

# Oxford Public International Law

## **Ch.7 Innocent Passage in the Territorial Sea**

**D. P. O'Connell Q.C., LL.D., D.C.L., F.R. HIST. S.**

**Edited By: I. A. Shearer LL.M., S.J.D.**

From: The International Law of the Sea: Volume I (1st Edition)

D. P. O'Connell

Edited By: I. A. Shearer

**Content type:** Book content

**Product:** Oxford Scholarly Authorities on International Law [OSAIL]

**Published in print:** 16 December 1982

**ISBN:** 9780198253464

**Subject(s):**

Innocent passage — Territorial sea — Warfare, sea — Ships / vessels — Codification — State practice

---

engaged in innocent passage may be instantly attacked on that ground alone, for other steps are available before attack becomes a 'necessary step'.

(p. 296) Obviously the question is affected by the question of whether warships have a right of innocent passage as a matter of law or as a matter of comity. If warships require prior permission to enter the territorial sea, and this permission is given on conditions only, such as passage of submarines on the surface, the coastal State is in a stronger position to argue that incursion of a submerged submarine into the territorial sea is tantamount to invasion by armed forces on land, than it would be if warships do not require permission, and the obligation to traverse the territorial sea on the surface is only ancillary to the right of passage. The claims of the coastal State to use force against a submerged submarine are obviously greater in the one case than in the other.

Certain considerations must be taken into account before an evaluation is possible of the right of a coastal State to attack a submarine submerged in its territorial sea. Where the territorial sea is narrow, and particularly where it is only three miles wide, the likelihood of a submerged submarine contact being there for purposes other than those of innocent passage is greater than where the territorial sea is extensive. The reason is that coastal waters may be hazardous for submarines in transit and such vessels would normally remain further out to sea. This consideration, of course, is minimized when a territorial sea greater than twelve miles is claimed. In this case, it would be reasonable to assume that a submarine in transit will pass through the territorial sea, and in certain weather conditions it may be more convenient, and even necessary, in order to avoid damage, for it to do so submerged. The factors that are to be taken into account, therefore, in assessing the innocence or otherwise of a submarine's submerged passage through the territorial sea would appear to be the reasonableness of the use of the territorial sea for transit purposes, which may be in ratio to its extent, the weather conditions at the time, the political climate, and, most importantly, the track taken by the submarine.

Fitzmaurice argues that 'a submarine that traverses the territorial sea submerged or not showing her flag may possibly not be in innocent passage, but this will not be *because* she is submerged or not showing her flag.'<sup>230</sup> In other words, his argument is that the innocence of the passage is not dependent upon the requirement of surface transit, and the coastal State is empowered only to 'require the warship to leave the territorial sea' under Article 23 of the Geneva Convention. As he poses the question, therefore, it is one of devising means of ordering the submerged submarine to vacate the territorial sea. Most submariners will agree that submergence in the territorial sea for purposes other than avoidance of bad weather, or similar reasons of well-being, may be adopting a belligerent posture, if not vis-à-vis the coastal State then (p. 297) vis-à-vis some other State, and that presence there in these circumstances would not amount to innocent passage. While it is possible, therefore, for a submerged submarine to be in innocent passage through the territorial sea, this is a matter for evaluation on the part of the staff which studies the submarine's behaviour, and the chances of its not being in innocent passage are high.

The question that then arises is what measures of force are to be taken against such a submarine. On 26 October 1961, the Soviet Union issued a press release in which it 'charged foreign submarines' with violating Soviet territorial waters, and announced that they would be destroyed.<sup>231</sup> The Swedish and Norwegian Navies have launched depth-charges at submerged contacts in the Swedish and Norwegian territorial sea, and the Argentinian Navy has done likewise.<sup>232</sup> No publicity has been given to other similar incidents.

While the use of force against a submerged submarine in the territorial sea is not ruled out, on the argument that entry of a warship for purposes other than the purpose of innocent passage is an intrusion upon national territory and may be repelled just as a military intrusion on land may be, every measure should be taken short of force to require the submarine to leave, as provided by Article 23 of the Geneva Convention.<sup>233</sup>

#### 4. Suspension of Innocent Passage

Article 16(3) of the Geneva Convention provides that the coastal State may, without discrimination 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. Such suspension shall take effect only after having been duly published. These provisions are repeated in the Draft Caracas Convention but with the addition of the words 'including weapons exercises' in amplification of the coastal State's security interests.<sup>234</sup> This is the (p. 298) only explicit rule of international law that can be said to relate to 'security zones' or 'exercise areas' as distinct from other jurisdictional zones.<sup>235</sup> The legislation of a number of countries<sup>236</sup> which provides for security zones must be construed to be limited to the territorial sea, and to be restricted by the conditions of Article 16(3) of the Geneva Convention and of its counterpart in the Draft Convention (1980).

#### Footnotes:

<sup>1</sup> The expression appears in Selden in a passage where he sought to explain away the fact that shipping navigated the Four Seas of England, on the ground of a general licence; he recited a number of treaties and licences to prove that the Crown had granted rights of passage, and hence had possessed the sea in which those rights were exercised: Ch. 2, particularly at 123, in the 1654 edition. It also appears in Loccenius (1660), who defined it: 'jus navigandi est innoxia facultas transfretandi ad vicinos aut remotos populos, a jure naturae, gentium, divisio et civili permissa'.

<sup>2</sup> *De jure belli ac pacis*, II, 2, 13.

<sup>3</sup> *Ibid.*, II, 3, 12.

<sup>4</sup> Schmettau (1675), 12; Hildebrand (1715), 31. Described as a 'natural servitude' by Engelbrecht, (1739), 35. The notion of 'servitude' originated with Vitriarius in 1686, who stated that no one could be excluded from the public way, including the sea.

<sup>5</sup> Heineccius, *De jure naturali et gentium* (1738), 519.

<sup>6</sup> *De jure naturae et gentium* (1688) III, 3, 5-6; IV, 5, 9. However, he seems to have oscillated between the view that a right of passage is a natural right and the need for licence: *ibid.*, III, 3, 5. The same ambiguity is in Conring, *Dissertatio politica de dominio maris*, in *Opera* (1730), Vol. 4, 950.

<sup>7</sup> *De dominio maris*, IV, 11, 12.

<sup>8</sup> Wolff in 1749 reiterated the naturalistic theory with an elaborate analysis of the concept of 'innocent use' across land, rivers and the occupied parts of the sea: ss. 346, 355.

<sup>9</sup> *Le droit des gens*, II, 9, para. 123; I, 23, para. 288.

<sup>10</sup> He also explained the doctrine of 'distress' as 'a remnant of primitive common rights which no man can renounce'.

<sup>11</sup> Abreu (1746), 75; Moser (1750), 349; Valin (1760), 636, 639, 640. Günther (1792), 49 (ambiguous); Azuni (1795), 238; Nau (1802), 103; Rayneval, (1803), 163 (ambiguous); Jouffroy (1806), 27 (ambiguous); Saalfeld (1809), 37; Schmalz (1877), 141; Klüber (1819),