CHAPTER 4

RECENT DEVELOPMENTS IN THE LAW OF THE SEA WITH REGARD TO THE PROBLEM OF PASSAGE THROUGH STRAITS USED FOR INTERNATIONAL NAVIGATION WITH PARTICULAR REFERENCE TO THE STRAITS OF MALACCA: A SURVEY OF DRAFT ARTICLES SUBMITTED TO THE SEABED COMMITTEE

Although the joint declaration of November 1971 by the governments of Malaysia and Indonesia asserted that the Straits of Malacca are not international straits, the two countries fully recognized their use for international shipping in accordance with the principle of innocent passage. Current state practice supports the claims of the two coastal states to a 12 mile territorial sea, and it is hardly possible for maritime states to effectively oppose such claims any longer. The question for the maritime powers is, therefore, to consider the problems which would be raised by the general acceptance of a 12-mile territorial sea.

Their concern is due to the fact that the 12-mile limit would completely sweep out the central belt of high seas in Straits used for international navigation, thus converting 116 such straits, including the Straits of Malacca, into territorial sea Straits, their status to be governed by article 16(4) of the Convention on the Territorial Sea. Article 16(4) states,

"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 or the territorial sea of a foreign state."

"Innocent passage" is defined in article 14(4) of the convention which provides,

> "Passage is innocent so long as it is not prejudicial to the peace, good order and security of the coastal state."

The provisions of the Convention however, are felt to be less than satisfactory by many states. The convention places with the coastal state the right to determine the innocence of a passage prior to the entry of the ship into the coastal state's territorial waters, thus giving the specific character of innocent passage a subjective criterion. The maritime powers thus fear that the passage of nuclear-powered vessels and oil tankers may be categorized as non-innocent if the coastal state so desires. Submarines are required by article 14(6) of the above-mentioned Convention to navigate on the surface and show their flags, while there is no right of overflight through the airspace above the territorial sea. In addition, the coastal state may impose various regulatory measures like limiting reasonably, the number of warships passing through the straits at any given time, prescribing a particular navigational route and various other navigational measures as long as such regulations do not contravene the right of innocent passage. This right is provided by article 14(4) which, besides defining "innocent passage", also stipulates that such innocent passage "shall take place in conformity with these articles and with other rules of international law." Article 14(4) must be read together with article 17 which reads,

> "Foreign ships exercising the right of innocent passage shall comply with the rules 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."

A problem arises with regard to the interpretation of article 17. The words "in conformity with these articles and other rules of international law" may be said to qualify "foreign ships exercising the right of innocent passage" or it may qualify "rules and regulations enacted by the coastal states." The former would allow the coastal states freedom to legislate on the right of innocent passage, whereas the latter would give the foreign ships power to determine whether a particular regulation of the coastal state is valid under international law. It has been submitted that the first one is the better interpretation because a state is always bound to act in accordance with international law including treaty provisions, and there can be no question on this.[72] Thus a ship may not disregard any coastal state regulations alleged to be beyond the powers of that state. Another factor unsatisfactory to the major maritime powers is the uncertainty as to whether the right of innocent passage applies to warships, and if it does, whether such right can be subjected to the requirement of prior notification.

It was because of the general feeling of dissatisfaction among the maritime states over the provisions of the 1958 Convention and to avoid difficulties,that many states have pressed for a new treaty which "would establish a 12 mile limit for territorial seas and provide for free transit through international Straits." Such is the policy of the

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[72] Das and Pradhan, op.cit. n.3, at p.33.

United States as stated in President Nixon's Oceans Policy statement of May 23, 1970.

The Soviet Union has also expressed a similar opinion saying that "it is necessary to preserve in . . . (such straits) the freedom of passage which existed before the extension of the territorial sea."[73]

The term "free transit" is a new concept in relation to the territorial sea. It is meant to give the same rights of navigation and overflight in and over territorial sea straits as are now enjoyed on and over the high seas. "Free transit" would therefore permit complete freedom of passage for all ships, including warships, nuclear armed submarines on the surface or submerged, without notification and irrespective of mission. It would permit freedom of civilian and military flight through the super-jacent airspace, and it would deprive the coastal state of the right to categorize certain passages such as those of nuclear-powered or nuclear-armed vessels and mammoth oil tankers as non-innocent.[74]

In Caracas, the United States, spurred by the Department of Defence, together with the Soviet Union and several other maritime nations made a non-negotiable demand for unimpeded transit through international straits including the rights of overflight and submerged passage for nuclear submarines. The maritime states maintained that special rules are necessary to protect the right of passage through Straits used for international navigation; thus territorial waters which fall within such

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[73] Brown, E.D., "Maritime Zones: A Survey of Claims" op.cit.n.29, at p.162.

