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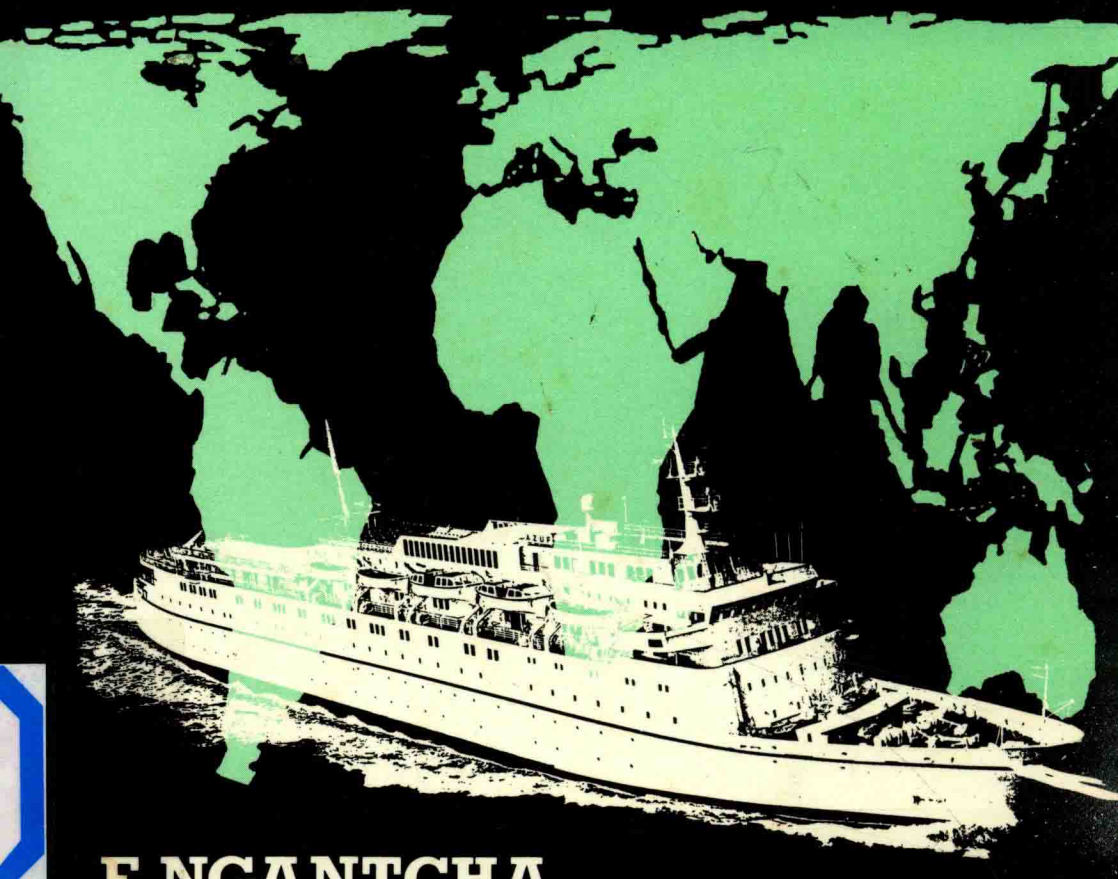
THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA



F. NGANTCHA

The Right of Innocent Passage and the Evolution of the International Law of the Sea

The Current Regime of 'Free' Navigation in Coastal Waters of Third States

Francis Ngantcha

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For Papa Monie Ngantcha, my mother, my wife,
brothers and sisters and
Charlotte Ngantcha

I am master of the earth but the law
is the mistress of the sea

Emperor Antoninus

Abbreviations

AFDI	Annuaire français de droit international
AJIL	The American Journal of International Law
BYBIL	British Year Book of International Law
ILC *Yearbook*	Yearbook of the International Law Commission
ICJ *Reports*	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	The International and Comparative Law Quarterly
IDI *Annuaire*	Annuaire de l'Institut de droit international
L O N Doc.	Documents of the League of Nations
ADI *Recueil*	Recueil des cours de l'Académie de droit international de La Haye
(First) UNCLOS	United Nations Conference on the Law of the Sea (1958)
Third UNCLOS	Third United Nations Conference on the Law of Sea
1982 Convention	The United Nations Convention on the Law of the Sea

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I would never forget, of course, the fountain of my interest in the Law of the Sea—Ambassador Paul Bamela Engo, former Chairman of one of the three Committees of the Third United Nations Conference on the Law of the Sea (1973–82). I hope he will enjoy reading this book.

