THE DOCTRINE
OF
FREEDOM OF NAVIGATION

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(SAROJ MOHAN)

Chapter I

INTRODUCTION

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> ... Upon the oceans, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there.
>
> Judge Story

The oceans play an important role in the life of human-beings. Covering 70.8 per cent of the world's surface or 140 million square miles,[1] the vast oceans are joined together by wide passages. This has led some to discard the old notion of "seven seas" and talk of one global sea in which all waters eventually meet.[2] Girdling the earth, the oceans have exercised a remarkable influence in the development of nations. In his "History of the Greek World", Herodotus declares that the sea is a road which unites the peoples of the earth to each other.[3] They constitute the most important highway for international communication. They facilitate not only communication between peoples living in distant lands but also give a big fillip to world trade. As Ogilvie points out:

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1. US Department of State, Sovereignty of the Sea, Geographic Bulletin, no. 3, April 1965, p. 1.
2. Vladmir and Kode Kovalik, The Ocean World (New York, 1966), p. 9.
3. Quoted in P.M. Ogilvie, International Waterways (New York, 1920), p. 6.

> The commodities of world industry pass over the threshold of each nation and thence over the seas into the distant markets of world assuring the prosperity and well-being of all who partake of this vital commerce. [4]

With the advent of air travel and transport, an alternate method of intercourse between nations separated by ocean space has been found. But water transport continues to account for a major share of the world's trade. To cite just one illustration, about 90 per cent of the United States' foreign trade of $56 billion per year moves by water.[5] One important reason why trade by sea has not been replaced by air transport is the prohibitive cost of the latter. It costs as much as forty times to transport by air (per ton mile) as by ocean shipping.[6]

In order that the oceans serve the purpose of international communication, it is important that they should remain free and not be appropriated by any one State or group of States. This is achieved through the doctrine of freedom of the seas. At one time during the fourteenth and fifteenth centuries, States claimed sovereignty over large areas of oceans. The Papal Bulls of 1493 divided the Atlantic and the Indian Oceans between Spain and Portugal.[7] But as this development was not conducive to the general well-being of the international community - and law develops and it must develop according to

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4. Ibid.

5. Marine Science Affairs, Second Report of the President to the Congress on Marine Resources and Engineering Development (February 1968), p. 73.

6. Ibid.

7. C.J. Colombos, The International Law of the Sea (London, 1959), edn. 4, p. 45.

the needs of the community - there was a reaction against the appropriation of the oceans by States. In the seventeenth century, Grotius propounded the doctrine of the freedom of the sea. The principle that the seas are free and all nations have an equal right to use them, became the cornertsone of the law of the sea.

There has been some controversy as to the nature of oceans in law. Some jurists assert that they are res nullius i.e. the property of no one and hence can be occupied. Others believe that they are res communis, i.e. the common property of the community and therefore cannot be appropriated.[8] Without going into this philosophical hair-splitting, suffice it to say that the interests of the international community require that all States should have an equal right to use them. As Mcdougal rightly points out:

> The sea - in much higher degree than the landmasses - is an easily sharable resource. It is tremendously vast - its expanses are great. Most of its resources that we presently know are renewable, flow resources. Similarly, where one ship has just been, another, with proper roles of accommodation, can soon come. [9]

Therefore, freedom of the seas has come to be accepted as one of the principles of international law. It received the stamp of conventional law in 1958 when the Geneva Convention on the High Sea declared that the high seas are open to all nations

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8. Ian Brownlie, Principles of Public International Law (Oxford, 1973), edn. 2, p. 181.

9. Myres S. Mcdougal, "International Law and the Law of the Sea", in Lewis M. Alexander, ed., The Law of the Sea: Offshore Boundaries and Zones (Ohio State University Press, 1967), p. 15.

and that no nation may validly purport to subject any part of them to its sovereignty.[10]

Freedom of navigation is one of the freedoms of the sea. This dissertation intends to discuss and analyse the concept of freedom of navigation and see how far it has come to be diluted in recent years.

We shall, first of all trace the genesis of the doctrine of freedom of seas from early Greek period to modern times. We shall note the political and economic factors which prompted jurists like Grotius to raise the banner of the freedom of the seas and why John Selden, in spite of his superior erudition, lost, to use Professor Nys' phrase, "the battle of the books". After the battle of Trafalagar in 1805, when Britain came to rule the waves, freedom of the sea became, almost like the "eleventh commandment" in international law. In the twentieth century, attempts were made at codification of the law and these efforts culminated in the Geneva Conventions on the High Seas and on the Territorial Sea and Contiguous Zones.

Another point that we shall note here is that as oceans were till recently mainly used for transport and communication, freedom of the sea primarily meant freedom of navigation. Other uses of the ocean, like exploitation of mineral resources and oil, are of recent origin. Although freedom of the seas means not only freedom to navigate but also freedoms to fish, lay down submarine cables and pipelines and to fly over, we will restrict

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10. Article 2 of the Convention on the High Seas, signed at Geneva in 1958. UN Doc. A/Conf.13/L.53.

ourselves here to a discussion of freedom of navigation only.

In Chapter 3, we shall explain the meaning of freedom of navigation on the high seas. The fact that no State can claim sovereign jurisdiction on the high seas does not mean that there is absence of authority to enforce law and order there. Every State whose flag the ship flies, exercises jurisdiction over it. We shall also see how, in recent times, limitations, some reasonable and others unreasonable, have come to be imposed on freedom of navigation.

Freedom of navigation on the high seas is meaningless unless navigation is guaranteed through the territorial seas. This will form the subject-matter of Chapter 4. We shall explain how the right of innocent passage is a compromise between the need of security of the coastal State and the need of the international community to navigate from one area to another. We will discuss the exact import of the right of innocent passage as well as the controversy whether the warships enjoy this right or not.

Straits provide the link between different oceans and seas. Right of navigation through them is of vital importance if freedom of navigation on the high seas has to have some meaning. Therefore, even when a strait forms part of the territorial sea of the coastal State, a more liberal regime than that of innocent passage exists for such areas. This will be discussed in Chapter 5. Recently, there has been a marked tendency towards claiming a broader area for the territorial sea. This has resulted in many straits which had a corridor of high seas becoming part of the territorial sea. This has generated

a demand for "free passage" through straits. The existing regime applicable to straits is no longer acceptable to the big Powers. There has been a fierce controversy on the point in debates in international forums, especially the sea-bed Committee of the United Nations. We shall examine this controversy in the light of the recent developments.

Freedom of navigation has played an important role in bringing the peoples of the world closer and promoting co-operation among them. But it has also been instrumental in the domination by the big maritime Powers and the exploitation of the smaller States by them. In the last chapter we shall recapitulate the history of the freedom of navigation and in the light of the changed circumstances see how this traditional right can and should be modified and readjusted to fulfil the present needs of the changed international society.

Chapter II

HISTORICAL DEVELOPMENT OF THE RIGHT OF NAVIGATION

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The Principle of Freedom of the High Seas asserted in Roman Law

The concept of the freedom of the high seas, especially that of navigation, has a long history. As far back as the Roman era, in the Institutes of Justinian, we find this principle unequivocally expressed: "By the law of nature, then, the following things are common to all men: the air, flowing water, the sea, and, consequently shores of the sea".[1] The sea was said there to be subject only to what was called the *jus nantium* and open thereby to free or public use. The ownership of the sea belonged to no one, nor did the sand beneath it.[2] Similarly, according to Ulpian,[3] the sea was open to everybody by nature, and according to Celsus,[4] the sea, like the air was common to all mankind. Again, when Emperor Antonius said, "I am indeed Lord of the World, but the law is the Lord of the Sea",[5] he was giving expression to the Roman idea of the principle of freedom of the sea.

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1. *Institutes* II, I, I, as quoted in Pitman B. Potter, *The Freedom of the Seas* (London, 1924), p. 25.
2. *Institutes*, II, 1, 6, as quoted in Potter, *ibid.*
3. See L. Oppenheim, *International Law, a Treatise* (ed. H. Lauterpacht) (London, 1970), p. 582.
4. *Ibid.*
5. *Digest*, XIV, 2, 9, as quoted in Potter, n. 1, p. 27.

The Principle of the Freedom of the High Seas not followed in State Practice

(i) Greek Period:

Whatever be the theory, in State practice we get a different picture. Maritime domination was a fact of political life as early as the pre-Greek era. The people of Tyre were said to have "brought the sea under their domination for a long time, not only the neighbouring sea, but wherever their fleets went"[6]. Indeed, the expression "Tyrian Sea" came to mean a body of water under control. It is on record that "there was an ancient ordinance concerning the Erythrean Sea laid down by King Erythras, when he was the master of that sea, that forbade the Egyptians to enter it in a ship of war, and restricted them to one merchantman"[7]. The case of Minos, King of Crete, is the most famous of all in this period. "He made himself master of a great part of what is now termed the Hellenic sea"[8]. Aristotle in his famous book Politics explained how under king Minos, Crete "acquired the empire of the sea and the isles"[9]. In the classic Greek era also, the long and protracted wars between Athens and Sparta were as much a struggle for domination on sea as on land.

(ii) Roman Period:

The Roman period in this respect was no different. Carthage, the Italian States preceding Rome, and Rome herself,

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6. Quintus Curtius IV, 20, 19; as quoted in Potter, n. 1, p. 12.

7. Philostratus, III, 35; as quoted in Potter, n. 1, p. 12.

8. Thucydides, 1, 4, as quoted in Potter, n. 1, p. 13.

9. Aristotle, Politics II, 10, 1; as quoted in Potter, n. 1, p. 13.

all attempted to secure and definitely claim maritime dominion. Polybius wrote about Carthaginians as "enjoying a dominion of the sea without dispute".[10] At one time, Carthage apparently declared a penalty of death for unlicensed trading from Spain, Gaul, and Italy to Sardinia, Corsica, Sicily and the pillars of Hercules.[11] Later Rome succeeded to the maritime power of these people. Romans began to call the Mediterranean "our sea". Florus, writing at the beginning of the second century, referred to the Straits of Gibraltar as the place "where the threshold of our sea appears".[12]

The above examples of state practice indicate that the control over the sea, exercised by any maritime power was the control rather of the mailed fist than that of legal right. Rulers knew that dominance at sea was desirable and possible; those who could obtain it did so. It was not the exercise of recognised authority which was important so much as ability to exercise control in fact.

(iii) Middle Ages:

Legal claims to sovereignty over parts of the open sea began to be made in the second half of the middle ages. As Oppenheim points out, "There is no doubt whatever that, at the time when the modern law of the Nations gradually arose, it was the conviction of the States that they could extend their

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10. Potter, n. 1, p. 27.

11. Ibid.

12. Florus, III, 6; as quoted in Potter, n. 1, p. 29.

sovereignty over certain parts of the open sea".[13] Thus, the States which cropped up after the breaking up of the Roman empire claimed jurisdiction over certain parts of the Mediterranean. Pisa and Tuscany controlled the Tyrrhenian sea and imposed tolls upon those entering its waters.[14] Venice attributed to herself the sovereignty of the Adriatic, whilst Genoa claimed the Ligurian Sea.[15] In the North, both Denmark and Sweden claimed sovereignty over the Baltic. The Danish claims were later extended to all the northern seas between Norway, Iceland and Greenland, on the principle that possession of the opposite shores carried the sovereignty of the intervening seas.[16]

England did not lag behind in the race and claimed sovereignty in the British seas. Henry IV (1399-1415) granted leave to a certain Spaniard to sail "freely from the port of London through our dominions to the town of Rochelle".[17] In Regina v. Constable it was held that "the Queen hath the whole jurisdiction of the sea between England and France".[18]

However, the most extensive claims were made by Portugal and Spain. Portugal claimed jurisdiction over the whole of

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13. Oppenheim, n. 3, p. 583.

14. Potter, n. 1, pp. 36-37.

15. C.J. Colombos, The International Law of the Sea (London, 1959), edn. 4, p. 45.

16. Ibid.

17. Potter, n. 1, p. 39.

18. Leonard, Reports, vol. III, 72; as quoted in Potter, n. 1, p. 39.

the Indian Ocean and over the Atlantic Ocean south of Morocco, and Spain over the Pacific and the Gulf of Mexico. These claims were given added authority by various Papal Bulls. By a Bull of 6 January 1454, Pope Nicholas V granted to Alfonso V, King of Portugal, the lands discovered and to be discovered on the West coast of Africa. By the two Papal Bulls of 4 May 1493, and of 26 September 1493, Pope Alexander VI divided the new world between Spain and Portugal. This arrangement was confirmed by the Treaty of Tordesillas in the following year.[19]

Practical Expression of Claims to Maritime Sovereignty

These wide claims over large expanses of oceans were enforced against other States by requiring their ships navigating these areas to observe certain ceremonials and honour the flags of the claimant States. The right to claim the salute to the British flag as a recognition of her sovereignty in British seas, for instance, was insisted upon by the British sovereign. Even ships bearing foreign rulers were not exempt from submitting to this claim. Phillip II of Spain, when coming to England in 1554 to marry Queen Mary, was fired upon for omitting to observe the "time-honoured" salute to the British Flag in the 'narrow seas'.[20]

Maritime sovereignty also found expression in the levying of tolls from ships navigating the area claimed by a particular State. The tolls levied by Genoa on the trade with the middle

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19. Colombos, n. 15, p. 45.

20. Ibid., p. 48.

East formed a substantial part of the revenues accruing to that State. As Fawcett points out: "the famous marriage of Venice with Adriatic sea had a practical form in the imposition of tolls on all shipping moving north of the line joining Ravenna with Fiume".[21]

Interdiction of fisheries to foreigners was also imposed by the States claiming maritime sovereignty. England's claim to the exclusive rights of fishing for its nationals in the English seas was the main cause of friction between Holland and England during the 17th century.

Some States attempted to control or even prohibit navigation by foreigners in that part of the seas which they claimed to be under their sovereignty. Thus, Portugal tried to exclude foreigners from the trade and commerce with the littoral States of the Indian Ocean and the States on the Western coast of Africa, just as Spain sought to monopolise the trade with America.

Challenge to Maritime Sovereignty

It was the extravagant claims of Spain and Portugal to a monopoly of navigation and commerce with the new world that created opposition to the very existence of such rights. This was an age when new lands and new routes were being discovered. Colombos had shown the way to America. The discovery of the Cape route by Vasco de Gama in 1497 led to the great stream of traffic between Europe and the East being diverted in the next

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21. J.E.S. Fawcett, "How free are the seas?", International Affairs (London), vol. 49, no. 1, January 1973, p. 15.

century from its old channel in the Mediterranean and Levant to the Atlantic. Trade and Commerce with the newly discovered lands was a lucrative proposition and the other States of Europe, especially Holland and England, also wanted to profit from it. The Spanish monopoly of commerce with the West Indies came to be challenged by the Tudors. Elizabeth I of England was the first to assert the freedom of the seas. When Mendoza, the Spanish ambassador in London, protested to Queen Elizabeth against Drake's famous expedition to the Spanish Main, the Queen refused to admit

> that Spain had any right to debar British subjects from trade or from freely sailing that vast ocean, seeing that the use of sea and air is common to all; neither can any title to the ocean belong to any people and private man for as much as neither nature nor regard of public use permitteth any possession thereof. 22

She reaffirmed the same principle in 1602 A.D. and instructed her ambassador to Christian IV of Denmark to declare that navigation in the open sea, as well as the use of the ports and coasts of Princes in amity, for traffic and the avoiding of the dangers from tempests was free, so that if the English were debarred from the enjoyment of these common rights it could only be by virtue of an agreement. 23

At the same time, some voices were also raised by jurists upholding the principle of freedom of the seas. They protested against the exclusive maritime sovereignty arrogated by Venice,

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22. Camden, Annals (1635), p. 225; as quoted in Colombos, n. 15, p. 47.

23. T.W. Fulton, The Sovereignty of the Sea (1911), pp. 110-11.

Portugal, or Spain on abstract legal grounds. Vasquez, the great Spanish jurist of the early sixteenth century, denied the legal value of the claims of not only the Venetians and the Genoese, but even of the Spanish Crown.[24] He held that to make the seas and the waves private national property was contrary to the law of nature and the elementary principles of international relations. Donelus, the French jurist of the same century, and Gentilis, an Italian, also raised the banner of the freedom of the seas and based their arguments on the principles of Roman Law.[25] Francis Alphanso de Castro, a Spanish monk who wrote in the middle of the sixteenth century, protested against the Genoese and the Venetians prohibiting other people from freely navigating the Ligurian and Adriatic seas and declared it as being contrary to the imperial law, the primitive right of mankind, and the law of nature. The Spanish and Portuguese claims to the exclusive rights to the navigation to the new world were also attacked by him.[26]

However, it was left to Grotius, a Dutch jurist, to mount a vigorous campaign to demolish the claims of exclusive sovereignty over certain parts of the high seas by these States and propound a full-fledged doctrine of freedom of the seas. He put forth his ideas in a book entitled Mare Liberum which was first published in 1608, and was one of the chapters of

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24. Vasquez, Chap. 89, as quoted in Potter, n. 1, p. 51.

25. Potter, n. 1, pp. 62-63.

26. Fulton, n. 23, p. 341.

his bigger book De Jure Praedae written in 1604-5.[27] It is important to note that Mare Liberum was not a philosophic exercise. Grotius had been retained by the Dutch East India Company to justify its capture of one of the ships of a Portuguese galleon in the straits of Malacca in the year 1602,[28] and the book was in the nature of a brief.

As has been mentioned above, Portuguese, founding their title on the Bulls of Pope of 1493, and the right of discovery, conquest, and prior occupation, arrogated to themselves the exclusive sovereignty of the great oceans which were the pathways for commerce and trade with the East. Portuguese authorities used to issue "cartas",[29] a sort of license or permit to trade with these countries, to any ship desiring to sail to these areas. This state of affairs was challenged by the Dutch. In 1602, the Dutch East India Company was formed. As it attempted to trade with the East Indies, its vessels came into conflict with those of the Portuguese engaged in the Eastern trade and which sought to exclude them from the Indian waters. Grotius, a young lawyer, gave the legal justification for the Dutch

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27. See Introductory Note, p. V of Hugo Grotius, Mare Liberum, trans. by R.V.D. Magoffin (1916).

28. Ibid.

29. The term connotes, according to Portuguese dictionary, a safe conduct which the Portuguese authorities used to grant in Asia to the friends of Portugal to secure to them safe navigation. They were granted in the name of the king by the viceroy or by a military or naval commander. The Cartaz appears, therefore, not only as the means of asserting Portuguese rights but also as an instrument for preserving order and security on national sea routes. See, C.H. Alexandrowicz, "Freites versus Grotius", British Yearbook of International Law, 35 (1969), pp. 162-82.

point of view in Mare Liberum. The sub-title of the book "The Right which Belongs to the Dutch to Take Part in the East Indian Trade" is self-explanatory. Grotius' arguments may be summarized in his own words as follows:

> The first is, that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation. The second is, that all that has been so constituted by nature that although serving some one person, it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature. 30

Grotius' main argument was that sea was free because by its very nature it could not be occupied. As he said: "In the legal philosophy of the Law of Nations, the sea is called indifferently, the property of no one (res nullius), or a common possession (res communis) or public property (res publica)".[31] The sea, unlike a river or a lake, he stressed, could not be contained within its shores because the sea was greater than the land. Another reason why it could not belong to anybody was because it could not be exhausted by promiscuous use.[32]

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30. Hugo Grotius, Mare Liberum (trans. R.V.D. Magoffin) (New York, 1916), p. 27.