[74] Ibid. pp.162-165.

Straits must be governed by a regime different from that governing territorial waters simpliciter.

It may be argued, however, that the distinction in the importance of passage through ordinary territorial waters simpliciter and territorial waters which fall within straits used for international navigation has already been recognized by the 1958 Geneva Convention on the Territorial Sea and Continguous Zone. A comparison of article 16(3) with article 16(4) of the Convention shows that the coastal states are given less control over innocent passage through international straits than in the case of innocent passage through the territorial sea. While a coastal state may, under article 16(3), suspend innocent passage of foreign ships in its territorial sea if such suspension is essential for the protection of its security, article 16(4) allows no such suspension in the case of innocent passage of foreign ships through straits used for international navigation. This difference reflects the recognition of the need for some concessions to be made in the case of passage through international straits. However, despite the realization of this difference, the concept "innocent passage" is still employed when describing passage both through the territorial sea and through international straits, thus showing the convention's concern that the importance of passage through international straits does not warrant the suspension of the concept of "innocent passage".

Thus the demands of the international maritime community as embodied in the United States Draft Articles on the Breadth of the Territorial Sea and Straits, would vary vastly from the provision of the 1958 Geneva Convention, and be wholly repulsive to the coastal states concerned. The

effect of article II of the United States Draft Articles would be to remove the application of the concept of innocent passage to international straits and to replace it by a high seas regime over which coastal states would have no control. Article II of the Draft reads:

> "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 aircraft 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 aircraft 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."

The United Kingdom has given express support for the United States Draft Articles, while Russia has tabled its own Draft Articles on International Straits, very similar to the American proposal, but containing more details with regard to the question of the coastal state's security.

However, these proposals can only be regarded as an attempt to rob the coastal states of their territorial sovereignty, and of rights invested in them by the 1958 Geneva Convention on the Territorial Sea, a convention which is the embodiment of the wishes and desires of the international maritime community itself. Theirs were the voices which

predominated the Conference of 1958.

Ambassador Stevenson in defending the United States position reiterated that the right of free transit demanded is a narrow one, merely one of transiting the Straits, not of conducting any other activities. Should a vessel indulge in activities that are in violation of coastal state laws and regulations, it would be exceeding the scope of its rights and would be subject to appropriate enforcement action by the coastal state.

This argument, however, fails to observe the absence, on the part of the coastal states, of such enforcement rules and regulations as referred. The United States Draft Articles are also silent on the subject except for stipulating that such rules should include reasonable safety regulations both for vessels and aircraft. If the regime of innocent passage applies then the coastal states would have the faculty to assume enforcement actions if foreign ships offend the peace, security and good order of the coastal states. In the case of free transit, however, the "other activities" not contemplated as "merely transiting the Straits" would be an obvious subject of dispute. It is also foreseeable that the question of what laws and regulations the coastal states can enact would present a ground for disagreement.

Although the American Draft Articles submitted to the Seabed Committee permitted the coastal states to "designate corridors suitable for transit by all ships and aircraft", in a subsequent statement, the United States emphasised that safety standards must be internationally prescribed and proposed that there should be treaty obligation to respect

international traffic separation schemes in accordance with the Rules and Procedures established by the Inter-Governmental Maritime Consultative Organisation (IMCO).

Thus the laws and regulations that can be enacted by the coastal states must, in order to be accepted, satisfy the wishes of the international maritime community. In this respect, the provisions of the United Kingdom Draft Articles on the Territorial Sea and Straits would most likely gain favour among the maritime states. Article 3(1) of the Draft provides that a straits state may "designate sea lanes and prescribe traffic separation schemes for navigation in the straits where necessary to promote the safe passage of ships". However this right is curtailed by article 3(3) which says,

> "Before designating sea-lanes or prescribing traffic separation schemes, a Straits state shall refer proposals to the competent international organisation and shall designate such sea lanes or prescribe such separation schemes only as approved by that organisation."

