THE TERRITORIAL SEA, CONTIGUOUS ZONE, STRAITS AND ARCHIPELAGOES UNDER THE 1982 CONVENTION ON THE LAW OF THE SEA.*

This is the second of three articles on aspects of the 1982 Convention On The Law Of The Sea. In this article, the author discusses the provisions of the convention relating to the territorial sea, contiguous zone, straits and archipelagoes and the special regimes of passage for ships and aircraft through, over and under straits used for international navigation and archipelagic sea lanes. The author also discusses the negotiating process leading to the adoption of these provisions.

I. THE TERRITORIAL SEA

A. The Maximum Permissible Breadth of the Territorial Sea

It will be recalled that the world community had made three fruitless attempts to reach an agreement on the maximum permissible breadth of the territorial sea at the Hague Codification Conference of 1930, the First UN Conference on the Law of the Sea (1958) and the Second UN Conference on the Law of the Sea 1960.[2] At its fourth attempt, the world community has agreed that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles, measured from baselines determined in accordance with the 1982 Convention.[3] Since twelve miles is the maximum permissible breadth, it is not mandatory for every coastal State to claim the maximum. In 1981, 24 coastal States still claimed a territorial sea of only three miles.[4] The overwhelming majority, 78 out of the 137 independent coastal States, claimed twelve miles.[5] There were also 26 States which claimed a territorial sea of more than twelve miles.[6] If these 26 States choose to become parties to the 1982 Convention, they must alter their national laws in order to conform to the Convention.

B. Delimitation of the Territorial Sea

Article 3 of the 1982 Convention states that the territorial sea shall be measured from "baselines determined in accordance with this Con-

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[1] The Convention was adopted on 30 April 1982. The text is contained in U.N. Doc. A/CONF. 62/122, 7 October 1982, and is reprinted in 21 I.L.M. 1245 (1982).

[2] For the background of these conferences see the first article in this series, "The Origins of the 1982 Convention on the Law of the Sea", (1987) 29 Mal. L.R. 1 at 7-14.

[3] 1982 Convention, *supra* note 1, Article 3.

[4] Choon-Ho Park, "Current Status of 200-Mile Claims in 'Exclusive Economic Zone'" in *Proceedings of the 7th International Ocean Symposium* (Tokyo: The Ocean Association of Japan, 1983), p. 31.

[5] *Ibid.*

[6] *Ibid.*

vention." The provisions of the 1982 Convention on the drawing of baselines are taken from the 1958 Convention on the Territorial Sea and the Contiguous Zone.[7] In summary, they are the following:

First, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast. The use of the low-water line as the normal baseline for delimiting the territorial sea emerged in the nineteenth century as a result of State practice.[8] The reason for using the low-water line rather than the high-water line is obviously intended to maximise the extent of the territorial sea for the coastal State. In most cases, the difference between the low-water line and the high-water line is not very great but in some cases, such as the Bay of Fundy in Canada, it can be more than a mile.

Second, Article 4 of the 1982 Convention states that the "outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea". This provision is also reproduced from the 1958 Territorial Sea Convention.[9] What does it mean? Is a coastal State free to choose either the *trace parallele* method or the *courbe tangante* method in determining the outer limit of its territorial sea?

There are two methods for determining the outer limit of the territorial sea.[10] The first method is called the *trace parallele* method. The line drawn by this method is parallel to the general trend of the coast, following the sinuosities of the baseline. This method works well when the coast is straight or gently curving. It does not work so well when the coast is irregular or highly indented. The second method is called the *courbe tangante* method. Using this method, the line is constructed by drawing arcs of circles to seaward from every point on the baseline. The area enclosed by all the arcs of circles up to the baseline constitutes the territorial sea. Although the resulting line is not a straight line, neither does it follow the sinuosities of the coastline. The *courbe tangante* method was proposed by the United States to the Hague Codification Conference of 1930. It was also recommended by the International Law Commission to the First UN Conference on the Law of the Sea. The language of Article 4, which is identical to article 6 of the 1958 Territorial Sea Convention, is apparently intended to sanction the use of the *courbe tangante* method[11] even though there is no reference to "arcs of circles". To conclude, it could be said that a coastal State could employ either the *trace parallele* method or the *courbe tangante* method in determining the outer limit of its territorial sea. Since the latter method is more advantageous to the coastal State than the former, it will probably be employed by most States except when the coastline is relatively straight, in which case, the two methods will produce roughly the same results.

[7] 1958 Convention on the Territorial Sea and Contiguous Zone, Articles 3-13, First United Nations Conference on the Law of the Sea, Off.Rec. (1958), Vol. II, pp. 132, Document A/CONF.13/L.52; 516 U.N.T.S. 205. (Hereinafter referred to as the 1958 Territorial Sea Convention).