31. Ibid., p. 22.

32. Jones summarized his views in these words: "The sea is common to all. It is infinite, in a sense, is incapable of being possessed, and is appropriate for the use of all for navigational and commercial purposes and for fishing privileges. It belongs to all and may not be subject to appropriation by any one". Erin Bain Jones, Law of the Sea: Oceanic Resources (1972), p. 9.

Reply to Grotius

The immediate object for which Mare Liberum was written and published, viz., the recognition of the right of the Dutch to sail to the East Indies and trade there, was achieved by the treaty of Antwerp in the month following its appearance, and no reply from the Portuguese or Spaniards to the arguments of Grotius was published till sixteen years later. In 1625, Franciscus Seraphinus de Freitas, a Spaniard, wrote De Justo Imperio Lusitanorum Asiatico, in which he argued that the imposition of a servitude on the sea was excluded only by private law and not by public law. The fact that a servitude could not be imposed by an individual did not mean that it could not be imposed by a sovereign. The sea might be res communis iuris gentium. But it could be charged with a servitude, including a prohibition against foreign navigation if it was occupied by a sovereign".[33]

Similarly, in defence of Venetian claims, a number of books appeared at this time, the best of which was that of Pacius who relied on immemorial possession and prescription and stated that the rights of the Venetians consisted in jurisdiction, imposition of taxes, the prohibition or regulation of navigation, the protection of subjects and the suppression of pirates.[34] Paolo Sarpi also defended these claims in his book Del Dominio del Mar Adriatico.

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33. Alexandrowicz, n.29, p.172.

34. Fulton, n.23, p.351.

The most powerful refutation of Grotius' arguments came from Britain. The Stuart kings claimed exclusive rights of fishing in the British seas for British nationals. James I levied the 'assize-herring' on Dutch fisherman who came to fish there. William Welwood, a Scottish Lawyer, wrote De Dominio Maria in 1613[35] defending the British claim to exclusive fishing rights in the British seas. Sir John Borough, another writer, supported the British claims in his book, The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom, written in 1633. But the masterly exposition of the British claims and refutation of the arguments of Grotius came from the pen of John Selden in a book titled Mare Clausum first written in 1617-18 and revised, altered, enlarged and published in 1635 A.D. The revision allowed Selden to take into account the views of Grotius as expressed in the De Jure Belli ac Pacis, published in 1625. Mare Clausum, as the name indicates, constituted the main defence of the doctrine of closed seas and maritime dominion.

The treatise was divided into two books. In Book I, Selden attempted to prove by means of theoretical arguments that the sea was not everywhere common but was capable of appropriation. The possibility and actuality of maritime domination was proved by reference to holy scriptures, ancient and medieval state practice, reason and equity.[36] The arguments in defence were sought to be refuted by means of philosophical

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35. Oppenheim, , n.3, p.585.

36. John Selden, Mare Clausum, Book I, Chapters 5-19, as quoted in Potter, n.1, p.62.

arguments and historical references. Selden drew freely upon the vast stores of his erudition. He quoted scriptures to show that the divine law allowed private dominion in the sea. He denied that the sea was inexhaustible from promiscuous use.

In Book II, Selden justified the claims of maritime domination of king Charles of England by quoting weighty precedents existing in the history of Britain. In fact, it was this part of the book which was of immediate political significance.[37] King Charles did what he could to emphasize the importance of the book. Although the book had been written earlier (in 1618), it was only at the request of Charles that Selden recast his treatise, added to it and completed it.[38] It was dedicated to the King and published at his "express commands". From the point of view of the King's policy, nothing that the pen could do could have been done better.[39]

Developments in the late 17th, 18th and 19th C. and the Acceptance of the Principle of Freedom of Navigation

Though Selden had made an elaborate and masterly exposition of the case for the sovereignty of the crown of Britain in the British seas and had forcefully put forward the doctrine of the closed seas, the controversy continued all through the 17th and 18th centuries. As Fulton remarks: "It was Selden's misfortune that the cause he championed was moribund, and opposed to the growing spirit of freedom throughout the

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37. Fulton, n. 23, p. 372.

38. Ibid., p. 366.

39. Ibid., p. 369.

world".[40] In the early part of the 19th century when the famous victory at Trafalgar in 1805 made Britain supreme on the sea[41] the principle of the freedom of the seas came to be unequivocally accepted.

"Law always develops - and it must develop - according to the needs of the society to which it applies".[42] Seventeenth and eighteenth centuries witnessed not only the Industrial revolution in the European countries but also an inordinate expansion of the inter-state commerce. Colonial rule was being established in Asian and African countries. In the words of Anand

> Freedom of navigation without let or hindrance was essential as much for the colonisation of Asia and Africa as for the growing inter-state commerce. Instead of fighting fruitless wars among themselves, the European Powers could go out and win new colonies, provided that the seas were safe for navigation. This was the need of the time. 43

It was for these reasons that freedom of navigation came to be recognized and accepted by the comity of nations. The Memorandum on the High Seas prepared by the UN Secretariat for the International Law Commission also points out:

> This question of territorial dominion over the high seas, so vigorously opposed in the name of the freedom of the high seas was settled in the 17th century by the political decline, of the States putting forward such claims, by the coordination of British and Dutch policies, and by the ascendancy of the English fleet arising from the decay of various naval powers. This

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40. Ibid., p. 370.

41. Potter, n. 1, p. 90.

42. R.P. Anand, "Tyranny of the Freedom of the Seas Doctrine", International Studies, vol. 12, no. 3 (1973), p. 416.

43. Ibid., pp. 418-19.

> fleet, once it had become de-facto mistress of the high seas, had no longer any interest in supporting Seldon's outdated arguments. 44

Freedom of the sea became the order of the day. Lord Stowell, in the case of Le-Louis (1817) stressed "All nations have an equal right to the unappropriated parts of the ocean for their navigation". 45 Judge Story of America opined in Marianna Flora case: "Upon the oceans, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there". 46 Fauchille said:

> The high seas do not form part of the territory of any state. No state can have over it a right of ownership, sovereignty or jurisdiction. None can lawfully claim to dictate laws for the high seas. 47

Bynkershoek in his book, De Domino Maria (1702), while making the distinction between the maritime belt, which is under the sovereignty of the littoral State, and the high seas, defended the freedom of the high seas. Vattel, G.F. de Martens, Azuni, and others followed his lead. 48

It must be pointed out, however, that though freedom of navigation came to be accepted much earlier and it may be said "that in the second half of that [seventeenth] century, navigation on all parts of the open sea was practically free

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44. "Regime of the High Seas", UN Doc. A/CN 4/32 (1950).

45. Quoted in Jones, n. 32, p. 12.

46. Ibid.

47. Ibid.

48. Oppenheim, n. 3, p. 686.

for vessels of all nations", yet "with regard to other points, claims to maritime sovereignty continued to be kept up".[49] The Netherlands had to accept by Article 4 of the Treaty of Westminster, 1674, that their vessels must salute the British flag within the British seas as a recognition of British maritime sovereignty.[50] It was only after 1805 that the British insistence on ceremonial salute in the British seas was silently dropped. Oppenheim points out:

> ... Throughout the eighteenth and at the beginning of the nineteenth century, the principle of the freedom of the open sea became more and more vigorous with the growth of the navies of other States; and at the end of the first quarter of the nineteenth century, it became universally recognised in theory and practice. [51]

When in 1821, Russia, which still owned Alaska in North America, attempted to prohibit all foreign ships from approaching within one hundred miles of the shores of Alaska, Great Britain and the United States protested in the interest of the freedom of the open sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825.[52]

Twentieth Century and the 1958 Convention on the High Seas

The needs of the powerful States in regard to trade, commerce and colonization being paramount, the principle of the

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49. Ibid. However the Black Sea was very much a closed sea, and remained so till the middle of the 19th century. See Yilmaz M. Altug, Turkey and Some Problems of International Law (1968).

50. Oppenheim, n. 3, p. 586.

51. Ibid.

52. Ibid.

freedom of the high seas was firmly established in the 19th Century. That was essentially an era of laissez faire policies. As in national sphere the trend was to put the minimum possible restrictions on individual enterprise, in international sphere greatest amount of freedom was claimed by States in their international dealings.

It may be pertinent to point out here that till the turn of the present century, the primary use of the sea was to provide an international highway for travel and commerce among the far flung nations.[53] When the jurists and statesmen talked of freedom of the high seas, they referred primarily to freedom of navigation. With the advance of technology the uses of the seas have been expanding. The widening horizons of science and technology in recent years have revealed a new under-sea world full of natural resources in quantities beyond the wildest dreams of man, not only in the sea-water but also on the sea-bed and in its subsoil. It is estimated that even if a small percentage of the oil found in the continental-shelf is exploited, the needs and requirements of the whole world would be more than met in the coming decades. Consequently, it is only natural that States are claiming jurisdiction over these natural resources so that they can be exploited to national advantage. This has brought the doctrine of freedom of the seas under a new strain. It must be pointed out, however, that freedom of navigation, which has become but one aspect of

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53. Of course fishing in the oceans has been prevalent since the early times.

freedom of the high seas, is still widely recognised. As this dissertation deals only with the freedom of navigation, the wider problem of freedom of the high seas and the effect of technology on it does not concern us here except incidentally when it affects freedom of navigation.

Attempts to codify the Freedom of the Seas Doctrine

In the twentieth century, several attempts have been made in the various international legal bodies and conferences to codify the law regarding freedom of the high seas. The Institute of International Law, after a thorough discussion of the doctrine at the Lausanne Conference in 1927, agreed on a Declaration which stated, inter alia:

> The principle of the freedom of the sea implies specially the following consequences: (1) freedom of navigation on the high seas, subject to the exclusive control, in the absence of a convention to the contrary, of the State whose flag is carried by the vessel. ... 54

The International Law Association adopted the draft entitled, "Law of Maritime Jurisdiction in time of peace" at its Vienna Conference in 1926. Article I of the draft enunciated the fundamental principle that:

> For the purpose of securing the fullest use of the seas, all States and their subjects shall enjoy absolute liberty and equality of navigation, transport, communications, industry and science in and on the seas. 55

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54. Annuaire, vol. 33, part iii, 1927, p. 339; as quoted in Colombos, n. 15, p. 59.

55. Colombos, n. 15, p. 59.

Article 13 further provided:

> No State or group of States may claim any right of sovereignty, privilege or prerogative over any portion of the high seas or place any obstacles to the free and full use of the sea. 56

The freedom of the high seas was a subject of intense discussion by the International Law Commission. The draft Articles prepared by the International Law Commission were discussed by the Conference on the Law of the Sea at Geneva in 1958. Ultimately, the principle was enshrined in Article 2 of the Convention on the High Seas, which reads:

> The High Seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of International Law. It comprises, inter-alia, both for coastal and non-coastal states:
>
> (1) Freedom of navigation;
>
> (2) Freedom of fishing;
>
> (3) Freedom to lay submarine cables and pipelines;
>
> (4) Freedom to fly over the high seas.
>
> These freedoms and others which are recognised by the general principles of International Law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. 57

It is clear, therefore, that freedom of navigation, which constitutes an important part of the freedom of the high seas, has come to be generally accepted in International Law

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56. Ibid.

57. UN Doc. A/Conf. 13/L.63.

although the contents of this have changed over the years. As the UN Memorandum on High Seas records:

> Freedom of the seas originally meant the liberation of the high seas from the extortions and robberies committed by pirates. A little later, it referred to resistance to the claims of certain countries to a monopoly of navigation in certain seas, and to the exclusive right of trading with countries bordering on such seas. ... In the 19th century, the express, "freedom of the high seas" was used to counter British claims to exercise the right of search in peacetime on the pretext, more or less well-founded of suppressing the odious slave trade. 58

It is important to note, however, that the right to freely navigate the seas was at the core of all these various meanings given to the concept of freedom of the high seas.

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58. "Regime of the High Seas", UN Doc. A/CN 4/32 (1950), pp. 1-2.

Chapter III

NATURE AND CONTENT OF FREEDOM OF NAVIGATION

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NATURE AND CONTENT OF FREEDOM OF NAVIGATION

Meaning of Freedom of Navigation

The right of navigation is a "demand for freedom to enter upon the oceans and to pass there unhindered by efforts of other states or entities to prohibit that use or to subject it to regulations unsupported by a general consensus among nations".[1] Historically, the concept of freedom of navigation was a reaction against the idea of territorial claims over the high seas. It originated essentially as a negative concept and implied non-interference in the use of the ocean by any State. In other words, the fact that the high seas could not be appropriated by any State ensured the freedom of navigation for all. The negative concept, therefore, came to have positive consequences. As the Memorandum on the High Seas prepared by the UN Secretariat pointed out:

> Directed against exclusive use, it necessarily developed into the idea of equal use. Opposition to the establishment of sovereignties over the high seas arises from a desire to make free use of them oneself. Ships of all nationalities have an equal right to make use of the high seas in every possible way, but the idea of equal use only comes second. The essential idea underlying the freedom of the high seas is the concept of the prohibition of interference in peacetime by ships flying one national flag with ships flying the flag of other nationalities. [2]

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1. Myres S. McDougal and W.T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (New Haven, 1962), p. 763.

2. Memorandum on the Regime of the High Seas prepared by the Secretariat for International Law Commission. It is widely believed that Gidel is the author though it is not specified in the Memorandum. It will be referred to as Gidel's Memorandum, UN Doc. A/CN.4/32, 14 July 1950, p. 3.

Legal Nature of High Seas

The doctrine of the freedom of the seas derives support from the legal nature of open seas. The high seas are commonly described as res communis, i.e. the joint property of the community[3] or as res extra commercium[4]. However all are agreed "that each and every State has equal and independent rights of user of the high seas in time of peace. The corollary is that no individual State may lawfully assert exclusive rights of user in any part of the high seas without the acquiescence of other States"[5]. The high seas, being res communis, cannot be occupied by any State. They are not subject to the sovereignty of any State. All States have the freedom to navigate upon them without interference from any quarter.

(i) Jurisdiction on the High Seas:

The fact that the high seas are not under the sovereignty of any State does not mean that a state of lawlessness and anarchy prevails there. To facilitate navigation on the high seas, a legal regime has been established under customary international law.

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3. The view that they are "res nullius" i.e. the property of nobody, though sometimes expressed with reference to sea-bed and sub-soil thereof is no longer valid with reference to the high seas as that would imply that they are capable of being occupied.

4. See L. Oppenheim, International Law: A Treatise (ed. H. Lauterpacht) (London, 1970), edn. 8, p. 689; and Schwarzenberger, International Law (1971), vol. 1, edn. 3, p. 309.

5. C.H.M. Waldock, "The Legal Basis of Claims to the Continental Shelf", The Grotius Society, Transactions for the Year 1950, vol. 36 (1951), p. 116.

(ii) Nationality of Ships:

Customary International Law requires that every ship sailing on the high seas must bear the nationality of some State whose flag it should fly. Ordinarily, the conditions under which a ship acquires the nationality of any State, are not regulated by international law. It is a matter to be decided by municipal law. International law only requires that:

> Each State shall fix the conditions for the grant of its nationality to ships; for the registration of ships in the territory and for the right to fly its flag. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 6

(iii) Jurisdiction of the Flag State:

Once the ship acquires the nationality of a particular State, that State becomes the competent authority to exercise jurisdiction over it when it is on the high seas. The jurisdiction of the flag State is exclusive in the case of warships but, as we shall see, not so exclusive in the case of merchant vessels.

The principle of freedom of navigation implies non-interference by ships flying the flag of one State with ships flying the flag of another State. However, in certain cases derogations from this absolute rule of non-interference are accepted in international law.

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6. Article 5 of the Convention on the High Seas adopted at Geneva in 1958. UN Doc. A/Conf. 13/L.53.

One such instance is where a ship is suspected of having committed piracy. Regarded as hostis humani generis (i.e. enemy of mankind), by his acts a pirate prejudices the free and peaceful uses of the high seas. The general interest, therefore, requires that a stop be put to his criminal activities. The warships of all States are, therefore, entitled to seize and search a ship which has or is suspected of having committed piracy.[7]

Another circumstance in which the ship flying the flag of one State can interfere with a ship flying the flag of another is that of hot pursuit. Article 23 of the Convention on the High Seas provides:

> The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or territorial sea of the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. [8]

The raison d'etre of this right is that "pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be effectively exercised".[9]

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7. See Article 15 of the Convention on the High Seas adopted at Geneva in 1958. UN Doc. A/Conf. 13/L.53.

8. UN Doc. A/Conf. 13/L.53.

9. Hall, A Treatise on International Law, as quoted in Ian Brownlie, Principles of Public International Law (Oxford, 1973), edn. 2, p. 245.

Another reason for which the jurisdiction of the flag State can be interfered with, is the plea of self-defence. There are numerous instances of State practice in which the right of self-defence and self-preservation has been invoked to justify such cases of interference. In recent times, the French Government has instituted and later defended the search and seizure of foreign vessels on the high seas which were suspected of smuggling arms to the Algerian rebels, as an instance of taking preventive measures for self-defence.[10]

Some international conventions also empower the ships of one State to search and seize the ships of other States if they are indulging in slave-traffic or traffic in narcotic drugs.

Thus it will be seen that freedom of navigation is not a licence for anarchy and lawlessness, but is subject to law and well-defined rules.

Limitations on Freedom of Navigation

In recent years, certain limitations on freedom of navigation are being imposed. These constraints are placed due to the increasing multiplicity of uses to which the ocean is being put. The oceans not only provide a link and a means of communication between the various land areas, but are also a rich source of food, minerals and other natural resources for mankind. With the advance of technology and scientific knowledge, the uses of the oceans are increasing. The multiple uses of the oceans have inevitably led to a conflict between the

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10. For a detailed account of these cases, see, Marjorie Whiteman, Digest of International Law, Vol. IV, Department of State Publication (1965), p. 513.

various uses. In such circumstances, as McDougal and Schlei have pointed out:

> The overriding policy which infuses this whole decision-making process - perhaps it requires explicit statement - is not the negation of use but the encouragement of use. The major policy purpose which inspires the regime of the high seas is not merely the negation of restrictions upon navigation and fishing, but also the promotion of the most advantageous - that is, the most conserving and fully utilising - peaceful use and development by all peoples of a great common resources....

They further add:

> And for all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitious, but indispensable standard of what, considering all relevant policies and all variables in context, is reasonable as between the parties. 11

It is this ever-valid test of "reasonableness" which must be applied to any limitation on the freedom of navigation to see if it is justified or not.