My last, but not the least, words of appreciation go to my family. The always readily available long-distant exhortation from my mother, Mama Elizabeth Yinga, and my brother, Mr Emmanuel Ngantcha, was comforting. Claudine, obviously overshadowed everybody else with her type of assistance—the indispensable emotional and psychological support from a beloved wife.

Francis T. Ngantcha
Geneva, Switzerland
September 1989

Contents

General introduction

Despite the signing of the United Nations Convention on the Law of the Sea in 1982, the presence of foreign vessels in coastal seas of third states remains subject to legal polemics. This has been surprisingly common in the 1980s where despite the increase in utilization of the oceans and coastal seas as global highways for navigation and shipping[1] in a beneficial interdependent maritime economy, strategic military and scientific equations have been introduced into these zones by the superpowers.

On 13 March 1986, two American naval vessels, a cruiser and a destroyer, equipped with sensors and listening devices, entered the Black Sea via the Turkish Straits, in order to exercise what the American naval authorities called their right of innocent passage in the territorial waters of the Soviet Union. The Soviet authorities placed its Black Sea air and naval forces on combat readiness and in its official note of protest characterized the American action as provocative and a manifest violation of their territorial rights.[2]

Shortly after this incident, some units of the United States naval forces of the Sixth Fleet in the Mediterranean sailed into the Gulf of Sirte south of latitude 32°30′, a zone claimed by the Libyan Arab Jamahiriya as internal waters.[3] This was purported to be in keeping with the Declaration made in July 1985 by the United States delegation to the United Nations to the effect that: '[she] rejects as an unlawful interference with the freedoms of navigation and overflight and related high seas freedoms, the Libyan claim to prohibit navigation . . . in the Gulf of Sirte'[4]

The Law of the Sea has traditionally been aimed at protecting the international community's interests over the inexhaustible uses of ocean space. To this end, the main pillar of that law has been the freedom of the sea—with the implication that seagoing vehicles and other similar structures may freely roam the oceans. When much of the ocean space was considered 'high seas' and the governing rule *res communis*, this tenet was unquestionable.

The 'territorialization' of the ocean space, i.e. its division into zones of coastal State sovereignty and/or jurisdiction, has put a stop to the 'old' system of 'free' global maritime communication and transportation. Consequently, the international networks of trade and commerce, naval mobility, overflight, etc. have come to depend upon the national maritime spaces of third States for purposes of passage.

Various regimes have been proposed, particularly within the forum of the Third United Nations Conference on the Law of the Sea, with the main purpose of protecting the rights of passage of vessels of third States in such 'territorialized' coastal waters. Among these rights are the right of innocent passage in the territorial sea, in archipelagic waters and sometimes in internal waters; the right of transit passage in international straits; and the right of archipelagic sealanes passage in archipelagic sealanes. Unlike the right of innocent passage, the last two rights are the products of intensive negotiations in the Third United Nations Conference on the Law of the Sea.

However dissimilar these other rights are to the right of innocent passage, they can be considered offshoots of the latter. Prior to the 1982 United Nations Convention on the Law of the Sea, the Geneva Conventions of 1958 were the governing law, acknowledging only that right for navigation in portions of waters subject to coastal State sovereignty. Beyond these waters, the rule of freedom of navigation applied.

The waters placed under coastal State sovereignty are made up of internal waters, the territorial seas and archipelagic waters. Within these zones, the coastal State generally exercises full sovereignty subject to the right of innocent passage. The exercise of full sovereignty on the one hand and the exercise of the right of innocent passage on the other invites the simultaneous projection of two sets of competing jurisdictions—those of individual coastal States and those of the international community *via* the flag State. One of the major goals of the Law of the Sea has been to strike a balance between the two.

The right of innocent passage is deeply rooted in the practice of States and universally recognized as one of the main rules of customary international law. Thus, independently of any convention, the right of innocent passage can be said to stand on its own merit. It is said to limit the sovereignty of States over their coastal waters.

However, in recognition of the sovereignty exercised by States over their coastal waters, it is also generally accepted that the right of innocent passage is confined to maritime surface navigation conducted for inoffensive and exclusively peaceful purposes. Secondly, the exercise of that right prima facie excludes overflight and submerged navigation. And, finally, it has been argued that appropriate prior notification and/or authorization of the coastal State is necessary to give certain foreign vessels such as warships the right to exercise innocent passage. That having been said, the codification of the right of innocent passage has inevitably been aimed at defining with greater precision that right and at delimiting the scope of coastal State sovereignty over its exercise. Key issues in this respect are the regulatory power of the coastal State in relation to passage and the innocent character of such passage.