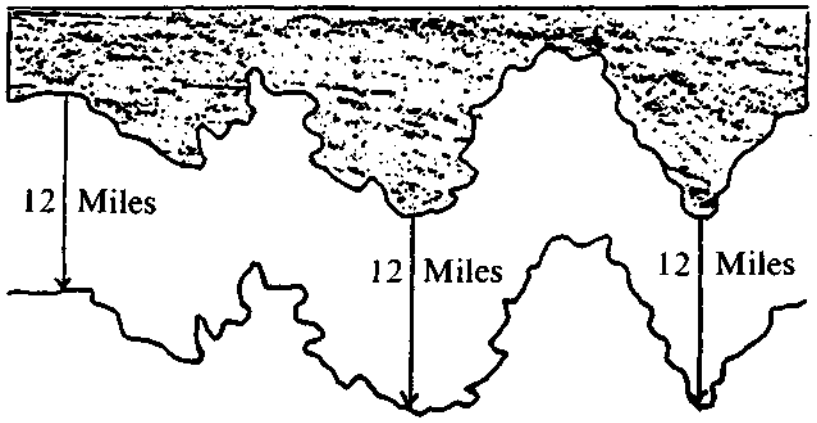
[8] S. Swartztrauber, *The Three Mile Limit of Territorial Seas* (1972).

[9] 1958 Convention on the Territorial Sea and Contiguous Zone, *supra,* note 7, Article 6.

[10] See Figure 1.

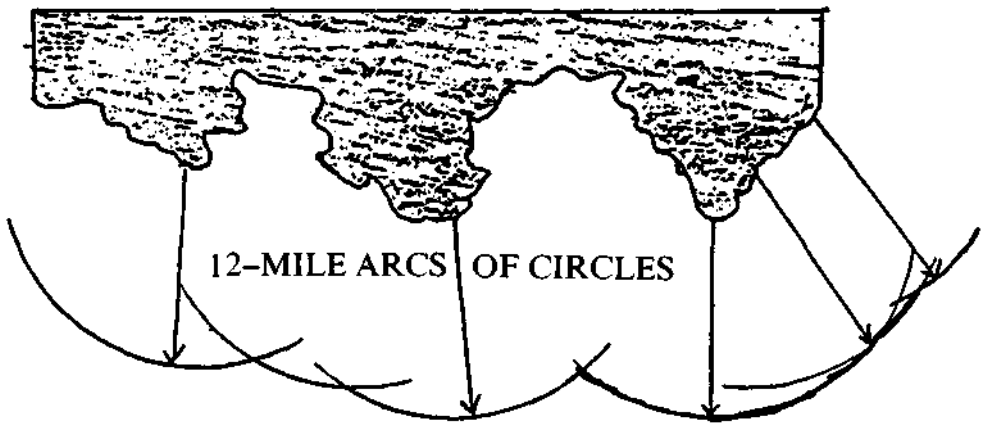
[11] S. Swartztrauber, *supra* note 8, at pp. 220-222.

FIGURE 1



OUTER LIMIT OF
TERRITORIAL SEA

TRACE PARALLELE Application of Twelve-Mile Limit

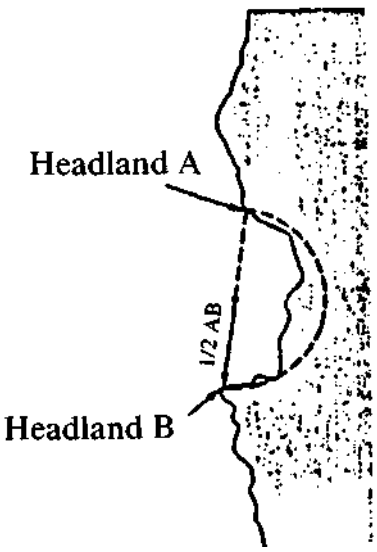


OUTER LIMIT OF
TERRITORIAL SEA

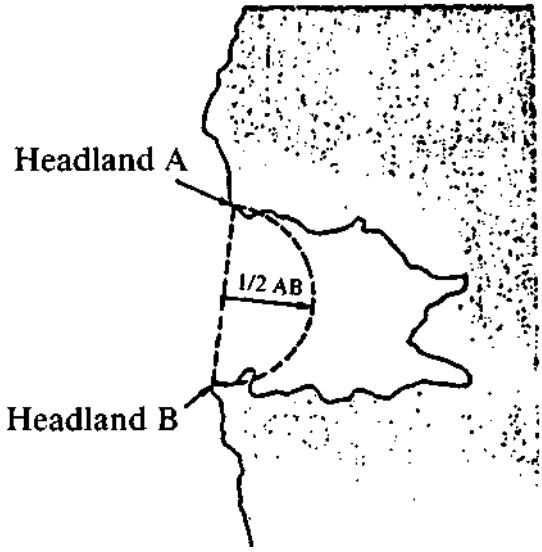
COURBE TANGANTE Application of Twelve-Mile Limit