Limitations due to Exploitation of Resources in Continental Shelf

The curb on the freedom of navigation necessitated by the exploitation of natural resources in the continental shelf area is an illustration of a reasonable limitation. The conflict of the uses of the oceans as a means of communication and as a source of wealth is no where more glaring than here. Discovery of oil near the cost of United States prompted the US Government to claim sovereign jurisdiction over the adjacent submarine

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11. Myres S. McDougal and Norbert A. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security", in McDougal and Associates, Studies in World Public Order (Yale University Press, 1960).

areas, commonly known as continental-shelf. The Truman Proclamation of 1945 through which it was accomplished initiated the process of unilateral extension of national jurisdiction over the continental-shelf. It was followed by Orders in Council of 1948 relating to Bahamas and Jamaica and by Proclamations issued by Saudi Arabia in 1948, and nine Sheikhdoms in the Persian Gulf under United Kingdom Protectorate in 1949.[12] The Latin American States also did not loose much time in extending their sovereignty to adjacent areas. Though some of these proclamations claimed only exclusive jurisdiction and control over the sea-bed and subsoil thereof for exploitation of the mineral resources, others claimed sovereign right or even sovereignty. However, all these extensions of national jurisdiction had one thing in common. In the words of Lauterpacht, "they all disclaim any intention of interfering with the principle of the freedom of navigation on the high seas as established by the accepted principles of international law".[13] The US Proclamation of 1945 expressly stated that "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected". Though the proclamations of some of the Latin American countries claimed sovereignty not only over the continental shelf but also over the superjacent waters, yet they did not abrogate the freedom of navigation. Their main purpose in making these claims was to reserve the

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12. See generally, H. Lauterpacht, "Sovereignty Over Submarine Areas", British Year Book of International Law, vol. 27 (1950), pp. 376-433.

13. Ibid., p. 383.

exclusive fisheries rights for their nationals.

The various drafts prepared by the International Law Commission also emphasised the same point. Article 3 of the Draft prepared by the International Law Commission in 1951 at its third session stated:

> The exercise by a coastal State of control and jurisdiction over the continental-shelf does not affect the legal status of the superjacent waters as high seas. 14

The 1953 and 1956 Drafts of the International Law Commission reiterated the same legal position.[15] In its Commentary the Commission did not leave any scope for doubt. It explained:

> Article 69 is intended to ensure respect for the freedom of the seas in face of the sovereign rights of the coastal State over the continental shelf. It provides that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as the high seas or the airspace above the superjacent waters. A claim to sovereign rights in the continental shelf can only extend to the seabed and subsoil and not to the superjacent waters ... which are and remain a part of the high seas. 16

At the Geneva Conference on the Law of the Sea in 1958, the above-mentioned article was adopted as Article 3 of the

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14. Report of the International Law Commission covering the work of its Third Session, 16 May - 27 July 1951. UN General Assembly Official Records (GAOR), session 6, Supplement no. 9(A/1858), p. 18.

15. Report of the International Law Commission covering the work of the fifth Session, 1 June - 14 August 1953. GAOR, session 8, Supplement no. 9(A/2456), p. 12.

16. Report of the International Law Commission covering the work of the eighth Session, 23 April - 4 July 1956. GAOR, session 11, Supplement no. 9(A/3159), p. 43.

Convention on the Continental Shelf.

Thus it will be seen that in Law every safeguard is applied to ensure freedom of navigation in the continental shelf area. But the physical limitations imposed by the huge platforms constructed for the exploitation of the resources of the sea-bed and subsoil thereof cannot be wished away. Article 5 of the Geneva Convention of the Continental Shelf states, "The exploration of the continental shelf and the exploitation of the natural resources must not result in any unjustifiable interference with navigation...."[17] It follows that any interference with the freedom of navigation which is a necessary consequence of the process of exploiting the mineral wealth of the continental shelf and hence justifiable is valid in law. Writing as far back as 1960 Sir Hersch Lauterpacht said:

> For the undoubted possibility of interference with navigation on the high seas as a result of installations, and the necessity to protect them, connected with the exploitation of the resources of the subsoil is, essentially, of a limited character. Unless abused, they may offend against the theory but not the true object of the freedom of the seas. Imagination may be tempted to conjure alarming vistas of the high seas crowded with installations impeding navigation and of crippling regulations intended to protect these installations. [18]

But since then much water has flowed under the bridge and the vistas conjured by imagination have now become a reality. Science and technology have made rapid strides. It was reported that in 1964 in the waters of the Gulf of Mexico, off the coast of the United States, there were 4,783 fixed oil installations,

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17. UN Doc. A/Conf. 13/L.18, emphasis added.

18. Lauterpacht, n. 12, p. 403.

of which 1,590 were located in or near shipping lanes.[19] Writing in 1971, Wolfgang Friedman described the position as follows:

> The steady horizontal and vertical extension of mining operations, with multiplication of fixed and floating platforms, submarine stations, maintenance service and diving equipment, feeder lines, off-shore storage, and loading facilities will increasingly curtail two of the most vital areas of the freedom of the seas - navigation and fishing. 20

He further adds:

> In the Gulf of Mexico, one of the most closely mined offshore areas, oil rigs have become so numerous that it has been necessary to provide 'fairlanes' for shipping. In spite of the safety precautions - warning signals and markers that may be installed on the high seas and the continental shelf - in accordance with the Geneva Conventions, which purport to safeguard the freedom of shipping and fishing, these traditional freedoms will soon be converted from primary rights into secondary licenses by the escalation of mining operations. 21

Thus though the Geneva Convention on Continental Shelf is eloquent on the preservation of the traditional freedom of navigation, the hard facts of physical limitations cannot be ignored. As explorations and installations multiply, the pious reassertions of the conventional and customary freedom of navigation obviously become increasingly empty. We are left with a question of priorities: the exclusive claims of the coastal State or the inclusive claims of the international community in respect of freedom of navigation. The answer can

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19. R. Young, "Offshore Claims and Problems in the North Sea", American Journal of International Law, 59 (1965), p. 505.

20. Wolfgang Friedmann, The Future of the Oceans (New York, 1971), p. 29.

21. Ibid.

hardly be in doubt. As has already been pointed out, in the Gulf of Mexico where oil drilling has reached an intensity likely to be followed soon in other areas, the relegation of shipping to 'fair' lanes has already forced navigation into a back seat.[22] To sum up, in Louis Henkin's words:

> General Principles of "freedom of the Seas" do not decide today's concrete issues; even the traditional supremacy of the freedom of navigation might bow to new uses which the society deemed more weighty. [23]

Limitations Due to Oil-Pollution-Free Zones

Another constraint on the freedom of navigation which is justifiable is being imposed by the concept of pollution-free zones. Pollution is caused by persistent oils - crude oil, fuel oil, heavy diesel oil and lubricating oil - spilling on the surface of the seas as a result of plying of big oil tankers and modern ships with their huge oil exhausts. As polluted waters are a source of hazard to the ecology and environment of the coastal State, Geneva Convention on Territorial Waters and Contiguous Zones of 1958 gave special powers to the coastal State to enforce the sanitary regulations within the contiguous zone which, however, could not extend beyonf twelve miles from the coast.[24] But as very large quantities of persistent oils are regularly discharged into the high seas by tankers as a result of

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22. Ibid., p. 38.

23. Louis Henkin, Law for the Sea's Mineral Resources, ISHA Monograph no. 1 (1968).

24. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone adopted at Geneva in 1958. UN Doc. A/Conf. 13/L.52.

the washing of their tanks and the disposal of their ballast water, and as these oils are capable of being carried considerable distances by currents, winds and surface drift, and may build up into deposits on the sea-shore, the need for concerted action to control pollution on the high seas has been felt. On 12 May 1954, the International Convention for the Prevention of Pollution of the Sea by oil was signed in London, and came into force on 26 July 1958.[25] It banned the discharge of oil by the tankers in certain prohibited zones and required other ships to discharge as far away as possible from land. It also, among other things, required the flag State to see to it that the ships be so fitted as to prevent the escape of oil into bilges the contents of which are discharged into the sea without being passed through an oily water separator.

The International Law Commission, which was also seized of the problem, stated:

> Water pollution by oil raises serious problems. ... Almost all maritime States have laid down regulations to prevent the pollution of their internal waters and their territorial sea by oils discharged from ships. But these special regulations are clearly inadequate. Petroleum products discharged on the high seas may be washed towards the coasts by currents and winds. All States should therefore enact regulations to be observed, even on the high seas by ships sailing under their flags.... [26]

Articles 24 and 26 of the Geneva Convention on the High Seas deal with pollution caused by the discharge of oil

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25. See Whiteman, n. 10, p. 692.

26. See Report of the International Law Commission, n. 16, p. 23.

and dumping of radio active waste. Article 24 states:

> Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the sea-bed and its sub-soil, taking account of existing treaty provisions on the subject. 27

In 1962 and 1969 some amendments to the 1954 Convention for Prevention of Pollution of the Sea by Oil were adopted. In November 1969, a conference convened by IMCO adopted two significant conventions, one dealing with the right of coastal States to take measures against foreign vessels on the high seas when such vessels are in imminent danger of causing pollution damage following a maritime casualty, and the other imposing strict civil liability upon the owner of a vessel responsible for pollution damage.[28]

However, these conventions were found to be inadequate to protect the interests of the coastal States because regulatory powers were vested only in the flag State. The coastal State was powerless to stop the passage of a ship near its coast even if it did not comply with the specifications laid down in the various conventions. Moreover, sometimes the very passage of a big oil tanker constitutes a hazard for the coastal State as, in the event of a maritime casualty the pollution caused by it would be sustained only by the coastal State. The Torrey Canyon disaster of 1967 which polluted the coasts of Britain and France

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27. UN Doc. A/Conf. 13/L.53.

28. See R.H. Neuman, "Oil and Troubled Waters: The International Control of Maritime Pollution", Journal of Maritime Law and Commerce, vol. 2 (1970-71), pp. 349-61.

is an illustration of the point. The oil-tanker struck against the Sicilian rocks and spilled thousands of gallons of oil into the sea which was washed to the shores of Britain and France.[29]

In order to remedy the situation in April 1970, the Government of Canada introduced in the Canadian House of Commons the Arctic Waters Pollution Prevention Bill[30] which was later passed in August 1970. The legislation asserts Canadian jurisdiction for the purpose of pollution prevention in all waters up to 100 nautical miles from every point of Canadian land above the sixtieth parallel of north latitude.[31] The Act empowers the Executive to prescribe regulations relating to navigation in "Arctic Waters" for the purpose of preventing pollution.

The immediate stimulus for the Canadian legislation was the historic voyage of the US Tanker S.S. Manhattan in the summer

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29. IMCO Doc. Leg/Conf./6 (Annex. II), 13 October 1969. There have been other oil disasters also. In 1966, the Anne Mildred Boving, a Norwegian tanker, collided with the British vessel Patland. After grounding, the hull broke into two, spilling 125,000 barrels of oil into the North Sea. Two and a half months were required for the clean up at a reported cost of £241,000. In 1968, the Ocean Eagle grounded and broke up while entering the harbour at San Juan, Puerto Rico, contaminating the beach area for sixteen miles. Two months were required for the clean up at a cost of £2.5 million. The coast of South Africa experienced oil-pollution when World Glory broke up into two during a severe storm and spilled 332,000 barrels of crude oil into the sea. See generally, Cundick Palmer, "High Seas Intervention: Parametres of Unilateral Action", The San Diego Law Review, vol. 10, no. 3 (1973), pp. 514-58.

30. Bill c-202, 8 April 1970.

31. Since Canada claims all the islands of the Arctic Archipelago, the legislation encompasses all waters of the Arctic region up to the North Pole between 146° longitude and an equidistant line running between Greenland and the East Coast of Canada.

of 1969 through the waters and ice of the Northwest Passage, north of the Canadian mainland. The voyage was designed to demonstrate the feasibility of utilizing ice-breaking super-tankers on this route for the large-scale transportation of oil from the developing oil-fields of Alaska.[32]

The enactment of the above legislation has raised the question whether the unilateral assertion by Canada of its power to regulate navigation on what is indisputably high seas is valid under international law. It is pertinent to point out here that the Act is based "on the theory of Canada's right to exercise jurisdiction for pollution control purposes on the high seas contiguous to, but outside of Canada's territorial waters, rather than on the theory that the waters embraced in the legislation are territorial or internal waters subject to Canadian Sovereignty".[33]

The United States which was directly affected by the legislation, challenged its validity. The US Department of State, in its formal protest note handed to the Canadian Ambassador stated, inter alia:

> International law provides no basis for these proposed unilateral extensions of jurisdiction on the high seas, and the U.S. can neither accept nor acquiesce in the assertions of such jurisdiction....
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> We are concerned that this action by Canada, if not opposed by us, would be taken as a precedent in other parts of the world for other unilateral

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32. R.B. Bilder, "Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea", Michigan Law Review, vol. 68 (1970-71), pp. 1-54.

33. Ibid., p. 13.

> infringements of the freedom of the seas.... Merchant shipping would be restricted and naval mobility would be seriously jeopardized. The potential for serious international dispute and conflict is obvious. 34

The weakness in the legal position of Canada under traditional international law can be surmised from the fact that when US offered to litigate the issue before the International Court of Justice, Canadian Government did not accept it.[35]

It may be largely true that traditional customary international law does not envisage any limitation on the freedom of navigation on the high seas for pollution control by the littoral State. But law cannot remain static. "Law always develops - and it must develop - according to the needs of the society to which it applies".[36] As Alan Beesley remarked, the doctrine of the freedom of the seas is a functional doctrine, and it is not appropriate to moralise about it as if it were the "eleventh commandment".[37] The justification of the Canadian action lies in the special ecological conditions of its north-west region. The dangers which utilization of the North-west Passage pose to this unique environment are particularly acute. "For one thing, the hazards of Arctic navigation substantially

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34. Department of State Press Release no. 121, 15 April 1970, as quoted in New York Times, 16 April 1970.

35. Neuman, n. 28, p. 366.

36. R.P. Anand, "'Tyranny' of the Freedom of the Seas Doctrine", International Studies, vol. 12, no. 3, July-September 1973, p. 416.

37. J. Alan Beesley, "Conflicting Approaches to the Control and Exploitation of the Oceans", Proceedings of the American Society of International Law, 29 April - 1 May 1971, p. 118.

increase the risk of maritime accidents. Moreover the peculiar ecology of the Arctic region - an environment in which life exists only precariously - coupled with the slow rate of hydrocarbon decompesition in a frigid climate and the difficulty of dispelling oil in Arctic areas, might cause any major oil spill to have disastrous and irreversible ecological consequences".[38] Perhaps this explains the general theme of newspaper comment on the US-Canada controversy on this point. The overwhelming view was "that the US was being 'legalistic' and that Canada was justified in acting to protect its fragile and unique Arctic environment".[39] As Neuman remarks:

> Public opinion thus reflected the appeal of ecology and the picture presented was that of the frailty of nature straining against the rusty chains of archaic rules of the sea. The United States, it appeared, was being stodgy and 'establishment' while Canada was acting with courage and foresight. [40]

The Canadian Government based the justification of its action "on the over-riding right of self-defense of coastal States to protect themselves against grave threats to their environments".[41]

Canada also asserted that its unilateral action was a positive element in the development of international law through the evolution of State practice. Mitchel Sharp, the

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38. Bilder, n. 32, p. 5.

39. Neuman, n. 28, p. 368.

40. Ibid.

41. Summary of Canadian Note Handed to the US Government on 16 April 1970. 114 House of Commons Debates 6027 (Appendix), 17 April 1970, pp. 6028-9.

then Secretary of State of Canada, stated: "The bill we have introduced should be regarded as a stepping stone towards the elaboration of the international legal order which will preserve and protect this planet".[42] He also claimed, "The Law is undeveloped on this question, but if that is the case, we propose to develop it".[43] It is relevant to point out here that in the Memorandum prepared by the UN Secretariat, Gidel refer to the "wider significance" of the "unilateral act" and described it as "one of the means by which international custom is formed".[44]

It may be concluded that since the Canadian legislation can eminently stand the crucial test of reasonableness, the limitation imposed by it on the freedom of navigation is amply justifiable, and hence, valid.

Limitation due to Atomic and Nuclear Test

Another constraint which is sought to be imposed on the freedom of navigation is the atomic and nuclear tests which are conducted on largely uninhabited or sparsely populated islands in midoceans. Though the atomic and nuclear devices are detonated on land which is under the sovereignty of a particular State, the effects of detonation are felt in a large surrounding areas of the ocean. This adversely affects navigation and fishing in the adjacent waters of the high seas, and infringes

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42. 114, House of Commons Debates 5949, 14 April 1970.

43. 114, House of Commons Debates 6015, 15 April 1970.

44. Gidel's Memorandum, n. 2, p. 90.

the freedom of the high seas. The basic legal problem, as posed by McDougal and Schlei, is whether the States conducting these tests are "authorised by relevant world prescription to continue measure which they deem essential to their defense or whether such measures must be condemned as unlawful ... through derivations from the customary international law of the sea".[45]

The United States of America was the first to advise the mariners in 1946 of the anticipated danger to ships approaching near Bikini atoll where the tests were in progress. An area of approximately 180,000 square miles surrounding the atoll was declared unsafe.[46] After that, it continued to declare warning areas near its test sites at Eniwetok. In all, it established well over 400 such areas. In 1954, 4,000,000 square miles of high seas were closed for navigation and fishing for a period of fifty-seven days.[47] In 1957, the United Kingdom declared a large area surrounding Christmas Islands in the Pacific, closed to navigation on account of the Hydrogen Bomb test which it proposed to conduct there.[48] It is not known if the USSR closed the high seas on account of atomic or nuclear tests, but it did so for missile and rocket tests. On 7 January 1960, it designated an area of approximately 1,000 miles east of the Marshall Islands

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45. McDougal and Schlei, n. 11, p. 766.

46. Ibid., p. 767.

47. Ibid.

48. Capt. J.R. Brock, "Legality of Warning Areas as Used by the United States", JAG Journal, December 1966 - January 1967, pp. 69-72.

in the Pacific for rocket and missiles tests.[49] Since 1966, France has been conducting atomic and nuclear tests in Mururua Atoll in the Pacific, thereby rendering a large part of the high seas unsafe for navigation.[50] As the tests are still continuing Australia and Newzealand took the matter before the International Court of Justice and its judgement is awaited.

The legal justification for these tests has mainly come from the USA. McDougal and Schlei put forward a strong defence of these tests. The main argument advanced in favour of the legality of tests is that of self-defense and military preparedness. The high seas have always been used for naval exercises and manoeuvres, and testing of atomic and nuclear devices is regarded as an extension of the same practice. As McDougal and Schlei state:

> It is authoritative community prescription, as well as unilateral claim that every sovereign state must have, in the words of Elihu Root, "the right...to protect itself by preventing a condition of affairs in which it will be too late to protect itself". Since as has been noted, the world community has no centrally organized police force, self-help is often the only rational alternative for maintaining public order, whether the threat to that order is posed by individuals responsive to the authority of no state, or by the instrumentalities of states themselves. [51]

Similarly, Franklin remarked:

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49. Carl M. Franklin, International Law Studies. The Law of the Sea: Some Recent Developments. Naval War College, Vol. LIII (Washington, 1961), p. 182.

50. Anthony A. D'Amato, "Legal Aspects of the French Nuclear Tests", American Journal of International Law, vol. 61 (1967), pp. 66-77.

51. McDougal and Schlei, n. 11, pp. 799-800.

> While the claim of a State to use a designated area of the high seas for weapons testing is relatively recent and unprecedented for the obvious reason that science and technology did not create such weapons until 1945, this new emergent use of the high seas is a reasonable one. It is reasonable because it is a necessary requisite of self-defense.... Certainly the objective of defending all the values of a free world society is as important as, and indeed includes, the traditional uses of the high seas for navigation, fishing, cable-laying etc. 52

Defending the closure of areas of the Pacific Ocean in January 1957, the then British Prime Minister Harold Macmillan stated in the British House of Commons:

> We do not consider that we are committing any breach of international law and, as I say, the temporary use of an area outside territorial waters for gunnery and bombing practice has never been considered a violation of the principle of the freedom of navigation on the high seas. 53

The French Government has also defended its tests as essential for its security interests and necessary to develop an independent nuclear deterrent force.[54]

Defending the atomic tests vis-a-vis the freedom of the navigation and fishing, it is argued that if the freedom of the high seas is as absolute as it is made out to be by the opponents of these tests, it may "reasonably" be asked why the seas are not as 'free' for nuclear weapon tests conducted in the interests of survival of the West, as they are for navigation and

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52. Franklin, n. 49, p. 181.