While coastal States are not to enact measures that virtually nullify or hamper the right of innocent passage, third States exercising that right are in turn not to construe it subjectively or to interpret it in a capricious or impetuous way. The delicate balance between the security and other interests of the coastal State, and the interest of the international community in free and unimpeded navigation in coastal waters, is therefore the backbone of the right of innocent passage.

The Third United Nations Conference on the Law of the Sea, with its issue-aggregate or package-deal considerations, used the rights-of-passage issue as a trump card in many respects.

The exercise of these rights in coastal waters was obtained in exchange for a grant to the coastal States of a 12-nautical-mile territorial sea, 'limited' sovereignty and economic jurisdiction in other portions of coastal waters, and a consent regime for marine scientific research. Thus a detailed analysis of the right of innocent passage will highlight prevailing trends in international relations (and their effects on the contemporary international order)—the bending and forging of rules to serve political ends. This is especially so with the 1982 Convention, the

product of the Third United Nations Conference on the Law of the Sea. The 1982 Convention reproduces verbatim parts of the 1958 Geneva Convention, adds innovations in many instances and contradicts some national laws. International navigational issues, independently of any doctrinal developments, have evolved into a 'comprehensive conventional arrangement of several interacting, contradicting and overlapping regulatory regimes'.

This bring us to the final point, which concerns the sovereignty recognized and attributed to States over their coastal waters. Sovereignty is still considered as a fundamental principle of positive international law, despite various opinions to the contrary. By virtue of the double recognition of the coastal States' exclusive rights in the coastal waters and the international community's inclusive right of passage in these waters, could it be said that these two rights coexist in equality or that there is an inherent hierarchy among them?

To address the various issues identified above, we shall conduct our analysis by attempting to answer the following questions:

— What is the right of innocent passage?
— Why does it exist?
— Where is it exercised?
— Who exercises it?
— And who decides whether its exercise or the refusal to allow its exercise is abusive?

With these questions in mind, we shall, in the chapters that follow, attempt to analyse the origin, nature and scope of the right of innocent passage, starting with an introductory chapter on the status of coastal waters. This will involve an evolutionary recapitulation of the legal status of the adjacent coastal seas in early State practice, bilateral and multilateral treaties, etc., and its successive accommodation with the rights-of-passage regimes.

In Chapter 2, we shall focus our investigation on the right of innocent passage as the principal derogation made by customary international law to the exercise of coastal State sovereignty. To this end, we shall scrutinize the debates preceding the adoption of provisions on the meaning of the right of innocent passage, and identify the special characteristics differentiating that right from other sea passage regimes. In this way, it is hoped that, as the nature, importance and interests at stake over coastal waters vary considerably, objective, stable and common rules will emerge for a uniform pattern of conduct in determining what does or does not constitute the exercise of the right of innocent passage.

Chapter 3 will be concerned with innocent passage in certain coastal zones. This will involve, where appropriate, a determination of the ideas which justified the exercise of that right pursuant to the special legal status accorded to certain coastal zones other than the territorial sea *stricto sensu*. It should be emphasized, of course, that the principle traditionally was concerned with navigation in the territorial sea generally and dealt neither with straits, nor 'internal waters', nor archipelagic waters.

Chapters 4 and 5 will consider the relationship between different categories of sea-going vessels and the degree of their entitlement to the exercise of the right of innocent passage. Here we shall attempt to analyse the 'powers of interference'

of the coastal State with regard to foreign merchant ships and foreign official ships, particularly warships.

These two chapters, the backbone of the book, will show that despite the various treaty provisions, by virtue of their all-powerful 'sovereignty', coastal States can frustrate the exercise of the 'independent' right of innocent passage by ships regardless of ownership and/or nationality.

To add to this examination of the right of innocent passage in connection with coastal State sovereignty, Chapter 6 will examine the rights and obligations of both the coastal State and the flag State in the exercise of that right, and Chapter 7 will focus on the mandatory or optional nature of the disputes settlement mechanism regarding the issues of non-innocent passage or of refusal of innocent passage by the coastal State.

Finally, the concluding chapter will evaluate in the light of contemporary law and practice the place of the right of innocent passage in coastal waters acknowledged to be under the sovereignty of the coastal State. In this way, the book could also be looked upon as a contribution to the international law of territorial sovereignty.