Third, in the case of bays, the coasts of which belong to a single State, a straight line may be drawn across the mouth of the bay joining the low water marks on each side of the mouth.[12] The territorial sea shall be measured from that line. The waters landward of that line are internal waters. The 1982 Convention reproduces two criteria from the 1958 Territorial Sea Convention[13] which must be complied with. The first criterion is that for an indentation of water to constitute a bay, its area must be equal to or larger than the area of the semi-circle whose diameter is a line drawn across the mouth of that indentation.[14] The second criterion is that the line drawn across the mouth of a bay must not exceed 24 miles. In a case where the mouth of a bay exceeds 24 miles, a straight baseline of 24 miles shall be drawn within the bay in such a manner as to enclose the maximum area of water. These provisions dp not apply to "historic" bays or in any case where the system of straight baselines provided for in Article 7 of the 1982 Convention is applied.

FIGURE 2



INDENTATION NOT CONSTITUTING A BAY



INDENTATION CONSTITUTING A BAY

[12] 1982 Convention, *supra* note 1, Article 10, para. 4.
[13] 1958 Convention, *supra* note 7, Article 7.
[14] See Figure 2.

Fourth, article 7 of the 1982 Convention lays down the circumstances under which a coastal State may draw straight baselines instead of baselines which follow the contours of its coast. The system of drawing straight baselines may be applied where: the coastline is deeply indented and cut into; there is a fringe of islands along the coast in its immediate vicinity; and the coastline is highly unstable because of the presence of a delta and other natural conditions. The use of straight baselines along irregular coastlines was introduced by Norway in 1935. This led to a dispute between Norway and the United Kingdom which was referred to the International Court of Justice.[15] The Court ruled that the straight baselines fixed by the Royal Norwegian Decree of 1935 were not contrary to international law. The Court explained that along rugged coastal areas, baselines need not necessarily follow the low-water mark but may be determined by lines reasonably drawn conforming to the general direction of the coast. This judicial precedent was accepted by the International Law Commission and incorporated into its recommendations and was adopted by the First UN Conference on the Law of the Sea.[16] Article 7 of the 1982 Convention is based upon Article 4 of the 1958 Territorial Sea Convention.

The 1982 Convention contains five provisos to the system of straight baselines. The drawing of straight baselines must not depart, to any appreciable extent, from the general direction of the coast and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.[17] Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.[18] In the cases of a coastline which is deeply indented and where there is a fringe of islands along the coast, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.[19] The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.[20] Finally, where the establishment of a straight baseline has the effect of enclosing, as internal waters, areas which had not previously been so considered, a right of innocent passage shall exist in those waters.[21]

C. Innocent Passage in the Territorial Sea

The sovereignty which every coastal State enjoys over its land territory, extends to its internal waters and its territorial sea.[22] The sovereignty of a coastal State over its territorial sea includes the air

[15] *The Anglo-Norwegian Fisheries Case,* I.C.J. Rep. 1951, p. 119.
[16] *Supra,* note 2.
[17] 1982 Convention, *supra* note 1, Article 7, para. 3.
[18] *Ibid.,* Article 7, para. 4.
[19] *Ibid.,* Article 7, para. 5.
[20] *Ibid.,* Article 7, para. 6.
[21] *Ibid.,* Article 8, para. 2.
[22] *Ibid.,* Article 2, para. 1.

space over the territorial sea as well as the seabed and subsoil.[23] The sovereignty over the territorial sea is, however, "subject to this Convention and to other rules of international law".[24] One of the things that sovereignty is subject to is the right of innocent passage which the ships of all States enjoy in the territorial sea.[25] Although the provisions of the 1982 Convention on innocent passage through the territorial sea are inspired by the provisions of the 1958 Territorial Sea Convention, the former are more extensive than the latter. The 1982 Convention contains new elements which are not to be found in the 1958 Territorial Sea Convention and which clarifies and strengthens the regime of innocent passage in the territorial sea.