53. As quoted in Brock, n. 48, p. 71.

54. D'Amato, n. 50, p. 68.

fishing.[55] It is well-known that freedom of the seas may be invoked to justify uses of the seas other than navigation and fishing, and that any and all uses may limit the freedom of other users.[56]

Another argument advanced is that the extent to which the bomb tests have actually interfered with commercial navigation, in spite of the size of the area affected, is virtually nil. No commercial maritime route crosses any part of the warning zones which have been established. The arguments in favour of the legality of the atomic tests are summed up below in the words of McDougal and Schlei:

> The factors most relevant for appraising the United States claim are that it is for a purpose much honored in world prescription, that it asserts the least possible degree of authority necessary to the achievement of its purpose, that it is limited both in area and in duration to the minimum consistent with its purpose, that the area which it affects is of relatively slight importance to international trade and fishing, and that it is asserted in a context of crises which makes its purpose of paramount importance to all who value a free world society.
>
> The claim of the United States is in substance a claim to prepare for self-defence. [57]

Moreover, as Arthur Dean, Chairman of the United States Delegation at the 1958 Conference on the Law of the Sea, stated in his testimony before US Senate Committee on Foreign Relations, there was nothing in the 1958 conventions about prohibiting the

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55. McDougal and Schlei, n. 11, p. 634.

56. See Mouton, The Continental Shelf (Nijhoff, the Hague, 1952), pp. 185-7.

57. McDougal and Schlei, n. 11, p. 812.

use of the high seas for the testing of nuclear or other dangerous scientific devices.

However, the above arguments to prove the reasonableness of the limitation on the freedom of navigation do not carry conviction beyond doubt. As Tao Cheng remarked:

> This (U.S. insistence on carrying out nuclear tests in the Pacific) not only seriously violates the UN Charter, but crudely undermines the universally acknowledged principles of international law concerning freedom of navigation on the high seas. The high seas do not belong to any country and no country has the right to occupy part of the high seas. 58

Emanual Margolis also argued:

> Freedom of the seas is an absolute freedom to use the seas except to the extent that international custom and treaties have modified it in order to meet the needs of a continually 'smaller' and more dynamic international community. 59

After affirming that the only derogations permitted from this absolute principle are either the general police powers to maintain order on the high seas or special police powers created by special treaties, he declares:

> No 'general police power' can be found to justify fencing off from maritime and air traffic of other nations hundreds of thousands of square miles of open sea and air space including waters forming 'a useful route of international maritime traffic. 60

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58. Tao Chong, "Communist China and the Law of the Sea", American Journal of International Law, vol. 63 (1969), p. 64.

59. E. Margolis, "The Hydrogen Bomb Experiments and International Law", Yale Law Journal, vol. 64 (1955), p. 634.

60. Ibid.

As to the justification of "reasonableness" because of self-defence and military preparedness, the hollowness of the argument becomes apparent when the case of French nuclear tests is examined. If it was legally permissible for the USA to conduct the tests in order to achieve balance of power or rather "balance of terror" with the USSR, there is no justification for denying the possession of a national nuclear deterrent to every State.[61] But if this is accepted and if every nation had the right to test its own nuclear arsenal in the Pacific Ocean, would there be any "regime of the High Seas" left for peaceful uses?[62]

In fact the argument of self-defense is, to use Gidel's words, "nothing more than an application of the only too famous theory of 'necessity' which is the very negation of all international law".[63]

It is submitted that the limitation on freedom of navigation on account of nuclear tests on the high seas is not reasonable, and hence not justifiable.

It may be pertinent to point out here that during the 1958 Conference on the Law of the Sea, the Soviet proposal which read; "States are bound to refrain from testing nuclear

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61. Though the Nuclear Non-Proliferation Treaty, banning Nuclear Weapons Tests in the Atmosphere, in outer space and under water was signed at Moscow on 6 August 1963 between the USA and the USSR and a number of countries also appended their signatures to it, some of the countries which have not signed it are France, China and India.

62. D'Amato, n. 50, p. 75.

63. Gidel's Memorandum, n. 2, p. 8.

weapons on the high seas",[64] was overwhelmingly rejected by the Conference. Instead the Indian proposal which was supported by the USA was passed by the Conference. It reads:

> Recognizing that there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas.
>
> Recognizing that the question of nuclear tests and production is still under review by the General Assembly under various resolutions on the subject and by the Disarmament Commission, and is at present under constant review and discussion by the Governments concerned.
>
> Decides to refer this matter to the General Assembly of U.N. for appropriate action. 65

As the Conference failed to specify anything on the legality of the tests, and in the absence of any conventional law on the point, we have to fall back upon customary law. As we have already seen, as these tests fail to meet the criterion of "reasonable limitation" on the freedom of navigation, they cannot be justified. It is hoped that the International Court of Justice will give an authoritative pronouncement on the subject in the cases Australia V. France, and Newzealand V. France pending before it.

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64. UN Doc. A/Conf.13/C.2/L.30.

65. UN Doc. A/Conf.13/L.56.

Chapter IV

FREEDOM OF NAVIGATION IN TERRITORIAL SEA

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FREEDOM OF NAVIGATION IN TERRITORIAL SEA

The Concept of Territorial Sea[1]

Even as the doctrine of the freedom of navigation on the high seas came to be accepted, the concept of territorial sea also gained acceptance in international law. Although the practice of appropriating large parts of the high seas came to be abandoned by the States, they found it necessary to have jurisdiction over some area of the sea near their shores for their protection and security. It would be unsafe and impracticable to permit the presence of foreign vessels right near their shores. It came to be generally recognized that every coastal State must have a right to exercise jurisdiction over some extent of the neighbouring sea for its own protection. As Elihu Root explained:

> The sea became, in general, as free internationally as it was under the Roman Law. But the new principle of freedom, when it approached the shore, met with another principle, the principle of protection; not a residuum of the old claim, but a new independent basis and reason for modification, near the shore of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects

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1. The term "territorial waters" though more prevalent is purposely not being used. As the International Law Commission pointed out, this term is often used to describe both internal waters only and internal waters and territorial sea combined. This might lead to confusion. For the same reason, the Law of the Sea Conference held at Geneva in 1958 used the term "territorial sea". Some writers like Oppenheim have used the term "maritime belt" to connote the same idea.

> and citizens against attack, against invasion, against interference and injury.... This is the basis and the sole basis on which is established the territorial zone that is recognised in international law of today. 2

Even Grotius, father of the doctrine of freedom of the seas, admitted that a State ought to acquire sovereignty over parts of the sea "in regard to territory, as and when those who sail on the coasts of a country may be compelled from the land, just as if they were on the land".[3] This idea was given a concrete shape by Cornelius Von Bynkershoek, a judge of the Supreme Court of Appeal of Holland. Since the basis of a coastal State's claim to a belt of sea was the principle of protection, its extent was supposed to be measured by the power of the littoral sovereign.[4] Bynkershoek declared, "The dominion of the land ends where the power of the arm terminates". Translating the idea into practical terms, he stated that the territorial dominion of the State extended as far as projectiles could be fired from the shore. This was the origin of the famous "cannon-shot" rule. Fulton justified the cannon-range by the picturesque simile; "it was the rule that the sea should salute the land and the range of guns determined the limit

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2. Arguments of Elihu Root, in XI Proceedings, North Atlantic Fisheries Arbitration, p. 2006; as quoted in Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York, G.A. Jennings, 1927), p. 6.

3. Hugo Grotius, De Jure Belli Ac Pacis; as quoted in Jessup, n. 2, p. 6.

4. R.P. Anand, "'Tyranny' of the Freedom-of-the Seas Doctrine", International Studies, vol. 12, no. 3 (1973), p. 419.

within which the salute ought to be rendered.[5] As the range of the cannon was supposed to be one marine league or three-miles at that time, the breadth of the territorial sea came to be generally regarded as three nautical miles.[6]

Giving the rationale for the acceptance of the concept of a territorial sea Colombos pointed out that: (1) The security of the State demands that it should have exclusive possession of its shores and that it should be able to protect its approaches; (2) for the purpose of furthering its commercial, fiscal and political interests, a State must be able to supervise all ships entering, leaving, or anchoring in its territorial waters; and (3) the exclusive exploitation and enjoyment of the products of

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5. Thomas W. Fulton, The Sovereignty of the Sea (London, 1911), p. 577.

6. It may be pointed out here that though many big maritime Powers like USA and UK have adhered to three-mile limit of the breadth of the territorial sea, it is not accepted as a general rule of International Law. The 1930 Hague Conference failed to reach agreement on a uniform limit. The International Law Commission which was seized of the problem from 1950 to 1956 could only note in its Commentary on the articles prepared by it in 1956 that it was an "incontrovertible fact" that there was no uniformity as regards the three-mile limit of territorial sea; that "the extension by a State of its territorial sea to a breadth between three and twelve miles was not characterized by the Commission as a breach of international law; and that "international law did not justify an extension of territorial sea beyond twelve miles". The position remained undecided at the two UN Conferences on the Law of the Sea held in 1958 and 1960.

Recently, there has been a clear trend towards extension of the breadth of territorial sea. The number of States claiming 12-miles territorial sea has increased from 13 in 1960 to 52 in 1973. Another 15 States have fixed the limits of their national jurisdiction at anything from 18 to 200 miles. However, it is important to note that there are still 26 States, including most of the big maritime Powers who adhere to the three-mile formula.

the sea within a State's territorial waters is necessary for the existence and welfare of the people on its coasts.[7]

Nature of Jurisdiction in Territorial Sea

Article I of the Convention on the Territorial Sea and the Contiguous Zone of 1958 lays down:

> (1) The sovereignty of the State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.
>
> (2) The sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

By customary as well as conventional international law, the State enjoys and exercises the same kind of sovereign rights in the territorial sea as it does within its land territory. Earlier, some writers[8] denied the sovereign jurisdiction of the coastal State in its territorial sea and conceded to it only certain limited powers of control and jurisdiction in the interest of the safety of the coast. However, a preponderant majority of writers have come to regard it now as part of the territory of the State and hence subject to its sovereignty. The practice of the States also agrees with this view. Thus, in the Air Navigation Convention of 1919, the contracting parties defined State territory as including, inter alia, the territorial waters adjacent thereto. Para 1 of Article I of the Convention on the Territorial Sea and Contiguous Zone,

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7. C. John Colombos, The International Law of the Sea (London, 1959), edn. 4, p. 74.

8. See L. Oppenheim, International Law, Vol. I (ed. H. Lauterpacht) (London, 1967), edn. 8, p. 487, footnote 3.

quoted above, leaves no room for doubt in this respect.

However, as Para 2 of the above quoted Article declares: the sovereign rights of the State in its territorial sea are not unlimited. They are to be exercised in conformity with the provisions of international law and the limitations imposed by the Convention. The most important limitation on the sovereignty of the State is the right of innocent passage through territorial sea guaranteed to all the other States by Article 14 of the Convention.

Innocent Passage

Freedom of navigation on the high seas would loose much of its utility if the littoral State can ban the passage of ships through its territorial sea. The inclusive interest of the world community in freedom of navigation and the exclusive interest of the littoral State in protecting its shores are sought to be harmonized through the concept of innocent passage. As Judge Jessup remarks:

> The right of innocent passage seems to be the result of an attempt to reconcile the freedom of navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral States a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas. As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law. 9

Similarly Oppenheim states:

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9. Jessup, n. 2, p. 120.

> It is the common conviction that every State has by customary international law, the right to demand that in time of peace, its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the open sea, for without this right navigation on the open sea by vessels of all nations would in fact be an impossibility. 10

The customary right of innocent passage first received the stamp of conventional law in the Barcelona Convention of 1921 on Freedom of Transit. Article 2 of this Convention provides that the contracting States "will allow transit in accordance with the customary conditions and reserves across their territorial waters".[11]

A consequence of the right of innocent passage is not only that the coastal State cannot normally stop the passage of the ships of other States, but also that no State can levy tolls for the mere passage of foreign vessels through its territorial sea.[12] Although the littoral State may spend a considerable amount of money for the construction and maintenance of lighthouses and other facilities for safe navigation within its territorial sea, it cannot make foreign vessels merely passing through those waters pay for such outlays. It is only when foreign ships cast anchor within the territorial belt or enter a port that they can be made to pay

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10. Oppenheim, n. 8, pp.

11. 7 League of Nations Treaties Series, 13, 27; as quoted in Marjorie M. Whiteman, Digest of International Law, Vol. II (Washington, 1965), p. 346.

12. Article 18 of the Convention on Territorial Waters and Contiguous Zones signed at Geneva in 1958. UN Doc. A/Conf. 13/L.52.

dues and tolls by the littoral State.

Meaning of Innocent Passage

Though the right of innocent passage is firmly established in international law, there is little unanimity as to the meaning of "innocent passage", and as to the kind of vessels which enjoy this right. The Hague Codification Conference of 1930 discussed the problem at length but could not come to a conclusive decision. The International Commission was also seized of the problem. In the 1958 Conference some sort of agreement was reached, but it was worded in such vague and ambiguous terms that States have been giving different interpretations to it. At the UN Committee for the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, which has been holding its discussions since 1969, the problem of the meaning of the right of innocent passage has again come up for discussion.

"Passage" has been defined in Article 14 paragraph 2 of the Geneva Convention on the Territorial Sea and Contiguous Zones as follows:

> Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters. 13

The inclusion of journeys for entering or leaving a port in the concept of 'passage' as defined above, was not achieved without opposition. At the Hague Codification Conference in 1930, Sir Maurice Gwyer, the British representative,

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13. UN Doc. A/Conf. 13/L.52.

and Hunter Miller, the Chairman of the US Delegation, objected to the inclusion of such journeys in the concept of "innocent passage". In the words of Hunter Miller:

> The right of innocent passage is a right of passage which is not connected with entrance to a port or with departure from a port; it is a right, in other words, of navigating the territorial waters for the purpose only of passing through them, from a place outside the jurisdiction of the State in question to another place outside that jurisdiction. 14

This position was objected to by the delegates of Belgium, Denmark, Norway, Japan, and Germany.[15]

The International Law Commission, however, favoured the inclusion of transit to and from the port of a State in the word 'passage'. This viewpoint was strongly criticized by Jessup. Commenting on the 1954 report of International Law Commission, he said:

> The result of these three paragraphs seems to be that a vessel passing through territorial waters enroute to or from a port of the coastal state is considered to be exercising a right of innocent passage ... [but] the jurisdictional rights of a coastal state are different in the two cases, exercise of jurisdiction over ships entering or leaving ports being in many instances reasonable or even necessary, while such exercise over a vessel in innocent passage could not be justified. 16

However, the International Law Commission in its final draft submitted in 1956,[17] upheld its earlier view and this was

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14. Quoted in Whiteman, n. 11, p. 360.

15. Ibid., p. 351.

16. Philip C. Jessup, "The International Law Commission's 1954 Report on the Regime of the Territorial Sea", American Journal of International Law, vol. 49 (1955), p. 226.

17. UN Doc. A/3159 (1956).

incorporated in Article 14 paragraph 2 of the Convention as quoted above.

'Passage' is essentially a term connoting movement and, therefore, the right of innocent passage will not be applicable to vessels which put anchor or otherwise remain stationary in the territorial sea. But Article 14 paragraph 3 of the Convention provides:

> Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress. 18

Another ticklish question concerns the meaning of the term "innocent". Article 14, paragraph 4, of the Geneva Convention defines it as follows:

> Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law. 19

The concept of "innocence" passed through many vicissitudes before this meaning was given to it. The 1930 Hague Codification Conference defined it in the negative form by declaring what makes the passage non-innocent. It said:

> Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State. 20

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18. UN Doc. A/Conf. 13/L.52.

19. Ibid.

20. Article 3 of the draft on "the Legal Status of the Territorial Sea", prepared by the Second Commission of the 1930 Hague Conference; as quoted in Whiteman, n. 11, p. 353.

The second Report of the International Law Commission prepared by Francois and submitted in 1952, contained an identical provision.[21] At the sixth session of the International Law Commission in 1954, Sir Hersch Lauterpacht proposed that 'public policy' be replaced by the word 'law', which would have reference to "such national law as was consistent with international law", and which would include and permit the deletion of the phrase "fiscal interests".[22]

The final draft prepared by the Commission in 1956 said:

> Passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law. 23

The International Law Commission omitted the expression 'public policy' because of its vagueness. It also did not deem it essential to specifically mention the "fiscal interests of that State" which would, in any case, be covered by a more general expression. The Commission made it clear, however, that passage of ships using the territorial sea for the express purpose of defeating import and export controls and contravening the customs regulations of the coastal State (hovering ships) could not be regarded as innocent.[24]

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21. UN Doc. A/CN.4/53 (1952), p. 34.

22. UN Doc. A/CN.4/SR. 262, 1 Yearbook of International Law Commission, 1954, p. 104.

23. Article 15, paragraph 3 of the draft Articles prepared by International Law Commission at its eighth session 1956. UN Doc. A/3159 (1956).

24. Ibid., p. 19.

At the UN Conference on the Law of the Sea at Geneva in 1958, a number of amendments were proposed to this article. In broad perspective, two contrasting attitudes seemed to underlie the various proposals for amendment. On the one hand, the United States and others sought to restrict the discretion of the coastal State by proposing that the sole test for determining the innocence of passage be the security of the coastal State.[25] As the US delegate, Yingling said, his delegation did not regard the word "security" as relating to economic or ideological security.[26] The US proposal on the meaning of innocent passage also attempted to restrict coastal State's discretion by further providing in a separate sentence, that "such passage shall take place in conformity with the present rules". The other viewpoint which was expressed in the eight-power proposal of the Latin American States[27] tended to emphasize the desirability of giving the coastal State a wide discretion. The suggested test of innocence would be whether passage was prejudicial to the "interests of the coastal State"; thereby giving unlimited discretion to the

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25. UN Doc. A/Conf.13/C.1/L.28/Rev.1. The US proposal stated: "Passage is innocent so long as it is not prejudicial to the security of the coastal State. Such passage shall take place in conformity with the present rules". UN Conference on the Law of the Sea, Official Records, vol. III, p. 216.

26. UN Conference on the Law of the Sea, Official Records, vol. III, pp. 82-83, para 22.

27. UN Doc. A/Conf.13/C.1/L.74. The proposal put forward by Chile, Ecuador, Haiti, Panama, Peru, Uruguay and Venezuela suggested the insertion in the US revised amendment of the words "or the interests" between the words "security" and "of the coastal State". Ibid., p. 86, para 4.

coastal State to determine what those interests might be. As the representative of India remarked in the General Assembly:

> The right of innocent passage, so-called, actually means that, first of all, one must prove innocence. Innocence depends upon the character of the party claiming the passage, it depends upon the purpose of the passage, and also upon the freight that is carried. 28

The delegate of Italy challenged India's opinion and affirmed:

> This interpretation would nullify the rule of innocent passage, since it is obvious that, if it were valid, the littoral State would no longer have the duty of justifying their refusal of passage to a vessel on specific occasions and for specific reasons; rather it would rest with the vessel to prove that its passage was innocent. 29

In the end, the US proposal, as amended by Indian suggestion inserting after the words "prejudicial to" the phrase "the peace, good order or",[30] was accepted at the Conference. As Gross has rightly pointed out:

> The text as adopted clearly puts the burden on the coastal state to show that the passage itself, rather than the passage of a particular ship, its purpose or cargo, was prejudicial to the stated values of the coastal state.... It represents a stage in the struggle for greater measure of objectivity and a corresponding reduction in the degree of subjectivity which generally characterizes the rules regarding innocent passage formulated by the International Law Commission. 31

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28. GAOR, session 11, plen. mtg 665, p. 271.

