

# Maritime Security: The Concept of Innocent Passage



The United Nations Convention on the Law of the Sea (UNCLOS) enshrines the concept of innocent passage through a coastal state's territorial sea. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. A vessel in innocent passage may traverse the coastal state's territorial sea continuously and expeditiously, not stopping or anchoring except in *force majeure* situations.

This article will examine the challenges related to evaluating whether embarking privately contracted armed security personnel (PCASP) aboard a merchant ship is contrary to the regime of innocent passage and whether vessels with embarked security teams are required to give prior notice of passage to coastal states.

In the international arena, it remains debated as to whether the employment of PCASP aboard commercial vessels is a violation of innocent passage. Each coastal state maintains its own interpretation as to whether specific vessels in its territorial sea may be prejudicial to its peace, good order or security. At present, no global standard is defined regarding the carriage of arms, armed personnel, personnel in fire positions, and other relevant conditions, resulting in a complex legal gray area.

## Defining Non-Innocent Passage

According to [Article 19 \(2\)](#) of UNCLOS, passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state and thus in non-innocent passage if, in the territorial sea (less than 12 nautical miles from shore), it engages in any of the following activities:

- (a) *any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;*
- (b) *any exercise or practice with weapons of any kind;*
- (c) *any act aimed at collecting information to the prejudice of the defence or security of the coastal State;*
- (d) *any act of propaganda aimed at affecting the defence or security of the coastal State;*
- (e) *the launching, landing or taking on board of any aircraft;*
- (f) *the launching, landing or taking on board of any military device;*
- (g) *the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;*
- (h) *any act of wilful and serious pollution contrary to this Convention;*

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- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

Most relevant to the embarkation of PCASP is UNCLOS Article 19 (2) (b)—“any exercise or practice with weapons of any kind.”

Supporters of armed guards maintain that the mere carriage of weapons, locked or stowed, certainly cannot be considered an “exercise or practice.” Similarly, using a weapon in a *bona fide* self-defense situation against genuine threats of piracy, armed robbery or terrorism would also not classify as an exercise or practice.

In the contemporary maritime security context, defending a vessel against *bona fide* pirate or terrorist threats would not constitute a use of force against the coastal state because the attackers are *hostis humani generis*, or enemies of all mankind, and are thus subject to universal jurisdiction. By this logic, engaging in genuine self-defense against pirates would not necessarily be a violation of innocent passage.

## Establishing Non-Innocent Passage

One of the most challenging enforcement activities for a coastal state is to establish, without a doubt, that a ship is in non-innocent passage. Modern interpretations of UNCLOS, specifically concerning physical and environmental security, stress that actual damage must occur before a coastal state can declare a vessel’s passage in its territorial sea non-innocent. If wrongly accused, the ship or charterer can hold the coastal state liable for damages.

Military and commercial vessels alike always enjoy the right of innocent passage and self-defense while within the territorial sea of a foreign state, granted they do not undertake activities which can be interpreted as a threat to the coastal state or engage in the use of force against the coastal state, including the “launching, landing, or taking aboard any aircraft or military device,” per [Article 19 \(2\) \(f\) of UNCLOS](#).

This clause may complicate the matter as PCASP themselves must eventually embark, disembark, and load or offload their weapons at some port or at a floating armory. Should these activities take place, specifically via floating armory or other vessel in a state’s territorial sea and without that coastal state’s permission, it may be considered as taking aboard a “military device” and thus a violation of innocent passage. This is especially true if the weapons taken aboard are not for commercial, private, maritime security personnel but for a military vessel protection detail (VPD,) in which a small team of military

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personnel is deployed to a commercial vessel, usually by the flag state, to protect it while transiting high-risk areas.

## Military Vessel Protection Details (VPDs)

The concept of VPDs further complicates the innocent passage regime as it introduces military personnel, equipment and government activities directly into the commercial maritime sector. Despite the presence of a VPD, a vessel itself remains a commercial ship and lacks clear markings identifying it as being on government service.

