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Art. 24 dangers can include exogenous factors. The means of publicising danger are not detailed in Art. 24. In practice this is done through 'Notices to Mariners' or similar publications. International publicity can also be facilitated through the International Maritime Organisation (IMO). As its Secretariat has pointed out:

'it appears clear that the required publicity objective will be effectively achieved only if the information in question reaches the States, authorities, entities and persons that are intended to be guided by the information. IMO maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation and the prevention, reduction and control of pollution of the marine environment from vessels. Accordingly, the purpose of the publicity is likely to be served by some IMO involvement.'³⁴

Article 25

Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, 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, including weapons exercises. Such suspension shall take effect only after having been duly published.

Bibliography: Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999); Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009); Alan V. Lowe, *The Right of Entry into Maritime Ports in International Law*, San Diego LRev 17 (1977), 597–622; Erik J. Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (1998); Erik J. Molenaar/Harm M. Dotinga, *Case Study of the Netherlands*, in: Erik Franckx (ed.), *Vessel Source Pollution and Coastal State Jurisdiction* (2001), 303–321; Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990); Myron H. Nordquist, *International Law Governing Places of Refuge for Tankers Threatening Pollution of Coastal Environment*, in: Tafsir Malik Ndiaye/Rüdiger Wolfrum (eds.), *Law of the Sea: Environmental Law and Settlement of Disputes* (2007), 497–517; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); Daniel P. O'Connell, *The International Law of the Sea*, vol. II (1982); Donald R. Rothwell, *Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice*, in: Donald R. Rothwell/Sam Bateman (eds.), *Navigational Rights and Freedoms in the New Law of the Sea* (2000), 74–93; Ivan A. Shearer, *Problems of Law Enforcement and Jurisdiction Against Delinquent Vessels*, ICLQ 35 (1986) 320–343; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005)

Documents: ILA, *Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution* (2000); ILC, *Report of the International Law Commission: Articles Concerning the Law of the Sea*, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4–12; IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Res. A.949(23) of 5 December 2003; League of Nations, *Draft Articles on the Legal Status of the Territorial Sea*, Report of the Second Committee, LN Doc. C.230.M117.1930.V.7 (1930)

Cases: ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; Raad van State (Judicial Division of the Council of State of the Netherlands), *Long Lin*, 10 April 1995, Netherlands Juristen Blaad (1995), 199–200; Hoge Raad der Nederlanden (Supreme Court of the Netherlands), *Attican Unity*, 7 February 1986, Schip en Schade No. 61 (1986)

³⁴ IMO, Study by the Secretariat of the IMO, Doc. LEG/MISC.7 (2012), 91.

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I. Purpose and Function

The territorial sea forms part of the territory of the State, wherein it enjoys general enforcement jurisdiction. This is limited in so far as foreign vessels are engaged in innocent passage. Accordingly, Art. 25 establishes the circumstances in which the coastal States can take action to limit the right of innocent passage in order to protect its interests. First, there is a general right to take necessary steps to prevent non innocent passage. Secondly, the coastal State may take action to prevent any breach of the conditions set by the coastal State for ships proceeding to internal waters or to a call at a port facility outside internal waters. Thirdly, it may suspend passage in specified areas for its security. This must be done without discrimination in form or in fact among foreign ships, and any such suspension will only take effect after being published.

II Historical Background

States have long exercised some degree of enforcement jurisdiction in coastal waters. However, the specific application of this in the context of innocent passage is linked to the emergence of that concept and its development during the 20th century. Although the possibility for a coastal State limiting or suspending innocent passage was not proposed at the Hague Codification Conference, Art. 5 of the Hague Codification Draft 1930 provided that:

'The right of passage does not prevent the coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State.'¹

This influenced the work of the International Law Commission in codifying the law of the sea between 1949 and 1956. Draft Art. 17 (1) (later Art. 16 (1) of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ)) provided that:

'The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law.'²

Notably, the reference to public policy in the 1930 Draft was dropped because this was considered to be imprecise, and potentially open to abuse.³ Subsequent sections addressed conditions for entry into internal waters, temporary suspension of passage in specified areas on non discriminatory basis and non suspension of passage in straits used for international navigation.⁴

¹ League of Nations, Draft Articles on the Legal Status of the Territorial Sea, Report of the Second Committee, LN Doc. C.230.M117.1930.V.7 (1930).

² ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 4, 6.

³ *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of the International Law of the Sea (1990), 164.

⁴ ILC Law of the Sea Articles (note 2), 6–7.