29. Ibid., p. 1287, para 51.

30. UN Doc. A/Conf. 13/C.1/L.73, p. 84, para 3.

31. L.M. Gross, "The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba", American Journal of International Law, vol. 53 (1959), p. 582.

During the discussions in the Sea-bed Committee also, the emphasis has been at eliminating the subjective criterion in determining whether a particular passage is or is not innocent Draft Articles relating to passage through the Territorial Sea submitted by Fiji to Sub-Committee II[32] seeks to apply an objective test in determining what acts are in fact considered to be prejudicial to the peace, good order and security of the coastal State. It enumerates 10 acts which if committed by any vessel would make its passage non-innocent.[33] Until some such exhaustive proposal is accepted, the presence of the subjective element cannot be ruled out. And if the subjective element

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32. UN Doc. A/AC.138/Sc.II/L.42 and Corr. 1, 19 July 1973.

33. Article 3, paragraph 2 of the Draft mentions the following acts, which if engaged in by any vessel in the territorial sea of a foreign State would make its passage non-innocent.

    (a) any warlike act against the coastal or any other State;

    (b) any exercise or practice with offensive weapons of any kind;

    (c) the launching or taking on board of any aircraft;

    (d) the launching, landing or taking on board of any warlike device;

    (e) the embarking or disembarking of any person;

    (f) any act of espionage affecting the defence or security of the coastal State;

    (g) any act of propaganda affecting the security of the coastal State;

    (h) any act of interference with any systems of communication of the coastal State;

    (i) any act of interference with any other facility or installation of the coastal State;

    (j) any other activity not having a direct bearing on passage.

    Ibid.

cannot be dispensed with, there is no reason why the discretion of the coastal State should not be relied upon. As the delegate of Indonesia, Djalal, very rightly pointed out during the discussions in Sub-Committee II of the Sea-Bed Committee:

> Those delegations which had reservations about the concept of innocent passage had expressed fears that coastal States might use subjective criteria for determining whether a passage was innocent. It should be pointed out, however, that passing ships might also use subjective criteria in deciding that their passage was not prejudicial to the coastal State. 34

He had earlier asserted at the meeting of Asian-African Legal Consultative Committee that:

> Finally ... the coastal State should have the last word in saying whether a certain passage was innocent or not, for the simple reason that in the last analysis, it was its vital national interest - security, economic or political - which was seriously at stake. 35

There is little doubt that apart from military threats or activities by a passing ship which are clearly prejudicial to the peace, good order and security of a coastal State which make the passage non-innocent, there are other factors which may pose a threat to its economic or political well-being. An illustration of the point is the passage of super-oil tankers through the territorial sea, especially if the waters are shallow at that point. In case of an accident, such oil-tankers can cause havoc to the ecology and economic life of the coastal State. Otherwise also, oil-spills from the tankers can pollute

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34. UN Doc. A/AC.138/SC.II/SR.60, 4 April 1973, pp. 190-2.

35. Asian-African Legal Consultative Committee, Vol. II, Lagos Session, 1972, pp. 360-1.

the waters and adversely affect coastal fisheries. It was for this reason that Malaysia and Indonesia by their Declaration of 16 November 1971 declared the passage of oil-tankers bigger than 200,000 tons, through the Malaccan Straits which are a part of the territorial sea of the two countries, as non-innocent. As admiral Sudamo of Indonesia said on 19 May 1972:

> Every nation has the right to protect its territorial waters from use by other countries which could endanger the interest of its people, as by causing water pollution and damaging off-shore exploration and fishing industries. This will surely happen if heavy ships above 200,000 tons pass through the waterway which is shallow in several parts. 36

The passage of nuclear-powered vessels is another source of threat to the "peace, good order and security" of the coastal State. Over and above the catastrophic results which will inevitably follow if such a vessel is involved in an accident, the very presence of such vessels of a not too friendly country can pose a threat to the security of the coastal State. That is why in most of the proposals put forward in the Sea-bed Committee in 1973, the passage of such ships requires previous authorization of the coastal State.[37]

Another point that was raised by the seizure of USS Pueblo[38] by North Korea is whether the passage of a vessel

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36. Working People's Daily, 21 May 1972.

37. See Fiji's Proposal - UN Doc. A/AC.138/SC.II/L.42, 19 July 1973; Eight Power Proposal - UN Doc. A/AC.138/SC.II/L.18, 27 March 1973.

38. USS Pueblo, a US naval vessel, ostensibly on oceanographic research mission, but actually gathering intelligence data by electronic devices, was seized by North Korea on

...contd. on next page

conducting electronic surveillance of the coastal State can be termed as innocent. During the Proceedings of the American Society of International Law in 1969, Aldrich, the US Under Secretary of State was questioned on the point by Lissitzyn who asked:

> Is it his view that in time of peace a State has the right of innocent passage through the territorial sea of another state for the deliberate purpose of conducting electronic reconnaissance of the territory of that State? 39

Aldrich replied:

> I can see the argument that, since visual observation is a normal part of passage and has never been thought to make an otherwise innocent passage non-innocent, similarly, electronic observation does not make a passage which would otherwise be innocent, non-innocent. ... I do not think ... that a coastal State could legitimately say that, 'you may not turn spy glasses towards our coast when you are engaged in passage. 40

However, it is extremely doubtful if coastal States would tolerate such surveillance of their coasts in the name of freedom of navigation.

Fishing vessels enjoy the right of innocent passage only if they observe the laws and regulations of the coastal

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(contd. from previous page)

> 23 January 1968. The exact position of the ship at the time of the seizure was, according to US sources, 16.3 nautical miles from the mainland of North Korea, and therefore, the vessel was on the high seas. But North Korea claims that it was within its territorial sea. See G.H. Aldrich, "Questions of International Law Raised by the Seizure of the USS Pueblo", Proceedings of the American Society of International Law, vol. 63 (1969), pp. 2-6.

39. Aldrich, n. 38, p. 4.

40. Ibid., pp. 4-5.

State. Most of such laws require that these vessels should secure their fishing gear and equipment while in innocent passage. This precaution is taken to minimize the chances of unauthorized fishing by foreign vessels in the territorial sea. Hence Article 14 of Geneva Convention provides:

> Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea. 41

Article 14, paragraph 6 states:

> Submarines are required to navigate on the surface and to show their flag. 42

This requirement is also to be fulfilled by commercial submarines. In the sub-Committee II of the Sea-Bed Committee, Fiji has suggested in its proposal that submarines could also travel in the territorial sea under water and without showing their flag if they give prior notification of their passage to the coastal State.[43]

Duties of the Coastal State

As a concomitant of the principle of freedom of navigation the coastal State is required not to obstruct navigation through its territorial sea. McDougal and Burke point out:

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41. UN Doc. A/Conf. 13/L.52.

42. Ibid.

43. UN Doc. A/AC. 138/SC.II/L.42 and Corr. 1, 19 July 1973, Article 6, para 1.

> Because, in varying degree, the territorial seas of coastal states must be utilized in this transportation and communication, the community is also concerned that passage through these areas be preserved free of undue coastal restrictions. 44

This is ensured through Article 15 of the Geneva Convention on the Territorial Sea and Contiguous Zones which declares:

> 1. The coastal State must not hamper innocent passage through the territorial sea.
>
> 2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea. 45

The positive duty to which the coastal State is subject in this provision should be contrasted with the more general and passive duty expressed in the Hague draft: "A coastal State may put no obstacle in the way of the innocent passage of foreign vessels in the territorial sea".[46] The change in the measure of duty incumbent on the coastal State is a consequence of the decision of the International Court of Justice in the Corfu Channel Case.[47] Referring to the failure of the Albanian Government to notify the British warships of the existence of mines in its territorial waters, the Court declared:

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44. McDougal and Burke, The Public Order of the Oceans (Yale University Press, 1962), p. 185.

45. UN Doc. A/Conf. 13/L.52.

46. Reproduced in American Journal of International Law, vol. 24 (Supp. 1930), p. 185.

47. The case is discussed in detail in the next chapter. See text of footnotes 15-18.

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based ... on certain general and well recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. 48

Rights of the Coastal States

In order that the coastal State may preserve its 'peace, good order and security', it is vested with certain rights to regulate and even to prevent under certain circumstances the innocent passage of foreign vessels through its territorial sea. Article 16 paragraph 1[49] empowers the coastal State if it finds that a particular passage by a foreign vessel is not innocent - and it has the right to decide the issue at least in the first instance - to "take the necessary steps in its territorial sea to prevent [such] passage". Paragraph 3 of the same Article goes much further and authorizes the coastal State:

> without discrimination amongst foreign ships [to] 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.

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48. The International Court of Justice Report (1949), p. 22.

49. UN Doc. A/Conf. 13/L.52.

This article may be contrasted with Article 17, paragraph 3 of the final draft prepared by the International Law Commission at its eighth session in 1956. It lays down:

> The coastal State may suspend temporarily in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of the rights referred to in paragraph 1. 50

When this article was discussed at the UN Conference on the Law of the Sea in 1958, the Netherlands, Portugal, the UK and the USA moved an amendment[51] to remove the strictly subjective power of the coastal State which might deem anything a threat to its security, and to substitute an objective standard allowing suspension of innocent passage only if such suspension was necessary for the protection of the State's security. This was objected to by the Indonesian delegate who commented:

> Given the absence of an independent organ which could arbitrate in the matter of the application of an objective rule, the only practical possibility was to maintain a subjective criterion as contained in the International Law Commission's draft. The coastal State should certainly substantiate any action it might take, but it undoubtedly had the right to initiate action at its own discretion. 52

The Soviet and Indian delegates supported this view. But in the end, the four-power proposal as amended by Greece[53] was

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50. UN Doc. A/3159 (1956). Emphasis added.

51. UN Doc. A/Conf.13/C.I/L.70, reproduced in UN Conference on the Law of the Sea, Official Records, vol. III.

52. UN Conference on the Law of the Sea, Official Records, vol. III, p. 94, para 20.

53. The Greek proposal was to insert after the word "may" and before the word "suspend", the words "without discrimination". UN Doc. A/Conf.13/C.I/L.31, quoted in ibid., p. 79, para 6.

accepted. The Greek amendment which added the phrase "without discrimination amongst foreign ships", further reduced the possibility of arbitrary action by littoral State against the ships of a particular State.

The coastal State has the right to make rules and regulations for the passage of foreign vessels through its territorial sea, and Article 17 of the Geneva Convention makes it obligatory for the passing ships to observe them. It states:

> Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation. 54

The International Law Commission mentioned several examples of areas in which the coastal State might make regulations. Some of them are:

(i) The safety of traffic and the protection of channels and buoys;

(ii) The protection of the waters of the coastal State against pollution of any kind caused by ships;

(iii) The conservation of the living resources of the sea;

(iv) The rights of fishing and hunting and analogous rights belonging to the coastal State;

(v) Any hydrographic survey;

(vi) Use of national flag;

(vii) Observance of rules relating to security, customs and health regulations; and

(viii) Use of the route prescribed for international navigation. 55

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54. Yearbook of International Law Commission, 1956, Vol. II (New York, 1959), p. 274.

55. Ibid.

However, the regulations to be made by the coastal State have to be in accordance with the provisions of the Convention and international law. It cannot make the regulations so crippling that it obstructs the innocent passage of the ships.

Jurisdiction of the Coastal State

As sovereignty of the State extends to its territorial sea, it may exercise jurisdiction over the ships passing through it. It is important to note that such jurisdiction can be exercised only on merchant ships or government-owned ships engaged in commercial activities.[56] Other government ships enjoy immunity from the local jurisdiction. If any warship fails to comply with the regulations of the coastal State, the latter can only require the ship to leave the territorial sea.[57]

In the case of merchant-ships, the flag-State's right of jurisdiction is given due consideration. Hence para 1 of Article 19 of the Geneva Convention on Territorial Sea and Contiguous Zones provides;

> The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through its territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:-
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

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56. Article 21 of the Geneva Convention on Territorial Sea and Contiguous Zones, n. 26.

57. Article 23, n. 26.

(c) If the assistance of the local authorities has been requested; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

To sum up, in the words of Jessup:

> The local sovereign is not concerned with events occurring on passing vessels when the effects and consequences of such events are confined to the vessel itself. On the other hand, it seems generally, to be admitted, when the interests of the local state are affected, that there is no magic in the right of innocent passage which nullifies the normal powers of the state owning the territorial waters. To the local state, therefore, must always be left the right to judge for itself whether its interests are involved. 58

In case of civil jurisdiction, the rights of the coastal State are circumscribed. It cannot stop or divert a foreign ship for the purpose of exercising civil jurisdiction in relation to a person on board the ship. Nor can it levy execution save only in respect of obligations or liabilities assumed in course of the voyage.[59] In case of ships proceeding to or coming from the port or internal waters of the coastal State, the jurisdiction is greater.

Right of Innocent Passage for Warships

Another controversy is whether foreign warships have the right of innocent passage through the territorial sea or is it only a courtesy extended to them by the littoral State. Practice of States shows a divergence on the point. Whereas some big maritime Powers like the UK, the USA, etc. regard it

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58. Jessup, n. 2, pp. 468-9.

59. Article 20, n. 26.

as a right, others like the USSR and most of the States of Afro-Asian bloc require notification and authorization before such passage can take place. The Indian delegate to the 1958 Conference, Sikri said:

> India regarded the passage of warships through its territorial sea as a courtesy, and in practice never refused such passage. But it could not regard such passage as a right and reserved its own right to refuse it. 60

Sometimes, the same State has changed its viewpoint. The USA was one of the staunch supporters of the requirement of prior notification and authorization for the passage of warship at the Hague Codification Conference of 1930. Elihu Root had stated:

> Warships may not pass without consent into this [Territorial Sea] Zone, because they threaten. Merchant ships may pass and repass, because they do not threaten.

By the 1958 Conference on the Law of the Sea, the USA had changed its stand and its delegate, Dean, asserted:

> It was generally recognized and laid down in many authoritative legal texts, that innocent passage of warships through the territorial waters of other States was admissible in time of peace. 62

There is no unanimity among the eminent jurists and writers on the issue. Hall, Jessup, Gidel, Bruel, etc. deny the existence of such right. Hall states:

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60. UN Conference on the Law of Sea, Official Records, vol. II, Plenary Meeting, 1958, p. 108.

61. Jessup, n. 2, p. 120.

62. UN Conference on the Law of Sea, Official Records, vol. II, Plenary Meeting, 1958, p. 69.

> The right of innocent passage does not extend to vessels of war.... The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purpose of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual States; it may often be injurious to third States; and it may sometimes be dangerous to the proprietor of the waters used. 63

Similarly Jessup remarks:

> As to warships, the sound rule seems to be that they should not enjoy an absolute legal right to pass through a State's territorial waters any more than an army may cross the land territory. 64

Gidel expresses the same idea when he says, "The passage of foreign ships of war within the territorial sea is not a right, but a tolerance".[65]

Some other writers like Westlake and Fauchille disagree with this view.[66] Westlake dissents mainly on the ground that the territorial sovereign could very well protect itself from abuse and that an unlimited power of exclusion would subject a belligerent warship to intolerable interruption.

Oppenheim also says:

> ... in practice, no State actually opposes in time of peace the passage of foreign men-of war and other public vessels through its maritime belt. It may safely be stated, first, that a

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63. Hall, International Law (edn. 8 by Higgins, 1924), p. 198; as quoted in Whiteman, n. 11, p. 404.

64. Jessup, n. 2, p. 120.

65. Gidel, Le Droit International Public de La Mer (1934), p. 284 (translation) as quoted in Whiteman, n. 11, p. 405.

66. See Colombos, n. 7, p. 222.

> usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace.... 67

A perusal of the various attempts at codification of international law shows that the controversy regarding the right of innocent passage of warships has still not been conclusively settled. The Report of the Second Commission (Territorial Sea) of the Hague Conference of 1930 adopted the view that actual practice established a right of innocent passage for warships which could be derogated from in exceptional circumstances. In reply to the questionnaire sent by the Conference, fifteen States recognized that warships had a right of innocent passage and only four States, i.e. Rumania, the United States, Bulgaria and Latvia, denied its existence.[68]

The first report of Francois on the regime of Territorial Waters submitted in 1952 contained the exact wording of the Hague Draft. It says:

> As a general rule, Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorisation or notification.... 69

In 1964, the International Law Commission adopted a more liberal text which stated:

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67. Oppenheim, n. 8, p. 494.

68. Corfu-Channel Case Pleadings, Oral Arguments, and Documents, International Court of Justice Report (1950), pp. 292-3.

69. UN Doc. A/CN.4/53, pp. 42-43.

> Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification. 70

However, in 1955 at its seventh session, after noting the comments of certain governments and after generally reviewing the question, the Commission felt obliged to alter its position. It amended the relevant article so as to grant to the coastal State the right to make the passage of warships through the territorial sea subject to prior authorization and notification. The same view prevailed at the eighth session in 1956. Article 24 of Draft prepared by it provides:

> The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 [Rights of Protection of the coastal State] and 18 [Duties of foreign vessels during their passage]. 71

In its commentary, the Commission noted that while a large number of States did not require previous authorization or notification, it could only welcome this attitude. But it did not mean that a State would not be entitled to require such notification or authorization. 72

At the UN Conference on the Law of the Sea in 1958, in the first Committee this Article was subjected to various amendments which sought to eliminate the requirements of notification

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70. GAOR, session 9, Supp. 9, A/2693 (1954).

71. GAOR, session 11, Supp. 9, A/3159, pp. 22-23.

72. Ibid.

and authorisation. These were rejected and the final draft submitted to the Plenary Session was identical with the Commission's text. There, the Danish delegate proposed an amendment[73] which would eliminate the requirement of authorization and only require notification. This was favoured by the majority.[74] But when the Article as a whole was voted upon, it failed to get the necessary two-thirds majority.[75] This left the question of innocent passage of warships in considerable doubt, since no article expressly confirming the right of innocent passage for warships is found in the Convention. The only provision relating to warships is Article 23 which relates to the rights of the coastal State in case a warship fails to comply with its rules and regulations.

It is sometimes argued that since Articles 14-17 providing the right of innocent passage apply to all ships, foreign warships also enjoy this right. Therefore, the actual text of the Convention can warrant the conclusion that warships have the same rights as the other ships, but the proceedings of the conference leave no room for doubt that this was not the intention of the majority of the delegations.[76]

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73. UN Doc. A/Conf. 13/L.39 (1958).

74. UN Conference on the Law of Sea, Official Records, vol. II, Plenary Meeting (1958), p. 67. The amendment was accepted by 45 votes to 27, with 6 abstentions.