This is because it has simply taken aboard agents who themselves are on government service to protect the vessel, not change its designation to a sovereign immune vessel under the UNCLOS definition. The VPD is simply performing point-to-point protection against piratical attacks. Neither the VPD nor the civilian client vessel is authorized to patrol the seas, board, inspect or arrest suspect pirate ships.

Yet transit of commercial vessels with embarked VPDs could still, by some, be considered a type of military passage due to the presence of military personnel and thus arouse other suspicions or concerns. This is especially true following the *Enrica Lexie* incident, where Italian marines as part of an embarked VPD opened fire and killed Indian fishermen.

If coastal states interpret this unfortunate incident in line with India's perspective – that trigger-happy guards are posing a danger to their nationals who transit, work or leisure in those waters – it may lead to increased coastal state calls for VPDs to be regulated in a different manner and their roles, rights and obligations to be clarified in international law.

Another issue is that VPDs (as military personnel) are trained to follow very strict and defined rules of engagement through the traditional military chain of command. Yet in the commercial maritime setting VPD personnel may have to be re-wired to take orders from a civilian ship master or learn to make decisions independently.

Some governments have made agreements to codify these relationships. For example, the Italian Ministry of Defense signed a memorandum of understanding with the Italian Shipowners Association indicating that ship masters have no responsibility to oversee or direct the actions of VPD personnel and are thus not liable for the ramifications of their behavior.

## Prior Notification

The topic of prior notification naturally follows suit as some coastal states request that vessels carrying armed security personnel provide prior notification to their maritime

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authority before entering their territorial sea. Legal debate remains as to whether international law requires transiting vessels employing PCASP to adhere to this coastal state request or if a requirement for prior notification is an infringement on the right of innocent passage.

Differing interpretations between East and West have traditionally existed regarding the concept of prior notification. This precedent is historically evident in naval passage contexts, but the trends can be applied to commercial vessels as well.

To put this debate to rest, the two most powerful naval countries of the Cold War, the USA and USSR, issued in 1989 a *Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage*, which provided as follows:

*"All ships, including warships, regardless of cargo, armament, or means of propulsion enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."*

In the twenty-five years since the issuance of this statement it has in many contexts been accepted by the international community and carries substantial weight in operations planning, analysis and legal debate by government and industry players. It reaffirms trends set by the major international powers of the time that ships do not need prior notification to enter territorial seas under the regime of innocent passage.

## Normal Mode

Some coastal states continue to argue against innocent passage if crews are in battle stations/fire positions and not traveling in "Normal Mode." Normal Mode has been defined for transit passage situations in the Corfu Channel Case of 1949, but the same definition and particulars are often extended to the innocent passage debate regarding both warships and embarked PCASP on merchant vessels.

Normal Mode generally applies only to military vessels in archipelagic sea lane transit but has increasingly, perhaps wrongly, been cited by some authorities seeking to regulate PCASP activities. Some parallels can be drawn, however, from distinctions of innocent and non-innocent passage for military vessels and applied to commercial operations. Military vessels must transit in Normal Mode, which means they must not undertake:

Underwater or submerged transit (submarines)

Activities necessary for the security of surface warships (such as formation-steaming and other force-protection measures).

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While this policy was designed specifically for military vessels, armed guards aboard commercial vessels may also be considered by some as a force-protection measure and therefore a violation of innocent passage, especially if they are in fire positions.

According to the Virginia Commentaries (Vol. 2, 342):

*“...it is clear from the context and from the negotiating history that the term [Normal Mode] was intended to refer to the mode which is normal or usual for navigation for the particular type of ship.... Making the passage in given circumstances.... Some guidance on this point can again be found in Corfu Channel where the International Court of Justice was satisfied that even when the British warships passed through the channel with crews at action stations, and ready to retaliate if fired upon, this was consistent given the tensions that existed....”*

By this interpretation, armed guards manning battle stations and preparing for contingencies can be considered Normal Mode in high-risk situations where an attack could occur and thus may not necessarily qualify the vessel as being in non-innocent passage.

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