Such a proposal would be wholly repugnant to the coastal states who maintain that they have sovereign rights over that part of the Straits which falls within the 12 mile territorial sea belt or the agreed median line, subject only to the right of innocent passage of foreign ships. This proposal would also take away the guarantee given by the United States that subject only to the right of free transit, the territorial waters would retain their national character in each and every respect. How it is possible to construe in the first place, that these waters can

retain their national character when matters which may characterise the Straits as national are being dictated by the marttime states, can only be considered an insult to the imagination.

The coastal states are themselves keen to seek the help and advice of international organisations such as IMCO and the International Hydrographic Organisation (IHO) in their effort to provide the best protection for their interests in the Straits, but acceptance of a proposal such as that contained in article 3(3) of the United Kingdom Draft Articles would be tantamount to abrogating the sovereign rights which they have over their own territory. It would be similar to accepting the Japanese proposal for the setting up of an international body under the auspices of IMCO for the purpose of maintaining the safety of the Straits; a proposal which the coastal states have already rejected. Although they agree to consult IMCO, and refrain from adopting any extreme position in enacting laws and regulations,[75] the coastal states have expressed their unwillingness to allow too much involvement on the part of IMCO as they feel that this could lead to international interference in the jurisdiction of their own territorial waters.

The United States fear that if coastal states are given jurisdiction to prescribe navigational safety standards and environmental protection measures, a situation might arise in which the coastal states would be given a legal basis for using safety regulations as a way of impairing the right of free transit. If such is the case they argue, then virtually every country in the world would find its very economy dependent upon the political goodwill of some other state

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[75] Statement at Tripartite Meeting on the Straits of Malacca and Singapore held in Jakarta on 4th and 5th July 1972.

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by virtue of geography.[76] Such an argument does not merit any consideration and can easily be refuted.

In Caracas, Malaysia, together with other straits countries worked out extensive Draft Treaty Articles on the question of passage of ships through the territorial sea and straits. These Draft Articles were presented by Oman, with Malaysia and other Straits countries as co-sponsors. The Articles comprise the suggestions of various countries so as to make them widely acceptable and reflect the concern of the coastal states over the right of unimpeded passage and the need to protect their own interests in the Straits.

To allay the fears of the international maritime community as expressed by the United States above, article 22(1) of the Oman Draft Articles provides,

> "Passage of foreign merchant ships through Straits shall be presumed to be innocent."

This provision, perhaps the most important element in the Draft Articles, was inserted specifically to remove any fear on the part of the majority of states which are concerned that, commercial shipping might be impeded unnecessarily. It also refute the particular argument put forward by the maritime states about the dependence of the economy of one state upon the political goodwill of another by virtue of geography. Thus there is no ground for the maritime states to argue as they did and to fear that the coastal states would employ too arbitrary and subjective

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[76] Ambassador Stevenson, op.cit. no.59.

a criterion when defining innocent passage, so as to exclude foreign commercial ships from their territorial waters. Furthermore article 3(2) of the Draft furnishes the objective criterion on which to base the "innocence" of passage. Article 3(2) characterizes the non-innocence of the passage of a foreign ship only if the ship engages in activities like conducting "any warlike act against the coastal state" or "any exercise or practice with weapons of any kind" or indulging in "any act of propagada" or "act of espionage" which would affect the defence and security of the coastal state. Hence article 3(2) takes care of the complaint of the maritime states that the doctrine of innocent passage is inadequate because some states consider "innocence" to be a subjective criterion to be left to the discretion of the coastal state. The provisions of article 3(2) are not arbitrary or prejudicial to the interest of the maritime states; in fact they can be considered a mere elaboration of what the maritime nations themselves have consented to. Maritime states have often stressed that the right of free transit is merely one of transisiting the Straits, not of conducting any other activities. Thus the provisions of article 3(2) are wholly compatible with the expressed views of the maritime states.

Furthermore, these provisions not only conform to customary international law, but are also more generous than the provisions of conventional international law. Although the Corfu Channel Case[77] only specified the right of innocent passage of foreign warships the decision has always been presumed to include the passage of merchant

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[77] Op.cit., n.14.

vessels because international custom and practice has historically recognised the right of passage of such vessels through international straits, at least in time of peace. Compared with the 1958 Convention on the Territorial Sea, it may be seen that the Draft Articles not only provide for the non-suspension of innocent passage of foreign ships through Straits, it also presumes the innocence of the passage of all foreign merchant ships; a provision which is absent from the Convention, and which serves to enhance the sincerity of the coastal states whose only concern is the protection of their interests - namely the preservation of their environment and their economic security.