75. Ibid., p. 68. The result of the vote was 43 in favour, 24 against, with 12 abstentions.

76. Max Sorensen, "Law of the Sea", International Conciliation, no. 520, November 1958, p. 235.

Be that as it may, it might also be important in this connection to point out that only 44 States are parties to the 1958 Convention out of which eight States entered specific reservations to safeguard their claimed right to subject passage of warship to previous notification and authorization.[77]

Neither has there been any authoritative judicial pronouncement by an International Court. In the Corfu-Channel Case,[78] the Court did not give its views about the right of warships in territorial waters other than Straits. Judge Azevedo, who was the only judge to discuss this broader question said in his dissenting opinion:

> It is evident that all the arguments invoked [in favour of freedom of passage for Warships] are clouded in confusion, at any rate sufficiently to bar the recognition of a custom in accordance with traditional requirements....
>
> In short, the passage of warships through territorial waters is subject to a precarious regime which may be modified, in a reasonable manner, by the coastal State.[79]

In the absence of authoritative judicial pronouncement, we have to rely upon the practice of States to determine whether the warships have a right of innocent passage. As a large majority of States require prior notification and authorization for the passage of such ships, it may be safely concluded that

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77. Bulgaria, Byelorussia SSR, Colombia, Czechoslovakia, Hungary, Romania, Ukranian SSR, and USSR. See UN Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions: List of Signatures, etc. (December 1972), p. 31.

78. See text of footnotes 16-18 in Chapter V of this work.

79. The International Court of Justice Reports (1949).

under customary international law, there is no right of innocent passage for foreign warships, though as a matter of courtesy, permission is always granted by the littoral State for the passage of such ships.

Chapter V

FREEDOM OF NAVIGATION THROUGH INTERNATIONAL STRAITS

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Meaning and Importance of International Straits

Geographically speaking, a strait may be defined as a "contraction of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated at least in that particular place by the territories in question".[1] Thus the essential characteristic of a strait is that it is often the only or the shortest route for navigation from one sea to another. Those straits which lie on international maritime navigational routes are usually referred to as international straits.[2] They are the life-line for international commerce and communication.

Straits have, of course, differing importance for transport according to their location and volume of traffic, and according to whether they connect two parts of the high seas or the high sea and an area of internal waters. Some straits are of vital importance because they are virtually indispensable for ocean transport, no other route being physically or economically possible. The Straits of Gibraltar, the Straits of Bosphorus and the Dardanellas, and the Straits

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1. Erik Bruel, International Straits (1947).

2. For a factual description of various straits throughout the world, see Commander R.H. Kennedy, "A Brief Geographical Study of Straits which Constitute Routes for International Traffic", in UN Conference on the Law of the Sea, Official Records, Vol. I: Preparatory Documents (Geneva, 1958), p.114.

of Tiran, among others, fall in this category. In other instances, the strait may be a convenient but not an indispensable route. The Corfu Channel and the Malaccan straits are an example of this category of straits.

Legal Regime of Straits

A strait may be comprised wholly of the territorial sea of the littoral State or States or a part of it may be territorial sea and a part of it high seas depending upon the width of the strait and the breadth of the territorial sea claimed by the littoral States. If a strait is wide enough to contain a channel of high seas, there is normally speaking no problem of navigation for the vessels of non-riparian States. But if territorial sea claims of the littoral States cover the whole width of the strait or the only navigable channel in the strait lies through the territorial sea, problems do arise as to the nature of the right of passage of the vessels of non-riparian States. Since many of the straits are of crucial importance for international communication, it is generally accepted that navigation through them would be guaranteed and access to them should not be prohibited without specific justifiable cause.[3]

The legal regime of the territorial sea is characterized by the right of innocent passage for the vessels of other States. But the right of innocent passage has become in some respects more a "courtesy" than a right. It is a standard which can be abused if a coastal State interprets it subjectively. Some

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3. Myres S. McDougal and William T. Burke, The Public Order of the Oceans (New Haven, Yale, 1962), pp. 175-6.

States, like Indonesia and Malaysia, have in fact declared the passage of certain types of vessels, such as super oil-tankers and nuclear-powered ships as non-innocent per se.[4] Moreover, the coastal State is within its power to suspend the right of innocent passage or even to prevent the passage if it decides - and it has the right to decide at least in the first instance - the passage to be non-innocent.[5] Hence, for those straits which are fully covered by the territorial-sea claim of the riparian State, the right of innocent passage is regarded as inadequate. Therefore in the various attempts at codification of the Law of the Sea, a special regime is sought to be established for the straits, even if they fall within the territorial sea of the coastal State.

During the nineteenth century when freedom of navigation came to be established, multilateral or bilateral treaties were entered into with regard to some important straits to guarantee the right of passage for merchant men of the signatory States. In some cases, as we shall see presently, this right was extended to the warships also. Thus the Straits of Dardanelles and Bosphorus[6] were opened through the treaty of Kuchuk Kamardji in 1774 which gave unrestricted right to the Russian merchant ships

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4. See generally, the US delegate, the 1972 Committee on the Peaceful Uses of the Sea-Bed. UN Doc. A/AC.138/SC.11/SR.43, pp. 10-13.

5. Article 16, paragraphs 1 and 3 of the Convention on the Territorial Sea and Contiguous Zones, signed at Geneva in 1958. UN Doc. A/Conf.13/L.52.

6. See generally, Yilmaz M. Altug, Turkey and Some Problems of International Law (Istanbul, 1958).

to navigate the Black Sea.[7] In 1829, in a treaty with Russia,[8] this right was extended to all merchant vessels trading with Russia and flying the flag of States not at war with Turkey. At present, passage through these straits is governed by the Montreaux Convention of 1956 which guarantees freedom of passage to merchant-men of all States in time of peace. The warships enjoy this right under certain constraints.

The Sound dues which used to be levied by Denmark on ships passing through the Danish Straits were abolished by the Treaty of Copenhagen in 1857 to which the USA subscribed in 1858.[9]

Other important straits have also been subject to special treaty arrangements. The Magellan Straits are governed by the Treaty between Argentina and Chile of 1881. Passage through the Straits of Gibraltar is regulated by the Anglo-French Declaration of 1904 to which Spain adhered to in 1912 through the Franco-Spanish Treaty.[10]

Without going into the details of these treaties, suffice it to say that all of them endeavoured to establish a legal regime which permits passage of the vessels of all States. This right is enjoyed in a greater measure by the

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7. Ibid., p. 46.

8. Article VII of the Treaty of Adrianople, 14 September 1829, as quoted in McDougal and Burke, n. 3, p. 197.

9. C. John Colombos, The International Law of the Sea (London, 1959), edn. 4, p. 171.

10. V.S. Mani and S. Balupuri, "Malacca Straits of International Law", The Indian Journal of International Law, vol. 13 (1973), p. 456.

merchant ships than by warships.

Legal Regime Applicable to Straits not governed by Special Treaty Provisions

The Montreaux Convention and other Treaties regulating the passage through Straits created important precedent towards the development of the international regime for the Straits. Right of merchant ships to a passage through the Straits came to be recognized with the acceptance of the doctrine of the freedom of the high seas. But passage of warships was a subject of controversy for a long time. In the words of McDougal and Burke:

> There was, however, for a long time a considerable difference of opinion concerning the right of warships to pass through straits, some states and commentators affirming a right of passage free of arbitrary exclusion, and others asserting that the coastal state was competent to exclude warships or, in equivalent action, to require notification and authorization. [11]

At the 1930 Hague Codification Conference, no conclusive decision was reached on the point. Report by the Committee of Experts, drafted by Professor Schucking, stated that it was a "rule of Law" already "established" that straits could never be closed. But Governments replying to the Preparatory Committee's Questionnaire were more reticent on the subject.[12] The Report of the Second Commission contained a provision to the effect: "Under no pretext, however, may there be any interference with the passage of warships through straits constituting a route

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11. McDougal and Burke, n. 3, p. 202.

12. Ibid.

for international traffic between two parts of the high sea".[13] Moreover, the passage of warships was, in Bruel's words, "permitted in practice by all states in time of peace".[14]

The first authoritative pronouncement on the issue of the passage of warships through the Straits came in the Judgement of the International Court of Justice in the Corfu Channel Case.[15] The case was occasioned by a dispute between Albania and the United Kingdom, on the latter's right to send its warships through the Corfu Channel, part of which lies within the territorial sea of the former. In May 1946, two British warships were fired upon by Albanian coastal batteries while the ships were within the Albanian part of the strait. This incident touched off the controversy between the two States: United Kingdom claiming a right to send its warships through the strait, and Albania insisting on prior notification and authorization for the passage of such ships. As the controversy could not be settled through diplomatic correspondence between the two States, United Kingdom decided to test the Albanian attitude by sending its warships through the straits. During the attempted passage on 22 October 1946 through the Albanian part of the strait, two British destroyers struck mines which caused considerable damage and loss of life. In November 1946, the United Kingdom decided to minesweep the Albanian part of the strait and did so against the wishes of the Albanian

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13. Report of the Second Commission, as quoted in ibid., p. 203.

14. Bruel, n. 1, p. 230.

15. International Court of Justice Reports (1949).

Government. The dispute was first referred to the Security Council on whose recommendations it was taken before the International Court of Justice.

The Court explicitly upheld the British claim to a right of innocent passage for its warships. Rejecting Albania's contention that the passage of 22 October 1946 was a violation of its sovereignty, the Court said:

> It is in the opinion of the Court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace. 16

It was clearly assumed as a basis of the Court's decision that the character of the vessel does not determine whether the passage is innocent or not. The significance of this assumption is that prior assertions by writers and Governments that warships had no right of passage probably rested on the belief that the military character of the vessel was in itself inconsistent with the notion of innocent passage.[17]

The Court also noted that the two riparian States, Greece and Albania, did not maintain normal relations, that Greece considered itself technically at war with Albania and that, therefore, Albania considered it necessary to take certain measures of vigilance in the region. In spite of this, the

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16. Ibid., p. 28.

17. McDougal and Burke, n. 3, p. 206.

Court maintained:

> Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization. 18

Whether the coastal State can require notification before the passage of a warship is not clear from the Judgement.

The Court's pronounced preference for freedom of navigation can be deduced from its conception of straits concerning which such a right must be recognized. The main Albanian argument was that Corfu Channel was not an important strait not being a necessary route between open sea areas, and that it was mainly used for local traffic between Corfu and Saranja. Rejecting these arguments, the Court emphasized that "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation".[19] The strait need not constitute an essential or indispensable route; it is sufficient if it is a useful route.

The judgement of the Court made it clear that the coastal authority over passage of warships and other ships is limited to exclusion of non-innocent passage only.

The International Law Commission was greatly influenced by the judgement in the Corfu Channel case. In its 1956 Draft, the Commission recommended that the coastal State could, in exceptional circumstances, suspend temporarily innocent passage

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18. International Court of Justice Reports (1949), p. 29. Emphasis added.

19. Ibid.

through its territorial sea.[20] But it made it clear that this right did not encompass the passage through straits. Article 17, paragraph 4 of the Draft stated:

> There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas. 21

The use of the word "ships" was meant to indicate that the prohibition to suspend innocent passage applied to warships as well as merchant vessels. It may also be noted that the Commission spoke of straits which were "normally" used for navigation. The Commission said in its commentary that "it would be in conformity with the Court's decision to insert the word 'normally' before the word 'used', which was suggested" by the Corfu Channel decision.[22] The Commission did not explain where in the Corfu Channel case, the "suggestion" was found or how was it in "conformity" with the decision. On the other hand, the judgement is "quite explicit in stating that the 'essential criterion' of a strait was geographical, and in rejecting the Albanian argument for an explicit criterion of use".[23]

At the UN Conference on the Law of the Sea at Geneva in 1958, substantial progress was made in the direction of promoting

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20. Article 17, paragraph 3 of the ILC Draft of 1956. UN Doc. A/3159 (1956).

21. UN Doc. A/3159 (1956). Emphasis added.

22. Ibid.

23. McDougal and Burke, n. 3, p. 209.

more 'inclusive' use of the straits and of restricting the authority of the coastal States. This was achieved firstly by the elimination of the word "normally" from the 1956 Draft of the International Law Commission; and secondly, by including those Straits which connect the high sea with the territorial sea of a foreign State in the conception of the type of straits to which the prohibition of suspension is applicable.

The United States delegate to the Conference moved an amendment[24] to Article 17, paragraph 4 of the ILC draft which would have deleted the term 'normally' from it. It was stated that the Corfu Channel decision had not so qualified the word "used". The object of moving the amendment was to assure passage through straits which were actually used and to avoid friction over the concept of 'normal use'. The United Kingdom delegate tabled another amendment[25] which would have had the effect of including straits providing access to ports as subject to the right of innocent passage. Eventually both proposals were combined and the final text was submitted as a Three-Power amendment[26] by the Netherlands, the UK, and Portugal.

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24. UN Doc. A/Conf.13/C.1/L.39, reproduced in UN Conference on the Law of the Sea, Official Records, vol. III, p. 220.

25. UN Doc. A/Conf.13/C.1/L.37, reproduced in Official Records, vol. III, p. 218.

26. The amendment read:
"substitute the following text:
(4) There shall be no suspension of the innocent passage of foreign ships through straits or other sealanes which are used for international navigation between a part of the high seas and another part of the high seas or the territorial waters of a foreign State".

When it was accepted by the Conference, the phrase "other sealanes" was dropped from the above quoted text.
UN Doc. A/Conf.13/C.1/L.57, reproduced as in ibid., p. 231.

Introducing this amendment, Verzijl, the Netherlands delegate declared:

> It was insufficient to declare the high seas open to traffic without also guaranteeing the right of entry into seaports. If the right of access to ports was to be assured to landlocked states, a fortiori, should it be guaranteed to the maritime countries. 27

The phrase "or the territorial sea of a foreign State" which came to be known as 'Aqaba Clause' was included to safeguard the right of Israel for entry to its port, Eilat, through the straits of Tiran and the Gulf of Aqaba which lie within the territorial sea of Egypt and Saudi Arabia. This question had been raised earlier at the discussions of the International Law Commission also. At the 366th Meeting of the Commission in 1956, Special Rapporteur Francois pointed out that paragraph 4 (of the comparable provision, then Article 18) "related to straits between two parts of the high seas, and so did not apply to the Gulf of Aqaba which though open to the high seas on one end, merely gave access to a port at the other".[28] In its commentary, the Commission decided to reserve its position on the issue.

When the question came up before the UN Conference at Geneva, the Aqaba Clause was strongly criticized by, among others, the Arab countries. Opposing the three-Power amendment, Shukairi, the delegate of Saudi Arabia, questioned the legal validity of the changes proposed in the amendment. He said that the amended text no longer dealt with general principles of international

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27. UN Conference on the Law of the Sea, Official Records, vol. III, p. 88.

28. 1 Yearbook of International Law Commission, 1956, p. 202.

law but had been clearly tailored to promote the claims of one State.[29] The Indonesian delegate, Kusumaatmadja, also expressed the view that no right of innocent passage existed in the case of straits connecting territorial sea with the high sea.[30] Even though in his reply to this criticism, Verzijl, the delegate of the Netherlands, could not refer to any specific authority in support of this new insertion, the amendment was adopted in the First Committee by a narrow margin of 31 votes to 30, with 10 abstentions and later endorsed by the Plenary session of the Conference.[31]

Thus, Article 16, paragraph 4 of the Geneva Convention provides:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

An argument that is often advanced against this article is that it is a "new rule". Thus, in an article on the 1958 Conference, Arthur H. Dean, the leader of US delegation to the Conference, said: "The Geneva Conference thus, in a politically charged area, achieved agreement sufficient to write a new and beneficient rule into international law".[32] But even if the

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29. UN Conference on the Law of the Sea, Official Records, vol. III, p. 93.

30. Ibid., pp. 93-94.

31. Ibid., vol. II, p. 65.

32. Quoted in L.M. Gross, "Passage Through Straits of Tiran and in the Gulf of Aqaba", Law and Contemporary Problems, 33(1)(1968), p. 142.

conference created a new rule, as Solomon Slonim points out:

> It was not in any way inconsistent with earlier pronouncements on the subject. Quite simply, there was no earlier pronouncement. In the place of such a vacuum, the Conference, by careful analogy to general principles of law, and bearing in mind the overwhelming practice and declarations of states on the matter, established a rule to govern the case in question. 33

He further adds:

> It was a legal question, even if its implications were political. Codification requires the filling of any gaps - even by creation of new law. In this case, the Conference was doing precisely that. 34

Similarly, Gross affirms:

> There is room for argument whether article 16/4 creates a new rule which would be binding on the contracting states only or whether it merely specifies or particularizes a rule which is deemed implicit in customary international law i.e. the general principle of freedom of the seas and navigation....
>
> In the present submission, the rule does represent a codification of customary international law although it could also be argued that it contains an element of progressive development of the law. 35

To sum up, the 1958 Conference not only reaffirmed the law laid down in the Corfu Channel Case under which the merchant vessels and warships have a right of innocent passage through straits and which cannot be arbitrarily denied by the coastal State, but made it even more liberal. The definition of a strait

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33. Solomon Slonim, "The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea", The Columbia Journal of Transnational Law, vol. 5 (1966), p. 115.

34. Ibid.

35. Gross, n. 32, p. 143.

to which such a regime is applicable was also made wider.

Effect of Extension of Territorial Sea

One of the issues on which the two Geneva Conferences held in 1958 and 1960 failed to arrive at a decision was the breadth of territorial sea. At that time, a large number of countries, including the big maritime Powers like the USA and the UK, adhered to the traditional limit of three miles. But this could not be incorporated in the Convention on Territorial waters mainly because of the opposition of the USSR, the Soviet Bloc, and the Third World Powers.

During the last decade, there has been a spurt of unilateral extensions of the limit of the territorial sea by States. Whereas in 1960 only 13 States claimed a twelve-mile territorial sea, in 1973, the number has risen to 52. Also, another 15 States claim a breadth of 18 to 200 miles for their territorial sea. It can be safely asserted that twelve-mile limit has become the most acceptable limit to a majority of the States. As the USSR delegate, Malik told the Sea-Bed Committee, "The 12 mile limit was recognized by 100 States on the basis of a rational consideration of their own interests and the interests of other countries".[36] Even those States which claim 200 mile limit do so for economic reasons and allow free passage beyond a limit of 12 miles.[37]

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36. UN Doc. A/AC.138/SC.II/SR.68, p. 125.

37. Only three Latin American States, Ecuador, Panama, and Brazil permit only innocent passage and not free passage in the 200 mile territorial sea claimed by them. F.V. Garcia Amador, Latin America and the Law of the Sea, Law of the Sea Institute, University of Rhode Island, Occasional Paper no. 14 (July 1972), p. 2.

One of the effects of this extension of territorial sea limit from three to twelve miles is that many straits which had a channel of high seas in which the traditional freedoms were enjoyed by all States, have become territorial seas subject to the coastal States' jurisdiction. A Study[38] carried out by the US State Department indicates that there are 116 such straits which would be affected by the extension of the territorial-sea limit from three to twelve miles. Most of these straits lie on important international routes. They include, among others, such important waterways as the two Bering Straits, Pohai Strait, Malacca Strait, Lombuk Strait and Strait of Hormus in Asia, Bab-El-Mendeb Straits in Africa; Straits of Gibraltar, Dover Straits, North Channel and Kara Straits in Europe.[39]

Demand for Free Passage in Straits

The big maritime Powers, like the USA and the UK, are not prepared to accept the extension of territorial sea to twelve miles unless it is accompanied by an acceptance of the right of "free passage" through straits used for international navigation. Moore, the United States delegate, said in the Sea-Bed Committee:

> Like other countries, the United States had made it clear that its vital interests required that agreement on a 12-mile territorial sea should be coupled with agreement on free transit through straits used for international navigation;

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38. Geographic Bulletin of the US State Department (1974), see Appendix I.