- 4 Art. 25 was based directly upon Art. 16 CTSCZ with some important changes to the wording of the text. First, the requirement of non discrimination was strengthened with the addition of the words ‘in form or in fact among foreign ships’.⁵ Second, the provision on straits was removed and became subject to more detailed provisions in Part III of the Convention.⁶

III Elements

1. ‘take necessary steps [...] to prevent passage which is not innocent’

- 5 It is generally accepted that merchant vessels engaged in non innocent passage fall under the plenary jurisdiction of the coastal State.⁷ This means that the coastal State may have recourse to the full range of enforcement jurisdiction in order to deal with vessels engaged in non innocent passage. Thus Art. 25 must be understood in light of Arts. 18 and 19 which define the legitimate scope of innocent passage.⁸ Protective measures extend to both vessels engaged in non innocent activities and vessels which are not in passage, e. g. hovering. In this regard, CHURCHILL & LOWE point out that there is no express provision setting out the right to exclude vessels not engaged in passage but that this right does exist under customary international law.⁹ Art. 25 only appears to deal with non innocent passage. However, it may be relevant to enforcement measures against vessels in innocent passage, which for example threaten the marine environment.¹⁰ SHEARER notes the existence of general enforcement jurisdiction and suggests that coastal States may choose to prosecute vessels for offences or to expel them from the territorial sea.¹¹
- 6 The way in which protective enforcement jurisdiction is exercised is at the discretion of coastal State, although it is subject to the requirement that only ‘necessary steps’ are taken. The Convention gives no indication of the meaning of ‘necessary steps’. MOLENAAR’s review of State practice shows this to be diverse and mostly silent on the extent or basis of enforcement jurisdiction, indicating that most States consider a definition of ‘necessary steps’ under domestic law to be superfluous.¹² Thus, it is reasonable to assume that States enjoy a wide discretion on how they respond to non innocent passage. This is reinforced, if some what controversially, by the practice of States preventing passage of vessels carrying potentially illegal migrants¹³ or vessels posing a risk to the maritime environment.¹⁴
- 7 Art. 25 does not establish a process to be followed by States when undertaking preventative action. A logical first step is for the State to verify the exact nature or character of the passage so that it is fully appraised of the situation. It can then decide what further necessary measures are appropriate. This may include requesting information from the ship about, *inter alia*, its flag status, route, and purpose. This is not expressly provided for in Art. 25, but is implicit within the general enforcement jurisdiction.¹⁵ Subsequent measures may include

⁵ Second Committee UNCLOS III, Malaysia *et al.*: Draft Articles on Navigation Through the Territorial Sea, Including Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.16 (1974), OR III, 192 (Art. 4).

⁶ See further *Jia* on Art. 45 MN 14–16.

⁷ Erik J. Molenaar, Coastal State Jurisdiction over Vessel Source Pollution (1998), 249; Robin R. Churchill/Alan V. Lowe, *The Law of the Sea* (3rd edn. 1999), 87; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2005), 216.

⁸ See generally Barnes on Arts. 18 and 19.

⁹ Churchill/Lowe (note 7), 87.

¹⁰ ILA, Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000), 497.

¹¹ Ivan A. Shearer, Problems of Law Enforcement and Jurisdiction Against Delinquent Vessels, ICLQ 35 (1986) 320, 326–327.

¹² Molenaar (note 7), 268 *et seq.*

¹³ See Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (2009), 199–204.

¹⁴ See Myron H. Nordquist, International Law Governing Places of Refuge for Tankers Threatening Pollution of Coastal Environment, in: Tafsir Malik Ndiaye/Rüdiger Wolfrum (eds.), *Law of the Sea. Environmental Law and Settlement of Disputes* (2007), 497–517.

¹⁵ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 19–20. (Art. 17).

warning communications, warning shots, interdiction, boarding and inspection. Vessels may then be denied passage, diverted, expelled from the territorial sea or ordered to put into port. It also is open to coastal State authorities to detain and institute proceedings against vessels, although this will be contingent upon whether or not such vessels have committed an offence under coastal State laws.¹⁶ Ultimately, force may be used to secure the coastal State against threats posed by delinquent ships. Any protective steps must also conform to principles of general international law. In particular, efforts should be made to ensure human life is not endangered, and that forcible measures do not go beyond what is reasonable and necessary.¹⁷

Art. 25 applies to all ships including warships, although its application is limited in respect of the immunity enjoyed by warships.¹⁸

2. 'conditions to which admission [...] to internal waters or such a call is subject'

Coastal States enjoy an enhanced right to take necessary steps to prevent any breach of the admission conditions for ships proceeding to internal waters or port facilities outside internal waters. This reflects the greater degree of interest States have in controlling entry into ports and internal waters. Ships may otherwise be engaged in innocent passage but still fail to meet conditions set for entry into internal waters or port facilities. Ships do not enjoy an automatic right to enter ports or internal waters.¹⁹ Accordingly, States may regulate such access as they see fit, except as noted below at MN 10. At a minimum, a refusal by a foreign flagged vessel to comply with such conditions is tantamount to a breach of Article 21. However, it is to be viewed more seriously because any attempt to enter a port or internal waters without permission may be regarded as a direct threat to the peace, good order and security of the coastal State. Thus, the enforcement measures under Art 25 (2) are described in the same terms as enforcement measures against non innocent passage generally. On this basis, the conduct of foreign vessels attempting to breach port entry conditions is akin to vessels engaged in non innocent passage.