The Draft Articles attempt to balance the interests of the coastal states with those of the maritime community. If the maritime nations are honestly concerned over their economic well-being then the provisions of the Articles are more than sufficient to remove any doubts or suspicions they might have over the motive of the coastal states. However, except for Japan, the ultimate concern of the maritime powers is military rather than economic. Thus they have demanded unbrid led passage for their warships, nuclear submarines, both on the surface and submerged, and the right of overflight for military as well as civilian aircraft. To these, the coastal states have refused their assent.

Article 22(1) of the Oman Draft Articles which presumes the innocence of the passage of merchant ships necessarily separates the question of passage of warships and submarines for which special provisions relating to prior notification or authorization are provided. Article 15(3) states,

> "The coastal state may require prior notification to or authorization by its competent authorities for the passage of foreign warships through its territorial sea, in conformity with the regulations in force in such a state."

As far as Malaysia is concerned, only prior notification is required.

"Previous authorization" would require the user state to obtain permission from the coastal state before passing through the latter's territorial waters. This principle presupposes that warships do not have the right of innocent passage through the territorial sea; if there is such a right, it is subject to regulation by the coastal state. "Prior notification"[78] on the other hand, requires warships to give advance notice to the coastal state of their intention to pass through the latter's territorial waters.

Although no express provision was made in the Geneva Convention regarding the right of a coastal state to require previous authorization or prior notification from foreign warships intending to use the straits, it is noteworthy that states which have imposed such a requirement have justified their actions on the basis of the Convention.

Both concepts had been made the subject of a Draft Article proposed by the International Law Commission in 1956, which permitted coastal states to make the passage of warships "subject to previous authorization or notification." The Commission in its commentary stated that "since a number of states do require previous notification or authorization" it could

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[78] The concept should be distinguished from mere notification or notification per se, which lacks the element of advance notice.

not dispute "the right of states to take such a measure".[79] But opposition forced an amendment to be made to the Commission's text to omit the word "authorization", thus leaving only "prior notification" on the record. This amendment was carried out by the Plenary Session by 45 votes to 27, with 6 abstentions. The text as thus amended was then voted on as a whole at Geneva, but it failed to obtain the necessary two-thirds majority. No replacement text was inserted in the Convention.[80] The recognition of the two concepts by the International Law Commission seems sufficient justification for some states.

But though current state practice does support the existence of both principles some reservation must be expressed with regard to the prior authorization concept. An examination of the Corfu Channel Case[81] is necessary to determine its validity in international law. The International Court of Justice in its most important dictum in that case states:

"It is in the opinion of the Court, generally recognized 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 that the passage is innocent."[82]

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[79] Harris, D.J. "Cases and Material on International Law," Sweet and Maxwell, London 1973, p.329.

[80] Ibid.

[81] Op.cit. n.14.

[82] Green at p.260.

Although this dictum does not mention wartime, the court took note of the fact that Greece and Albania did not maintain normal relations at that time and Greece had considered herself technically in a state of war with Albania. In view of these exceptional circumstances, the court was of the opinion that Albania would have been justified in issuing regulations in respect of the passage of warships through the Straits, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.

With the position under international customary law fairly certain against the question of prior authorization, coastal states which impose this requirement has sought to rely on the Geneva Convention to justify their actions. The Soviet Union is one of the few countries which require previous authorization. Article 16 of the Soviet Statute on the Protection of the State Boundary of the U.S.S.R. 1960 states,

> "Foreign warships are to pass through territorial waters and enter the internal waters of the U.S.S.R. in accordance with the previous authorization of the U.S.S.R. Government in the manner provided for by special rules for the visits of foreign warships. Foreign submarines permitted entrance ... must navigate on the surface."[83]

The Soviet Union rests its argument on the interpretaion of articles 17 and 23 of the 1958 Convention of the Territorial Sea, and on the fact that the convention does not expressly prohibit such

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[83] Butler, W.E., "The Legal Regime of Russian Territorial Waters", (1968) 62 American Journal of International Law, p.51 at p.63.

a rule. Under article 17 the coastal states are empowered to make laws and regulations which must be complied with by foreign ships. Article 23 specifically refers to the obligation of warships to observe the regulation imposed by the coastal states concerning passage through its territorial sea. The Soviet Union argues that these two articles empower it to make regulations which can include the imposition of the prior authorization rule.