39. Ibid.

> that position continued to represent one of the basic elements of its national policy, which it would not sacrifice. 40

The right of innocent passage which is provided under the present customary and conventional international law in straits which form the territorial sea of the littoral State, is regarded by these Powers as inadequate. They regard the regime of innocent passage as unsatisfactory because (i) the rules relating to innocent passage of warships are not beyond doubt even under the 1958 Convention on Territorial Sea and Contiguous Zones; (ii) under article 14 paragraph 6 of the Convention, submarines are required to navigate on the surface and to show their flags; (iii) the coastal State is free in the first instance to categorise any passage as non-innocent, e.g. the passage of nuclear-powered vessels or oil tankers, and (iv) there is no right of innocent passage for aircraft through the airspace above the territorial sea.[41] Moreover, the mobility of the naval forces of the big Powers, which they believe is essential for their global diplomacy, is greatly restricted if only the right of innocent passage exists in the straits connecting one sea with another.

Another reason put forward to support their demand for free passage in the straits is that freedom of navigation on the high seas would become meaningless unless there is freedom of transit through straits. As Stevenson, the US Delegate said

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40. UN Doc. A/AC.138/SC.II/SR.68, p. 130.

41. See the statement of the delegate of Ghana, in Asian-African Legal Consultative Committee. Report of the 13th Session held at Lagos (1972), p. 281.

during the deliberations of the Sea-Bed Committee:

> The United States delegation believed that the right to pass through straits should be regarded in law as what it was in fact: an inherent and inseparable adjunct of the freedom of navigation and overflight on the high seas themselves. Without such right of transit, those high sea freedoms would lose much of their meaning if the breadth of territorial sea was to be increased to twelve miles. 42

Making an ocean policy statement on 23 May 1970, President Nixon of the United States emphasized the need for a treaty establishing 12-mile limit for territorial sea and free transit through international straits.[43] To give it a concrete form, the United States introduced in sub-Committee II of the UN Sea-bed Committee a set of Draft articles on the Breadth of the Territorial Sea, Straits and Fisheries.

Explaining the objectives of the Draft, the US observer at the Asian-African Legal Consultative Committee said:

> Some few States are advocating the establishment of new, hitherto unrecognized controls over freedom of movement through some of the most significant arteries of international communication. What the United States seeks is not the creation of any new rights or privileges, but simply the maintenance of existing freedom of navigation and of overflight. 44

Article I of the Draft recognizes the right of the coastal State to establish a breadth of territorial sea no more than twelve miles. Article II states:

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42. UN Doc. A/AC.138/SC.II/SR.8, p. 46.

43. International Legal Materials, 1970, p. 809.

44. Report of the 13th Session of Asian-African Legal Consultative Committee, held at Lagos (1972), pp. 231-2.

(i) In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircrafts in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircrafts through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors so far as ships are concerned, shall include such channels.

(ii) The Provisions of this Article shall not effect conventions or other international agreements already in force specifically relating to particular straits. 45

Elaborating the Draft, the US delegate to the Sea-Bed Committee declared that "the right of free transit proposed by the United States was a limited right i.e. a ship or aircraft exercising that right could only enter a strait, pass through or over it on the most direct course and leave it at the other end. In particular, it was not entitled to engage in activities prejudicial to the security of the coastal State".[46]

In order to safeguard the interests of the littoral State, the Draft further provides that the coastal State has the right but not the obligation to designate corridors suitable for transit. The State could enforce compliance with reasonable traffic safety regulations, but could never use safety regulations as a way of impairing the right of free transit.[47]

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45. UN Doc. A/AC.138/SC.II/L.4.

46. Delegate of the United States, UN Doc. A/AC.138/SC.II/SR.43, pp. 10-13.

47. UN Doc. A/AC.138/SC.II/SR.8, p. 46.

The draft has been, among others, expressly supported by the UK. Its delegate to the Sea-Bed Committee, Simpson said:

> ... if an extension of the territorial sea to 12 mile was generally recognized and agreed, and the number of straits which were entirely territorial was thereby increased, the interest of the international community in unimpeded navigation required the acceptance of the principle of freedom of navigation and over-flight for the purpose of transit through and over straits as established in article II of the draft articles on the breadth of territorial sea, straits and fisheries submitted by the US. 48

Having the same broad strategic interest in the freedom of navigation as the United States, the Soviet Union has adopted an almost similar attitude towards the question of freedom of passage through straits. Stressing the importance of freedom of passage through international straits, Kolesnik, the USSR delegate to the Sea-Bed Committee said:

> The role played by international straits connecting two parts of the high seas, their social functions made it inevitable that the regime of these sea-routes could not and should not be determined by one or two states to the detriment of others. It was common knowledge that over the centuries, customary rules of international law had been established providing for freedom of passage through international straits without any discrimination as to flag. Those rules had later not only been reflected in the works of jurists and statesmen but had been incorporated in a series of international instruments. 49

Kolesnik went on to cite article 7 of the Franco-British Declaration of 8 April 1907 which stipulated that "passage through the straits of Gibraltar should be free".

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48. UN Doc. A/AC.138/SC.II/SR.27.

49. UN Doc. A/AC.138/SC.II/SR.69, pp. 2-5.

He added:

> Although those documents were part of history, the freedom of passage through the straits fixed in them remained unimpaired. 50

USSR submitted draft articles to the Sea-Bed Committee, part I of which stated:

> In straits used for international navigation between one part of the high seas and another part of the high seas all ships and aircrafts in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have in the high seas. Coastal States may designate corridors suitable for transit by all ships and aircrafts through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit the corridors, so far as ships are concerned, shall include such channels. 51

It should be noted that, though Part I of the draft is almost identically worded as article II of the US draft, it differs from the later in that it does not contain the "Aqaba clause". It is so because the Government of the USSR believes that:

> The regime covering straits used for international navigation should not be extended to straits linking the high seas with the territorial sea of any State. Navigation in straits of that kind, such as the straits of Tiran and Pemba, should be governed by the rules for innocent passage. 52

Another feature of the USSR draft is that it does not prescribe the same legal regime for all the straits linking

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50. Ibid.

51. UN Doc. A/AC.138/SC.II/L.7.

52. Statement of Malik, the USSR delegate to the Sea-Bed Committee. UN Doc. A/AC.138/SC.II/SR.58, p. 125.

two parts of the high seas. As Khlestov, the USSR delegate said:

> It went without saying that not all international straits should be measured with the same yardstick. There were straits which had never been used for international navigation and there was all the difference in the world between them and major international waterways which had been freely used for international shipping. 53

As to the legal regime to be applied to straits which do not lie on major international routes, the USSR favours the regime of innocent passage which is provided under the existing international law. But as regards straits used for international shipping and of interest to all countries, it wants to establish a regime of "free passage". Because by their geographical situation, such straits lie off the coasts of a small number of States, such as the United Kingdom, France, Spain, Morocco, Italy, Greece, Malaysia, Indonesia, Singapore, Ethiopia, Yemen, Japan, Australia, and a few others.[54] Refusal to accept free passage would mean, according to the Soviet Union establishing the domination of only 12 to 15 States adjacent to straits over the passage of vessels of some 130 States of the world.[55]

The Soviet Union has defended its draft articles on the plea that closure of important international straits would compel the ships to take a longer route which will add to the shipping charges and increase the prices of commodities. As the USSR observer to the Asian-African Legal Consultative

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53. UN Doc. A/AC.138/SC.II/SR.6, p. 23.

54. UN Doc. A/AC.138/SC.II/SR.83, pp. 26-30.

55. Ibid.

Committee said:

> Limitation on the freedom of passage through straits which could result from the application of the regime of the territorial sea to them would make the ship movement more difficult, be harmful to international navigation and trade, and bring about higher transportation costs as well as increased commodity prices. 56

And this will have adverse effects on the economy not only of countries having sea-going vessels but also of those which had to use foreign ships to carry their cargoes.

Opposition to the Demand for Free Passage

The right of free passage in international straits demanded by the two Super-Powers and other maritime States is unacceptable to the small coastal States. As a vast majority of countries already claims a territorial sea of 12-miles, they are not overwhelmed with the proposals put forward by USA and the USSR accepting these claims. On the other hand, they regard the demand of free passage through straits as an invasion of their territorial sovereignty. These States are convinced that as these straits form the territorial sea of the littoral State, the regime applicable to territorial sea, i.e. that of innocent passage should be applied to these waters.

The raison d'etre of the concept of territorial sea is the security of the littoral State. The States opposing the demand for free passage are afraid that acceptance of free transit through straits which are covered by these territorial seas would adversely affect their security. They are alarmed

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56. Report of the 13th Session of Asian-African Legal Consultative Committee, held at Lagos (1972), p. 299.

at the prospect of permitting foreign nuclear-powered ships and submarines next to their shores. The more the big Powers insist on freedom of navigation and free passage through international straits, the more the smaller Powers become sceptical of the true intentions of those Powers and zealously guard their sovereignty. For, as the delegate of Ghana explained:

> free transit ... would apparently permit complete freedom of passage for warships, nuclear-armed submarines, on the surface or submerged, without notification and irrespective of mission. It would permit freedom of civilian or military flight through the superjacent airspace. Finally it would deprive the coastal State of the power to categorize certain passages, such as those of nuclear-powered vessels and mammoth oil tankers as non-innocent. 57

Moreover, the concept of free passage would apply not only to the territorial sea lying beyond the old 3-mile limit but to the whole of the strait. This would belie the big Power claim that what they seek "is not the creation of new rights or privileges, but simply the maintenance of existing freedom of navigation and overflights".[58]

Christopher Pinto, delegate of Sri Lanka at the Colombo Session of the Asia-African Legal Consultative Committee, stated:

> It is submitted that any attempt to replace the right of innocent passage with the 'free transit' or the 'high seas corridor' concept... is an attempt to erode the traditional rights of coastal States and to subordinate them to the interests of the big maritime Powers. 59

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57. Ibid., pp. 281-2.

58. Ibid., pp. 231-2.

59. Brief Documents on the Law of the Sea, Vol. II, prepared by the Secretariat of the Asian-African Legal Consultative Committee, Colombo Session, 18 to 27 January 1971.

Stressing the risk to the coastal States' security involved in permitting free passage, the delegate of Spain declared that the submerged transit of submarines, particularly if the submarines in question were nuclear-powered or carried nuclear weapons, would leave the coastal State powerless in the face of possible accident.[60] The delegate contended that it was unfair to impose on States bordering straits risks which were related to political and strategic objectives of big Powers entailing a serious threat to their national security, all the more so when such risks were in no way necessary for the sake of the international community as a whole but served the interests of a small group of States. He further asserted that

> new standard [of free passage] would in no way advance peaceful cooperation and trade among peoples, but would, on the contrary promote the deployment of the naval forces of the great Powers. 61

Rejecting the US and USSR proposals, the delegate of Egypt declared:

> ... and yet others who extend their maritime rights of communication to interfere in the domestic affairs of States situated thousands of miles away from their shores are championing a cause of superficial freedom.... Such a freedom which allowed submerged marines, nuclear or otherwise, to pass unseen could not be called anything other than licensing for the spread of terror. 62

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60. UN Doc. A/AC.138/SC.II/SR.6, pp.

61. UN Doc. A/AC.138/SC.II/SR.28, p. 52.

62. Brief of Documents on the Law of the Sea, Vol. I, prepared by the Secretariat of the Asian-African Legal Consultative Committee, Fourteenth Session, New Delhi, 10 January 1973 to 17 January 1973, p. 515.

The threat to the coastal security becomes even more apparent when it is noted that the demand for free passage includes the right of military and civil aircraft to overfly the superjacent airspace. As Ruiz Morales, the delegate of Spain to the Sea-Bed Committee, observed:

> The proposals in question were still more serious with reference to the overflying of straits by military aircraft. The political and strategic motive was even clearer in that connexion, because the amendment to the law which was claimed to be urgent would only benefit military aircraft. 63

Another reason why the demand for free passage is resisted by the smaller States is the fear of pollution. Some States, like Malaysia and Indonesia, have declared the passage of super oil-tankers as non-innocent per se. These States would be powerless to stop the passage of such ships through the straits forming part of their territorial sea if the USSR or the US proposal is accepted. As Admiral Sudomo of Indonesia said on 19 May 1972:

> Every nation has the right to protect its territorial waters from use by other countries which could endanger the interest of its people, as by causing water pollution and damaging off-shore exploration and fishing industries. This will surely happen if heavy ships above 200,000 tons pass through waterway which is shallow in several parts. 64

The problem of pollution of the waters of the Malacca strait, which is the route normally taken by oil-tankers carrying oil from the Middle East to Japan, is becoming more and more acute. It is unlikely that because of hazards of pollution,

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63. UN Doc. A/AC.138/SC.II/SR.42, p. 53.

64. Working People's Daily, 21 May 1972.

the great maritime Powers will cease to build large oil tankers. In October 1972, Japan launched the world's biggest tanker of 477,000 DWT, named Globtik Tokyo.[65]

The USSR draft is unacceptable for the additional reason that it lays down two different regimes, one for straits which are on important navigational routes, and another for those which are not so important for international commerce. Criticizing the reference to the two categories of straits in the USSR proposal, Cuenca, the delegate of Spain observed:

> With regard to the definition of the category of straits that would remain open to freedom of navigation, the USSR representative's statement gave the impression that freedom of navigation increased with the distance of the straits from the coast of the USSR. 66

He pointed out that

> According to a well-known Soviet work on International law, there were four category of straits, firstly those which the USSR regarded as 'historic straits' to which freedom of navigation did not apply; secondly, straits providing passage from an interior sea of the USSR to the high seas, to which such freedom likewise did not apply; thirdly, straits which afforded USSR vessels access to the open sea by passage through the territory of another State which were subject to a regime of greater freedom; and fourthly, straits remote from the coast of the USSR which were subject to a regime of absolute freedom without discrimination. 67

It must be noted here that the USSR claims a territorial sea of 12-miles. It also requires prior notification and

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65. Koji Nakamura, "Spain's Ace is Productivity", Far Eastern Economic Review, vol. 79, no. 8, 26 February 1973, p. 10.

66. UN Doc. A/AC.138/SC.II/SR.28, pp. 52-53.

67. Ibid.

authorization for the passage of foreign warships through its territorial waters. Thus, by putting forward the proposal of free passage in international straits, even if they are only 24-mile wide or less, it seeks to deny these very rights to the littoral States of those straits.

Therefore most of the developing States have put forward the demand that the regime of innocent passage which is applicable to the territorial sea should as at present continue to be applicable to the international straits. As the delegate of China to the Sea-Bed Committee, Shen Wei-Liang affirmed:

> ... straits lying within the territorial waters of a coastal State, still come under the national sovereignty of that State, even if they were often used for international navigation. Permitting innocent passage was not at all the same thing as closing the straits. 68

Referring to the fears of Super-Powers that the regime of innocent passage if applied to international straits might endanger international trade and commerce, Djalal, the Indonesian delegate to the Sea-Bed Committee said:

> The principle of innocent passage was quite capable of ensuring the smooth operation of international navigation. There was no merit to the idea of separating the regime of passage through the territorial sea from that of passage through straits used for international navigation, for such straits were part of the territorial sea. 69

Emphasizing the same point, Warioba, the delegate of Tanzania asserted:

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68. UN Doc. A/AC.138/SC.II/SR.36, p. 21.

69. UN Doc. A/AC.138/SC.II/SR.60, p. 190.

> All were aware that straits were vital for international navigation, and the interests of the international community should be taken into account. His delegation believed, however, that it was the coastal State which should determine the harmonization of its interests and the interests of the international community. International navigation was as important to the coastal State as it was to other States, and his delegation did not believe that any coastal State would disregard the interests of international community. 70

In order to give a concrete form to their demands, the States opposing free passage submitted Draft Articles in Sub-Committee II of the UN Sea-Bed Committee on 27 March 1973.[71] Introducing the Eight-Power Draft, Tolentino, the delegate of Philippines stated:

> The purpose of the proposal was to harmonize two fundamental principles of international law, namely the principle of freedom of navigation on the high seas for the benefit of international community and the principle of the territorial sovereignty of the coastal State. 72

The main feature of the Draft is that navigation through the territorial sea and through straits used for international navigation are dealt with as one entity, since the straits in question form part of the territorial sea of the coastal State. Article 8 of the Draft authorizes the coastal State to designate sea lanes and traffic separation schemes. Articles 15, 17, and 21 empower the coastal State to require prior notification and authorization for the passage of nuclear-

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70. UN Doc. A/AC.138/SC.II/SR.58, p. 137.

71. UN Doc. A/AC.138/SC.II/L.18, submitted by Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen.

72. UN Doc. A/AC.138/SC.II/SR.58, pp. 120-2.

powered ships, vessels carrying nuclear weapons, foreign ships engaged in research and hydrographic survey, and foreign warships. Submarines are obliged to travel on surface.[73] The Draft, thus, seeks to clarify the ambiguities regarding the passage of warships in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zones

Defending these provisions, the delegate of Philippines said:

> In anchoring these considerations to the basic principles of innocent passage, the sponsors had no desire to hamper legitimate international navigation, but they believed that innocent passages regulated, fully met the need of international maritime community. Furthermore the proposals included two fundamental safeguards for peaceful navigation, the rule according to which coastal States were not to discriminate among foreign ships, and the rule of non-suspension of innocent passage through straits forming part of the territorial sea used for international navigation. [74]

The Working Paper submitted by China to the Sub-Committee II of the Sea-Bed Committee on 16 July 1973 contained similar provisions in regard to the international straits.[75] It was based on the premise that "a strait lying within the territorial sea, whether or not it is frequently used for international navigation forms an inseparable part of the territorial sea of the coastal State". Hence it provides for a regime of innocent passage applicable to these straits. In keeping with the Chinese position on the passage of warships through territorial

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73. UN Doc. A/AC.138/SC.II/L.18, n. 71.

74. UN Doc. A/AC.138/SC.II/SR.68.

75. UN Doc. A/AC.138/SC.II/L.34.

sea, it empowers the coastal State to require prior notification and authorization for the passage of such ships.

Evolving a Compromise Formula

Some other proposals which have been submitted to the Sea-Bed Committee overlap the claims made by the two sides and offer some sort of compromise between the positions of the big Powers and the small Powers. The set of Draft Articles prepared by Malta[76] and submitted on 13 July 1973 is one such proposal. In Article 38, it provides that passage through the straits can be suspended by the coastal State in case of reasonable fear of grave and imminent threat to its security, but unless approved by International Ocean Space Institutions these shall lapse after 30 days. As far as the passage of foreign warships is concerned, it states that the coastal State can require three days prior notification for such passage or for the passage of submarines. The aircraft of all States are given the right of overflight over the superjacent airspace, provided three days prior notification is given in case of military aircraft.

Italy submitted another proposal[77] which aims at providing to all ships and aircraft "the same freedom of navigation or overflight as exists on the high seas". However, transit and overflight is to be governed "by the provisions concerning innocent passage in straits which

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76. UN Doc. A/AC.138/SC.II/L.28.

77. UN Doc. A/AC.138/SC.II/L.30.

(i) are not more than six miles wide;

(ii) lie between the coasts of the same State;

(iii) are near other routes of communication between the parts of the sea connected by the straits".