Conditions of entry to port may be regulated by international law, and in such cases coastal States are required to comply with any such obligations incumbent upon them. Notably, international law has established common standards concerning port security measures under the International Ship and Port Facility Security Code.²⁰

3. 'suspend temporarily [...] the innocent passage of foreign ships'

According to Art. 25 (3), coastal States can suspend passage in areas where this is necessary to protect its security, including for weapons practice. CHURCHILL & LOWE note temporary suspensions are commonly implemented in zones around naval dockyards.²¹ Suspension of the right of innocent passage cannot be a blanket coverage of the entire territorial sea; it must be limited to the part of the sea which prompted the security closure in the first instance.

¹⁶ Hoge Raad der Nederlanden (Supreme Court of the Netherlands), *Attican Unity*, 7 February 1986, *Schip en Schade* No. 61 (1986); Raad van State (Judicial Division of the Council of State of the Netherlands), *Long Lin*, 10 April 1995, *Netherlands Juristen Blaad* (1995), 199–200; noted in *Erik Jaap Molenaar/Harm M. Dotinga*, *Case Study of the Netherlands*, in: Erik Franckx (ed.), *Vessel Source Pollution and Coastal State Jurisdiction* (2001), 303, 311.

¹⁷ ITLOS, *The M/V 'Saiga' (No. 2)* (Case (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10 (paras. 155–156); ILA Report (note 10), 454–457, 497.

¹⁸ See *Barnes* on Art. 32 MN 10–13.

¹⁹ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports (1986), 14, 111 (paras. 212–213). See also: *Daniel P. O'Connell*, *The International Law of the Sea*, vol. II (1982), 848; *Alan V. Lowe*, *The Right of Entry into Maritime Ports in International Law*, *San Diego LRev* 17 (1977), 597, 619.

²⁰ The International Ship and Port Facility Code (as adopted 12 December 2002) is implemented under Ch. XI/2 Ch. 2 Annex International Convention for the Safety of Life at Sea 1974 (SOLAS 1974 as amended).

²¹ *Churchill/Lowe* (note 7), 87.

- 12 The right to suspend innocent passage is subject to four conditions. First, it must be necessary to protect coastal State security. It may be noted that this provision only refers to 'security' unlike Art 19(1), which refers to 'peace, good order and security'. This indicates a more limited range of reasons may be available to justify instances where passage is temporarily suspended. However, it is difficult to conceive of how such a difference would operate in practice. In this respect CHURCHILL & LOWE note that this aspect of the right is liberally framed, with the additional of the example of 'weapons exercises'.²² This indicates that suspension is possible for a range of wider security matters, of which military security is just one example. This seems to be born out in practice, with States taking protective measures against vessels carrying migrants and vessels posing environmental risks. In the latter instance, the International Maritime Organisation has sought to coordinate State responses through the use of places of refuge for vessels in distress.²³
- 13 Second, suspension must be non discriminatory between foreign ships 'in form or in fact'. This phrase also appears in Arts. 24, 42 (2), 52 (2) and 227, and bears a similar connotation. It means, in principle, all foreign vessels must be banned from any areas of sea in which the right to innocent passage has been suspended. State practice on this point is difficult to assess, although there are reported instances of States suspending innocent passage as a means of targeting specific vessels, as in the case of the *LUSITANIA EXPRESSO*.²⁴
- 14 Third, suspension must be temporary. However, there is no definition of 'temporary' suspension and no limit on its duration is provided in the text. In practice this period of time should be coterminous with the related security threat.
- 15 Finally, before any suspension can be effective the coastal State must publish notice of the area of suspension. Some States have gone as far as notifying the UN Secretary General, although the list of notifications appears to be limited.²⁵ It would seem sensible to approach the issue of publicity in a manner consistent with publicity of navigational hazards under Article 24 (2).²⁶

Article 26

Charges which may be levied on foreign ships

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.
2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

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Documents: ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12–45; League of Nations, Committee of

²² *Ibid.*, 87–88.

²³ IMO, Guidelines on Places of Refuge for Ships in Need of Assistance, IMO Res. A.949(23) of 5 December 2003.

²⁴ *Donald R. Rothwell*, Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice, in: *Donald R. Rothwell/Sam Bateman* (eds.), Navigational Rights and Freedoms in the New Law of the Sea (2000), 92.

²⁵ Available at: http://www.un.org/depts/los/convention_agreements/innocent_passages_suspension.htm.

²⁶ See further *Barnes* on Art. 24 MN 11.