The basis on which the Soviet Union rests its arguments may however be disputed. Firstly, the fact that the Convention does not expressly prohibit the imposition of such a rule, does not necessarily mean that it would sanction it, particularly, when it is remembered that the Draft Article of the International Law Commission proposing such a rule was defeated in Geneva. Secondly, under article 17, the coastal states are empowered to enact laws and regulations which are in conformity with the rest of the Convention and with other rules of international law. Although it may be argued that the Convention does not expressly prohibit the making of rules requiring previous authorization international customary law as embodied in the Corfu Channel decision does. The fact that few states still require authorization of passage does not change customary law because to change custom, it would require a change in the practice of the majority of states.

Also in multilateral Treaties governing the status of some international straits like the Moutreaux Convention, no provision is made regarding prior authorization.

Some writers have also argued against the validity of the Russian regulation on another ground - that the Soviet Union have wrongly interpreted articles 17 and 23 of the Convention. In their view,

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since articles 14 to 17 come under the heading "Rules Applicable to all ships" thus guaranteeing a right of innocent passage for all ships (including warships) article 16 of the Soviet Statute is in violation of the Convention, because its effect is to deny the right and substitute for it a mere privilege.[84]

The above factors have perhaps induced Malaysia to sacrifice her ideals in order to get international acceptance of her Draft Articles. Malaysia realises the futility of pursuing the concept of prior authorization in the face of harsh opposition from the international maritime community, and with no support except from coastal states in similar position. But these states number less than twenty in the world. To unilaterally enforce such a rule would be impossible in view of her military weakness vis-a-vis the maritime powers. Malaysia has therefore abandoned her demand for prior authorization and now claims only prior notification from warships intending to pass through the Straits of Malacca.

As opposed to prior authorization, the concept of prior notification is accepted by the majoirty of states today. Although it failed to obtain the necessary two-thirds majority at the final Geneva Convention it was not deleted from Draft Article 24 of the International Law Commission as was the fate of the prior authorization requirement.

It may be contended that as long as the sovereignty of the coastal states over territorial waters in Straits is subject to a

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[84] Pharand, D., "Innocent Passage in the Arctic". 6 Canadian Yearbook of International Law (1968) p.3 at p.5.

right of innocent passage of foreign warships, there should be no hesitation in allowing the coastal states to require prior notification. The right of foreign warships to use the Straits must be balanced by a consideration for the security interests of the coastal states which necessarily feel harassed by the presence of unknown numbers of foreign war vessels carrying lethal weapons, lurking around their territory. The need for such a balance has already been recognized by the 1958 Geneva Convention which in articles 14 and 17 provides that the coastal states may enact laws and regulations which must be complied with by the foreign warships. But unlike the case of prior authorization, a regulation which requires prior notification would not convert the right of innocent passage into a mere privilege. Prior notification does not pre-suppose that foreign warships do not have a right to use the Straits.

At a meeting of the first committee on the Territorial Sea and Contiguous Zone, in the 1958 Geneva Convention, Mr. Sorenson, the delegate from Denmark asserted that giving previous notification would only serve as an indication that the intended passage is innocent. At another meeting, the Indonesian delegate expressed support for this opinion. He observed that since giving prior notification would not involve any inconvenience or any interference with the right of passage of these warships, refusal to comply with this requirement would indicate a potentially non-innocent passage.[85] One writer has also argued that notification to the coastal state would

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[85] Das and Pradhan, op.cit. n.3, p.45.

seem to be the minimum requirement before warships could exercise the right of innocent passage through territorial waters.[86]

Further the Corfu Channel Case[87] makes no mention of the undesirability of prior notification. The Court in stating its disagreement with the prior authorization concept began: "It is . . . generally recognized and in accordance with international custom . . ." that no prior authorization is required for passage of warships in Straits during peace time. Since no mention is made of any international custom prohibiting prior notification and since a majority of states does recognize the validity of prior notification, it is not unreasonable to assume that coastal states would be justified in stipulating this rule. Thus Malaysia and Indonesia may validly enact rules requiring prior notification.

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[86] Slonin, S. "The Right of Innocent Passage and the Geneva Conferences on the Law of the Sea", 5 Columbia Journal of Transnational Law (1966) p.96 at p.115.

[87] Op.cit. n.14.