranteed, even in a virtual sense.

As regulated in the UNCLOS, coastal States was asked not to "hamper the innocent passage of foreign ships through the territorial sea", but was also authorized to suspend the innocent passages "if such suspension is essential for the protection of its security" [1]. Such vague and paradoxical rules hampered the effective application of innocent passage itself, ever since the cold war period, the globe has continuously witnessed international issues that raised challenges on the principle. The United Arab Republic's blockading of Israel's passage through the Straits of Tiran in 1967, the South China Sea incident between China and US in 2013, the Russia's action of blocking the Black Sea during Ukraine war in 2021, a great many international blockade and disputes has showed how vulnerable such regulations can become under a tense international environment, controversial area, or severe regional conflicts [13].

Looking into its vulnerability, the nature of international maritime law may has to take a large part of the responsibilities. Including the UNCLOS, most international laws based on Vienna convention are soft laws, which means that they are not expected to have any compelling power for execution, thus the violation toward which might receive no legal penalty at all. In the system of international maritime law, there are quite a few regulations pertain to soft laws, such as the London Convention governing the waste dumping issues of the ocean.

In this context, the only credible "penalties" are deterrent actions conducted by strong states. To describe in a realistic way, soft laws blurred the boundaries between politics and law, thus juridical decisions "would become indistinguishable from the exercise of power" [14,15]. No wonder the IL system would fail to act as the conventional "scales of justice", but may be turned into the "tools of the powerful" from time to time. With a rather powerful influence from political reality, the outlook of applying the regulation about innocent passage seems bleak and passive.

2.4. Key Factors for Problems and Another Possibility

As stated in the former section, international soft laws are visibly weak in the actual governance of international affairs. The key factor for their fragile maintenance, to analyze in an approach of structural realism, is the balance of great power interests. As was universally acknowledged, the UN system was build after WW2, thus naturally represents the interests and appeals of victor states. Being one of the UN conventions, UNCLOS submits to these major powers as well, leading to its unchangeable characteristic of being generally flexible and beneficial to the powerful nations.

Does that means principle like innocent passage have no credit when it comes to issues involving strong countries like P5 of the UN, and we shall emphasize political methods instead of developing such broke-in-a-touch laws? The answer is not necessarily. If we look beyond the territorial seas or ordinary ocean areas, there are indeed evidences of innocent passage being consciously maintained and strictly obeyed--the principle was also mentioned in other continuous space that is either hard to draw a visible border, or been universally admitted as the common wealth of mankind. It's not hard to discover the rules or regulations similar to innocent passage in the law about polar regions or even outer space.

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In a century recently, due to the global warming, the rapid melt of ice glaciers is gradually turning the arctic from a frozen area into a concentration of shortcut channels in the Northern hemisphere. Arctic navigation hence attracted global attentions. While states like Russia and Canada was trying to seize more governance right in the arctic oceans, other states consistently held an opposite or neutral view. The innocent passage principle was showed in Article 234 of the UNCLOS, a product of major power counterbalance about the "Arctic Exception" clause put forward by Canada [1,16]. Even Canada has reached a huge success in negotiation, gaining extra rights to "unilaterally formulate and enforce laws and regulations" for the passage through arctic oceans in order to control pollution, it still needs to accept many restrictions to "protect the navigation interests of other countries" in Arctic, including the no-suspension of innocent passage. Amazingly, though Article 234 is still fragile, known as "the most ambiguous provision in the Convention", Arctic waters has never witness harm or severe challenge of innocent passage [16,17].

For the passage in outer space, the most authorized doctrine is the Outer Space Treaty. In Article 1, it regulated that the outer space "is not subject to national appropriation by claim of sovereignty, by means of use or occupation", and should remain" free for exploration and use by all States without discrimination of any kind" [17]. These expressions, impressively, is the most idealistic statement that the principle of innocent passage could ever image. And again, it has been practiced well, defaulted as a formula promoting "the maximum exploitation of space technology in the service of human needs" [18].

It's not hard to discover that the most important common points between the two kinds of spaces above are "unexploited", dramatically similar to the impression of the ocean which was possessed by our ancestors in the 15th century. Due to the prior desire of effective exploration and exploitation, as well as the covert concerns of resource monopolization, countries are able to form a mutual supervision mechanism. Another significant point to add is the deficiency of military approaches in the two areas, which obviously lowered the degree of national threat perceptions, reducing the anxiety that may cause a privatizaion, or to say, territorialization of space, thus may lead to a better anticipation of friendly cooperation.

As a scholar put it, "Discursive approaches that stress the public character of international law appear very promising, because they link broad concepts of law with considerations of legitimacy" [19]. The IL system has "constructive and destructive aspects of ambiguity", enjoying both good and bad effects [20]. In an era preferring peaceful cooperation and limited competition, once soft laws like the UNCLOS are able to suit themselves in an "blue ocean" that welcomes peaceful cooperation and calls for legal advocate and regulation of movements, they can maximize their advantages, showing a surprising power of flexibility and resilience.

3. Conclusions

For innocent passage, a long history has turned it into a nearly uncontroversial common sense, hence may ensured its stability in the modern IL system. However, the nature of vulnerability and ambiguity echos in every strike, challenges and violations it has faced in real national disputes. To promote a better application of it, as well as the similar soft laws, it's important to recognize its limitations, abstract its key idea, and adopt a more flexible way in legal practice. What's more, for a broadly-defined innocent passage principle, extending it to another suitable field might provide it with new possibilities, even giving it a new lease of life.

Mainly focusing on opening a new viewpoint for the analysis about innocent passage, hoping to rediscover the power of soft laws in legal practice, this article presented rather a tentative thesis than a systematic, fully-developed research. For future researchers, it's appreciative to look further into the function of international organizations in detailing and refining controversial principles, such as the innocent passage, in the IL system, and the applicable ways of extending such principles

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into the law-making process concerning resources exploitation in new areas is in need as well. If such tender and advocating ideas could be more commonly accepted, a larger step for maintaining a peaceful world, as well as building our human community with a shared future, could be taken.

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