

Proelss

United Nations
Convention on the
Law of the Sea

A Commentary

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2017



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coastal State require it to leave the territorial sea. This order may be issued regardless of whether or not the warship passage is innocent.

2. 'the coastal State may require it to leave the territorial sea immediately'

Art. 30 does not specify what further steps the coastal State may take to secure compliance with its request. Neither does the International Law Commission's Commentary on Art. 25 CTSCZ provide any assistance.¹¹ NORDQUIST *et al.* observe that requiring a warship to leave the territorial sea immediately is the 'sole recourse available to a coastal State'.¹² OXMAN notes this is the classic remedy available to the State lacking enforcement jurisdiction, and regards it equivalent to the remedy of expulsion from territory for misbehaving diplomats.¹³ However, this limitation may simply be a conventional one and other forcible measures may be taken under general international law, including countermeasures.

Art. 25 permits steps to be taken to prevent passage which is non-innocent. The key issue is then whether a warship's failure to comply with a request to leave the territorial sea renders its passage non-innocent. This interpretation is one that is open to the coastal State, although it seems reasonable to require some investigation of the situation by the coastal State, and to allow the warship an opportunity to correct its conduct. CHURCHILL & LOWE take the position that the coastal State 'may use any force necessary' to compel a warship to leave the territorial sea.¹⁴ Likewise, DELUPIS regards Art. 30 as appropriate for milder cases of violations of local laws, and that force may be used in more serious cases.¹⁵ If force is permissible, then it must necessarily comply with general requirements of necessity and proportionality. It is suggested that coastal States should first consider other appropriate measures, such as diplomatic protest before resorting to force.

3. Prior Notification

Neither Art. 30, nor any other provision in Part II, Section 3, requires the prior notification or authorization of entry into the territorial sea by warships for the purpose of exercising the right of innocent passage. The issue was vigorously debated during the conference proceedings.¹⁶ Although no consensus was reached on the matter, progress was secured by side-stepping the issue, leaving the matter to be addressed implicitly in Art. 19 on the meaning of innocent passage and Art. 25 on the rights of protection of the coastal States, as well as general international law. Prior authorisation indicates that coastal States may control the enjoyment of the right of innocent passage, and this is contrary to the other provisions of Section 3. Notification is not incompatible with the regulatory authority of the coastal State, under Art. 21, but remains indeterminate as a matter of conventional law. Hence, questions of prior notification should be considered according to the practice of States in light of the general provisions on innocent passage.¹⁷

¹¹ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GOAR 11th Sess. Suppl. 9, 12, 23 (Art. 25).

¹² Nordquist/Nandan/Rosenne (note 7), 255; see also *Ivan A. Shearer*, Problems of Jurisdiction and Enforcement Against Delinquent Vessels, ICLQ 35 (1986), 320, 325.

¹³ *Bernard H. Oxman*, The Regime of Warships under the United Nations Convention on the Law of the Sea, VJIL 24 (1983), 809, 817.

¹⁴ *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 99; also *Daniel P. O'Connell*, The International Law of the Sea, vol. I (1982), 297.

¹⁵ *Ingrid Delupis*, Foreign Warships and Immunity for Espionage, AJIL 78 (1984), 53, 73.

¹⁶ See *William E. Butler*, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, AJIL 81 (1987), 331-347; *Froman* (note 9), 639 *et seq.*; *Francis Ngantcha*, The Right of Innocent Passage and the Evolution of International Law of the Sea (1990), 142 *et seq.*; *Erik Franckx*, The USSR Position on the Innocent Passage of Warships through Foreign Territorial Waters, JMLC 18 (1987), 33-65; *Shao Jin*, The Question of Innocent Passage of Warships: After UNCLOS III, Marine Policy 13 (1989), 56-67.

¹⁷ *Robin R. Churchill*, The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention, in: *Alex G. Oude Elferink* (ed.), Stability and Change in the Law of the Sea: The Role of the Law of the Sea Convention (2005), 91, 111-114.