Introducing the draft articles, Stefano D'Andrea, the delegate of Italy, explained the reasons for providing a regime of free passage. He said that trade conducted through such straits was increasing yearly, particularly with the developing countries. So "it would be absurd if in the present state of international relations, these straits were controlled by a small minority of States".[78] However, exceptions were provided because Italy believed that "the right of transit should be exercised only when it was a necessity and no other solution was available".[79]

The Italian proposal has been criticized, among others, by Indonesia and Spain. In addition to their opposition to the provision of free passage, the exceptions to the general rule have also been unfavourably commented upon. The figure of six miles is regarded by Spain as arbitrary. Commenting on the other exceptions, Rech, the delegate of Spain to the Sea-Bed Committee said:

> It was the old idea that some straits were of secondary importance for international navigation. His delegation, however, could not accept the view and agreed with the statement of the Great British jurist, Sir Eric Backett, that the thesis that "there are highways and highways" was unacceptable. 80

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78. UN Doc. A/AC.138/SC.II/SR.66, p. 2.

79. Ibid.

80. UN Doc. A/AC.138/SC.II/SR.67.

Moreover, such a view has already been rejected by the International Court of Justice in the Corfu-Channel case.

Fiji submitted another proposal[81] to the Sub-Committee II of the UN Sea-Bed Committee on 19 July 1973. Its chief merit lies in that while providing for a regime of innocent passage in straits, it has tried to meet some of the objections of the big maritime Powers by eliminating the subjective element from the concept of innocent passage. It attempts to bring in objectivity in determining the innocence or otherwise of a particular passage by enumerating activities which if indulged in by any ship would make the passage non-innocent.[82]

Another feature of this proposal is that it provides for the submerged passage of a submarine if prior notification is given to the coastal State. This provision should go a long way in satisfying the requirement of the big Powers that the submarine should not be compelled to come on surface, while at the same time allaying the fears of the coastal State regarding their security by laying down the requirement of prior notification. Tankers and ships carrying nuclear or other inherently dangerous substances are also required to give prior notification of their passage and to confine themselves to the sea-lanes designated by the coastal State. Nuclear-powered ships were not included in this category because, as Nandan, the delegate of Fiji explained, "a particular form of propulsion could not

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81. UN Doc. A/AC.138/SC.II/L.42.

82. For a list of such activities, see footnote 34 of Chapter IV.

be deemed to be dangerous *per se*".[83]

All these proposals which were submitted to the UN Sea-bed Committee are being discussed at the Law of the Sea Conference, being held at Carcacas (Venezuela) since June 1974. The concern of the smaller coastal States with their national security is legitimate. They cannot be expected to acquiesce in a situation where foreign warships and submarines have a right to navigate next to their shores. If the relations between the coastal State and the flag State of the warship are tense and strained, the presence of such ships can lead to misunderstanding and may result in a war triggered off by such misunderstanding. Trade and commerce of the international community can be safeguarded by the right of innocent passage. However, the military and strategic interests of the big Powers cannot be easily ignored. As secrecy is essential for the naval deployment, the requirement of submarines to navigate on the surface is not palatable to them. As each State's attitude is determined by its national interests the big Powers are sure to resist the recognition of a 12-mile territorial sea unless it is accompanied by the acceptance of free passage through the international straits.

Let us hope that there will not be an impasse at the Conference and some compromise formula, as suggested by Fiji in which objective standards are laid down for deciding the innocence or otherwise of a passage, is adopted. Neither the regime of free transit nor that of innocent passage as it is

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83. UN Doc. A/AC.138/SC.II/SR.68.

accepted today can be accepted unless safeguards are provided to protect the interests of the other parties. Innocent passage would be acceptable only if the rights of the coastal State are severely limited and the scope of arbitrary action by it reduced so that international trade and commerce are not adversely affected.

Chapter VI

CONCLUSIONS

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CONCLUSION

Constituting more than 70 per cent of the global surface, oceans provide vital link between the continents of dry land which are otherwise separated from each other by miles of sea waters. It is hardly possible to overemphasize the importance of sea for a variety of uses; as international highways, for transport and communications, commerce, and national defence. In spite of the advent of air transport the sea continues to be the principal means of inter-continental contact. It is obvious that such a multi-purpose use of the ocean could be achieved only through the doctrine of the freedom of the high seas, particularly the freedom of navigation.

It was only in the eighteenth and nineteenth centuries that the concept of freedom of navigation came to be accepted as a fundamental principle of international law. During the Greek and Roman eras, the term "freedom of navigation" merely meant freedom from the menace of pirates. Any State which was able to suppress them wielded authority over that portion of the sea. By the fifteenth century, a large number of seas were appropriated by different sovereigns, so much so that the Atlantic and the Indian Oceans were formally divided between Portugal and Spain by means of the authority derived from Papal Bulls.

The crusade against such domination of the oceans by individual sovereigns was initiated by Hugo Grotius, a Dutch

jurist. He propounded the doctrine of the freedom of the seas basing his argument on the fact that (i) the sea by its nature could not be occupied, and that (ii) it was inexhaustible. He said that the sea was common to all and its use should be open to everybody. John Selden of Britain vehemently criticised this view-point in his book Mare Clausum and put forth a forceful defence of the doctrine of the closed seas. This view was, however, against the temper of the times. The growing need for international contact necessitated a liberal use of the sea by different States. Consequently the stand taken by Grotius was ultimately vindicated by history.

Seventeenth and eighteenth centuries witnessed not only industrial revolution in the European countries but also a massive expansion in inter-state commerce. As oceans provided the main trade routes for international trade and commerce acceptance of the doctrine of freedom of navigation became the need of the time.

After the battle of Trafalgar in 1805 Great Britain, then the most dominant naval Power, became a staunch champion of the freedom of the seas. By the beginning of the nineteenth century freedom of the high seas was established as one of the fundamental principles of international law.

Codification of the doctrine of the freedom of the seas was accomplished only in the 1958 Geneva Conventions on the High Seas and on Territorial Seas and Contiguous Zones. Article 2 of the Geneva Convention on the High Seas enshrines the principle of the freedom of the high seas. Articles 14-22 of the Convention on the Territorial Sea and Contiguous Zones

provide for the right of innocent passage through the territorial sea of another State.

Freedom of navigation means that the ships of all States have a right to pass unhindered on the high seas. The underlying principle is the prohibition of interference by the ships of one flag State with those of another. It also implies that only the State whose flag the ship is flying is competent to exercise jurisdiction on events occurring on board the ship.

With the advance in science and technology leading to the intensification and multiplication of the uses of the sea, some limitations have been placed on freedom of navigation on the seas. Some of these limitations are reasonable and can be justified in terms of the larger interests of international community, whereas some others which serve the narrow interests of only one particular State or a small group of States cannot be so justified.

Interference with the freedom of navigation on account of the exploitation of the resources of the continental shelf is an illustration of a reasonable limitation. The ocean is not only a means of communication but is now a rich source of food and mineral wealth also. When these two uses of the ocean become incompatible, the latter enjoys a degree of preference. Thus exploitation of oil resources in the continental shelf requires huge platforms constructed near the main navigational routes. Although these platforms do interfere with the passage of the ships to some extent they can be said to be covered by the reasonable restrictions on the freedom of navigation

permitted by law.

Another limitation on the freedom of navigation which can be justified in terms of the larger interests of international community arises from the concept of pollution free zones. Pollution may be caused by the spilling of persistent oils from big ships and oil-tankers. Unfortunately, international conventions regulating oil pollution are inadequate in as much as they do not vest any power of regulation and control in the coastal State near whose shores such pollution takes place. This has led some States like Canada to declare a part of the high seas near their coasts as pollution-free zones where the big oil tankers are not allowed to navigate.

However, there are some States which have sought to close large areas of the high seas and thereby interfere with the freedom of navigation for the purpose of conducting atomic and nuclear tests. This, it is submitted, is an unreasonable restriction because testing of atomic and nuclear devices cannot be said to promote the general interests of the international community. On the contrary, it only secures limited purpose of enhancing the military potential of a particular State.

Along with the doctrine of freedom of navigation, the concept of territorial sea also came to be recognised in international law. For security reasons coastal States could not permit ships of other States to come very near their shores. An area of the sea adjacent to the coast was, therefore, recognized to be under the sovereign jurisdiction of the littoral State though the vessels of other States were also given the right of innocent passage through it. This was

done to achieve a harmonious compromise between the needs of international navigation and security of the coastal State.

One of the ticklish problems of international law has been the definition of the term "innocent passage". The International Law Commission debated the issue at length. In the Geneva Convention on Territorial Sea and Contiguous Zones, innocent passage is defined as a passage which "is not prejudicial to the peace, good order and security of the coastal State". However, this definition has certain inherent ambiguities. What kind of passage is prejudicial to the peace, good order and security of the coastal State is determined through a subjective decision of the littoral State. In order to lay down objective criteria for this purpose, Fiji has submitted a proposal before the UN Sea-bed Committee in which it has enumerated specific acts which, if indulged in, would make a passage non-innocent. This proposal is likely to be discussed in the Conference on the Law of the Sea being held in Caracas in 1974.

Another controversial question is whether warships have the right of innocent passage. In the absence of a judicial pronouncement on the subject - the International Court declared in the Corfu Channel case that warships had a right of passage through straits but was silent about the right of passage for men of war through the territorial sea if it was not a strait - this could only be decided in an international convention. The 1958 convention on the Territorial Sea and Contiguous Zones does not contain any special provisions relating to warships, but only general rules applicable to all ships.

Apparently the text of the Convention would warrant the conclusion that warships have the same rights in this respect as other ships. But the proceedings of the conference leave no room for doubt that this was not the intention of the majority of delegations.

As the basic idea behind the acceptance of the doctrine of freedom of navigation and the right of innocent passage through territorial sea is the promotion of inter-State trade and commerce, the right of warships to innocent passage cannot be said to be implicit. On the contrary if such passage is not subjected to the requirement of prior notification and authorization, the presence of warships of other States in the territorial sea can defeat the basic purpose of the recognition of territorial waters and endanger the security of the coastal States. The requirement that submarines should navigate on surface while passing through the territorial sea was incorporated in the convention in view of such considerations.

The right of innocent passage acquires added importance when applied to passage through straits. In recent times, there has been a trend towards extension of the breadth of the territorial sea. At present 12 miles' width is being claimed by a majority of the States. This has resulted in straits, which earlier had a corridor of high seas in their midst becoming part of the territorial sea of the coastal States. As passage through straits is essential for international communication and mobility, there has been a demand by the major maritime States, including the Super-Powers that <u>free passage</u> rather than <u>innocent</u> passage should

be permitted through international straits. The Geneva Convention clearly lays down that the right of innocent passage through straits used for international navigation cannot be suspended. This, however, does not satisfy the Super-Powers because it is the coastal State which has the right to decide, at least in the first instance, the innocence of otherwise of a particular passage. The passage of mammoth oil-tankers has been declared non-innocent per se by some coastal States resulting in inconvenience to big Powers. The requirement that submarines should navigate on the surface while in innocent passage is also not palatable to the Super-Powers as secrecy is essential to their naval deployment. The passage of nuclear-powered ships is another thorny issue. The overflight by aircraft is also not included in the right of innocent passage. For all these reasons, the USA and the USSR, among others, have been insisting on a right of free passage through international straits.

The smaller coastal States are resisting the demand for free passage for reasons of their own national security and sovereignty. The proposals put forward in the Sea-Bed Committee by these Powers seek to abridge the already existing rights in so far as they demand the same regime for straits as exists for the territorial sea.

Let us hope these conflicts would be resolved and some compromise formula would emerge at the Law of the Sea Conference being held in Caracas in 1974. The right of free passage as demanded by the Super-Powers cannot be accepted unless ways and means are found to allay the fears of the

coastal States. At the same, straits being the arteries of international navigation, passage through them cannot be left entirely at the mercy of the coastal States without supplanting the very basis of the freedom of navigation and losing all the advantages flowing from it.

ANNEXURE I

ANNEXURE I

116 STRAITS WHICH WOULD BE PLACED UNDER NATIONAL SOVEREIGNTY BY A 12-MILE TERRITORIAL SEA*

	Passage	Narrowest width (NM)	Territorial Sovereignty
	WESTERN HEMISPHERE		
1.	Robeson Channel	10	Greenland - Canada
2.	Kennedy Channel	14.5	Greenland - Canada
3.	Barrow Strait	15	Canada
4.	Strait of Belle Isle	9	Canada
5.	Jacques Cartier passage (Mingan)	15	Canada
6.	Northumberland Strait	6.75	Canada
7.	Northwest Providence Channel	23.75	Bahama Islands
8.	Mayaguana Passage	21	Bahama Islands
9.	Turks Island Passage	13	Bahama Islands
10.	Mauchoiri Passage	23	Bahama Islands
11.	Virgin Passage	7	U.S. (Virgin Islands)
12.	Dominica Channel	22	Dominica (British) Martinique (French)
13.	Saint Lucia Channel	17	Martinique (French) Saint Lucia (British)
14.	Aruba Paraguana Passage	15	Aruba (Netherlands) Peninsula da Paraguna (Venezuela)

* Geographic Bulletin of the US State Department 1974.

Passage		Narrowest Width (NM)	Territorial Sovereignty
15.	Serpent's Mouth	9	Venezuela - Trinidad
16.	Estrecho De Le Maire	16	Argentina
17.	Guatemalan Caribbean Entrance	11.9	Honduras - British Honduras
18.	Pailolo Channel	8	U.S. (Hawaiian Islands)
19.	Kaiwi Channel	22	U.S. (Hawaiian Islands)
20.	Kaulakahi Channel	15	U.S. (Hawaiian Islands)
21.	Straits of Juan De Fuca	9	U.S. (Washington) - Canada
22.	Hecate Strait	23.8	Canada
23.	Shelikof Strait	20	U.S. (Alaska)
24.	Unimak Pass	10	U.S. (Aleutian Islands)
25.	Samalgor Pass	16	U.S. (Aleutian Islands)
26.	Hebert Pass	14	U.S. (Aleutian Islands)
27.	Yunaska Pass	10	U.S. (Aleutian Islands)
28.	Seguam Pass	13	U.S. (Aleutian Islands)
29.	Adak Strait	7	U.S. (Aleutian Islands)
30.	Tanaga Pass	13	U.S. (Aleutian Islands)
31.	Agattu Strait	16	U.S. (Aleutian Islands)
32.	Etolin Strait	16	U.S. (Alaska)
<u>A S I A</u>			
33.	Bering Strait	19	U.S.S.R.
34.	Bering Strait	19½	U.S.
35.	Litke Strait	15	U.S.S.R.
36.	Kuril Strait	6.1	U.S.S.R.

Passage		Narrowest Width (NM)	Territorial Sovereignty
37.	Banjo Kaikyo	11.6	Kuril Islands
38.	Shirinki Kaikyo	8	Kuril Islands
39.	Plati Strait	16	Kuril Islands
40.	Harumukotan Kaikyo	8	Kuril Islands
41.	Shasukotan Kaikyo	16	Kuril Islands
42.	Koroni Kaikyo	10	Kuril Islands
43.	Rashowa Kaikyo	16	Kuril Islands
44.	Ketoi Kaikyo	14	Kuril Islands
45.	Diana Strait	11	Kuril Islands
46.	Minamiuruppu Suido	15	Kuril Islands
47.	Yetorofu Kaikyo	22	Kuril Islands
48.	Kunashiri Suido	13	Kuril Islands
49.	Skikotan Suido	11.75	Kuril Islands
50.	Taraku Suido	6.2	Kuril Islands
51.	Notsuka Suido	9	Japan-Kuril Islands
52.	(Unnamed) (59-05N.,151-00E)	10	USSR (Siberia)
53.	Severnyy Proliv	7	USSR (Siberia)
54.	Soya Kaikyo (La Perouse Strait)	20	USSR - Japan
55.	Rishiri Suido	10	Japan
56.	Okushiri Kaikyo	10	Japan
57.	Tsugaru Kaikyo	10	Japan
58.	Sado Kaikyo	17	Japan
59.	35-45N., 133-00E	23	Japan
60.	Cheju Nashyop	13.25	South Korea

Passage		Narrowest width (NM)	Territorial Sovereignty
61.	Maemul Sudo	13	South Korea
62.	Ruksan Chedo	8	South Korea
63.	Western Chosen Strait	22.8	Japan-Korea
64.	Pohai Strait	22	Communist China
65.	Osumi Kaikyo (Van Diemen Strait)	16	Ryukyu Islands (Japan)
66.	Yakushima Kaikyo	6.6	Ryukyu Islands (Japan)
67.	Tenegashima Kaikyo	10	Ryukyu Islands (Japan)
68.	Tokara Kaikyo	22	Ryukyu Islands (Japan)
69.	Nakanoshima Suido	11	Japan
70.	Suwanose Suido	9	Japan
71.	Pescadores Channel	17	Nationalist China
72.	Lama Channel	6.1	Communist China (Claimed)
73.	Kainan Strait	10	Communist China
74.	Mindoro Strait	20	Philippines
75.	Surigao Strait	8.6	Philippines
76.	Subutu Passage	18	Philippines
77.	Fobia Passage	10	Indonesia
78.	Serasan Passage	23	Indonesia
79.	Api Passage	16	Indonesia
80.	Malacca Strait	20	Malaysia - Indonesia
81.	Malacca Strait (Note: Becomes Singapore Strait; exact dividing line unclear.)	8.6	Malaysia - Indonesia
82.	Berhala Strait	9	Indonesia
83.	Gaspar Strait	8	Indonesia
84.	Bangka Strait	8	Indonesia

	Passage	Narrowest Width (NM)	Territorial Sovereignty
85.	Selat Lombok	11.5	Indonesia
86.	Sape Strait	8	Indonesia
87.	Ombai Strait	13	Indonesia
88.	Roti Strait	5.6	Indonesia
89.	Bangka Passage	19	Indonesia
90.	Grehound Strait	10	Indonesia
91.	Boston Passage	16	Indonesia
92.	Manipa Strait	13	Indonesia
93.	Isumrud Strait	8	Australia - (New Guinea)
94.	Dampier Strait	13	New Britain
95.	St. Georges Channel	8	New Britain - New Ireland
96.	Bougainville Strait	17	Solomon Islands
97.	Manning Strait	7	Solomon Islands
98.	Indispensible Strait	19	Solomon Islands
99.	Cook Strait	12.2	New Zealand
100.	Banks Strait	9	Australia
101.	Strait of Hormoz	21	Iran-Oman
	AFRICA		
102.	Bab El Mandeb	10	Ethiopia-Yemen-England-France
103.	Cameroon Bay	19	Spain-Cameroons
	EUROPE		
104.	Strait of Gibraltar	8	Spain - Morocco
105.	Freu De Monorca	20	Spain

Passage		Narrowest Width (NM)	Territorial Sovereignty
106.	Strait between Corsica & Elba	18	Corsica-Italy (Elba)
107.	Carpathos	13	Greece
108.	Kithera	9	Greece
109.	Ile D'Yeu	9	France
110.	Dover Strait	18	England-France
111.	North Channel	11	Ireland-England
112.	Little Minch	10	Scotland (Hebrides)
113.	The Hole	23	Scotland
114.	Gulf of Finland	17	Finland-USSR
115.	Gulf of Bothnia	13	Sweden-Finland
116.	Kara Strait	19	USSR

Counting the 2 Bering Straits separately, because a different sovereignty controls each of the straits, the total of this list becomes 116.

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