Throughout this book, we shall attempt, wherever appropriate, to examine customary international law and the municipal laws of some States, and to examine relevant case law, so as to grasp properly the policy intentions underlying the debates preceding the adoption of the only two sets of conventions that relate exclusively to the Law of the Sea: the 1958 Geneva Conventions and the 1982 United Nations Convention on the Law of the Sea. In this way, we hope to clarify the various interests which divided the negotiators and to decipher the rationale behind the specific provisions adopted.

We have adopted the 1930 Hague Codification Conference as a watershed, and the 1982 Convention as the present codified international law on innocent passage. It would be an error to regard the latter as having settled all issues involving international navigation in coastal waters. As will be seen, coastal States, and particularly the major maritime powers, have in many ways successfully managed to avoid the inclusion in the final text of any provisions expressly contrary to their interests in this area. Ambiguous clauses were the price paid for agreement in many circumstances. This uncertainty casts its shadow on the right of innocent passage in the face of a strong, full-fledged sovereignty of the coastal State in its coastal waters. Although the right of innocent passage in coastal waters has never been a scholarly *terra incognita*, its changing meaning and significance remain a subject of academic as well as practical interest. For, according to conventional wisdom, 'la mer est juridiquement toujours "autre chose" que la terre; le navire est juridiquement toujours "autre chose" qu'un simple objet permettant à des êtres humains d'agir dans le milieu maritime.'[5]

Notes

1. Moore, J.N., 'Regime of Straits and the Third United Nations Conference on the Law of the Sea', *AJIL*, vol. 74, 1980, pp. 77–121, at p. 119.
2. For further details see Butler, W.E., 'Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy', *AJIL*, vol. 81, 1987, pp. 331–47, at pp. 343ff.

On 12 February 1988, two United States warships and two Soviet frigates 'collided' in Soviet territorial waters in the Black Sea. The Soviet Union issued another formal protest of the American 'presence'.

3. More facts can be distilled from the following volumes of *Keesing's Contemporary Archives*: 1981, vol. 27, pp. 31181–3; 1986, vol. 32, pp. 34454–7. In 1987, a *note* circulated to all members of the United Nations referring to the accord entitled 'Agreement on the historical waters of the Republic of Vietnam and the Republic of Kampuchea' signed 7 July 1982. It was stated expressly: '. . . the United States views the historic claim to the waters in question as without foundation and reserves its rights and those of its nationals in this regard.' Per notes by governments—*Law of the Sea Bulletin*, No. 10, November 1987, p. 23.
4. *Law of the Sea Bulletin*, No. 6, October 1985, p. 40.
5. Per Riphagen, W., in *Perspectives du droit de la mer à l'issue de la 3e Conférence des Nations Unies*. Société française pour le droit international, Colloque de Rouen, Paris, Pedone, 1984, p. 201. Another philosophy upholds that portions of the seas 'colour' a particular vessel in a certain 'legal light', op. cit., note 2, p. 340.

Chapter 1

Legal status of adjacent coastal waters and the regime of passage (evolutionary perspective)

1. Introduction

There are today no more doubts that the cherished Grotian concept of the freedom of the seas does not apply to all the areas of the globe that belong to the sea in the geographical sense.[1] A coastal State is entitled, by virtue of its sovereignty over the land territory, to exercise a similar[2] prerogative over a marginal area of the sea adjacent to its coast.

In its Article 2(1), the United Nations Convention on the Law of the Sea (1982 Convention)[3] states the following fundamental principle: 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea'. This provision by and large reproduces Article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[4] which itself was based on Article 1 of the draft of the International Law Commission.

The International Law Commission stated in its commentary on the draft of this Article, in its report to the General Assembly, that

> the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory . . . It is also the principle underlying a number of multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat the territorial sea in the same way as other parts of State territory.[5]

Similar statements had been made in the 1920s and 1930s. At The Hague Codification Conference of 1930, held under the auspices of the League of Nations, it was declared, in an observation relating to an identical article on the same subject-matter, that

> the idea . . . sought . . . by stating that the belt of territorial sea forms part of the territory of the State is that the power exercised by the State over this belt is in its nature in no way different from the power which the State exercises over the land domain. This is also the reason why the term "sovereignty" has been retained, a term which better than any other describes the juridical nature of this power.[6]

However, Article 2 of the 1982 Convention on the Law of the Sea goes on to declare, in its paragraph 3, that '. . . the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law'.

This paragraph, like the first one discussed above, is a verbatim reproduction of paragraph 2 of Article 1 of the 1958 Geneva Convention on the Territorial Sea