The term "innocent passage" is defined in two steps: first, what is passage and second, what is innocent passage. This two-step approach is based upon the scheme in the 1958 Territorial Sea Convention. "Passage" is defined as navigation through the territorial sea for two purposes.[26] The first purpose is traversing the territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters.[27] The second purpose is proceeding to or from internal waters or a call at a roadstead or port facility outside internal waters.[28] The passage of a ship in the territorial sea "shall be continuous and expeditious".[29] Does this mean that a ship cannot stop or anchor under any circumstances? A ship may stop and anchor if stopping and anchoring are incidental to ordinary navigation.[30] For example, a ship may be forced to stop and anchor temporarily because of congestion in a shipping lane. A ship may also stop and anchor if they are rendered necessary *byforce majeure* or distress, *e.g.* as a result of a storm or accident.[31] A ship may also stop and anchor for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[32]

Passage is said to be innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State".[33] The 1958 Territorial Sea Convention states only one case of passage falling outside the scope of innocent passage: foreign fishing vessels fishing in the territorial sea, contrary to the laws and regulations of the coastal State.[34] In contrast, the 1982 Convention sets out twelve circumstances in which the passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State and, therefore, to be not in innocent passage.[35] This list is probably

[23] *Ibid.,* Article 2, para. 2.
[24] *Ibid.,* Article 2, para. 3.
[25] *Ibid.,* Article 17.
[26] *Ibid.,* Article 18, para. 1.
[27] *Ibid.,* Article 18, para. l(a).
[28] *Ibid.,* Article 18, para. 1 (b). The reference to a call at a roadstead or port facility outside internal waters is absent from Article 14 of the 1958 Convention.
[29] *Ibid.,* Article 18, para. 2. This is implicit in Article 14, para. 3 of the 1958 Convention.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.,* Article 19, para. 1. This is identical to Article 14, para. 4 of the 1958 Convention; *supra* note 7.
[34] 1958 Convention, *supra* note 7, Article 14, para. 5.
[35] 1982 Convention, *supra* note 1, Article 19, para. 2.

intended to be exhaustive. Therefore, if the passage of a ship does not infringe against any of these twelve grounds, it must be presumed to be innocent.

What are the twelve circumstances in which the passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State? First, if the ship engages in any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State or if the ship acts in any other manner contrary to the principles of international law contained in the UN Charter.[36] Second, if the ship engages in any exercise or practice with weapons of any kind.[37] Third, if the ship engages in any act aimed at collecting information to the prejudice of the defence or security of the coastal State.[38] Fourth, if the ship engages in any act of propaganda aimed at affecting the defence or security of the coastal State.[39] An example would be a ship making broadcasts urging the people of the coastal State to overthrow its Government. Fifth, if the ship engages in the launching, landing or taking on board of any aircraft.[40] Sixth, if the ship engages in the launching, landing or taking on board of any military device.[41] Seventh, if the ship engages in the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.[42] Eighth, if the ship engages in any wilful and serious pollution contrary to the Convention.[43] An example would be a ship which deliberately discharges oil whilst traversing the territorial sea. Ninth, if a ship engages in any fishing activity.[44] Tenth, if a ship carries out research or survey activities.[45] Eleventh, if the ship interferes with any communications or any other facilities or installations of the coastal State.[46] An example would be a ship which attempts to jam the telecommunication system of the coastal State. The twelfth is the broadest category: if a ship engages in any activity not having a direct bearing on passage.[47] This category is vague and imprecise and could give rise to disputes over its interpretation and application.

What are the legal consequences of the distinction between passage which is innocent and passage which is not innocent? What rights does a ship in innocent passage enjoy which are denied to a ship which is not in innocent passage? A ship whose passage is not innocent has no right to traverse the territorial sea and a coastal State may take the necessary steps in its territorial sea to prevent the ship's passage.[48] *Per contra,* a ship in innocent passage has the right to traverse the territorial sea of a coastal State and the coastal State is under a duty not to hamper the innocent passage of such ship.[49] In addition, the coastal

[36] *Ibid.,* Article 19, para. 2(a).
[37] *Ibid,* Article 19, para. 2(b).
[38] *Ibid.,* Article 19, para. 2(c).
[39] *Ibid.,* Article 19, para. 2(d).
[40] *Ibid.,* Article 19, para. 2(e).
[41] *Ibid.,* Article 19, para. 2(f).
[42] *Ibid.,* Article 19, para. 2(g).
[43] *Ibid.,* Article 19, para. 2(h).
[44] *Ibid.,* Article 19, para. 2(i).
[45] *Ibid.,* Article 19, para. 2(j).
[46] *Ibid.,* Article 19, para. 2(k).
[47] *Ibid.,* Article 19, para. 2(1).
[48] *Ibid.,* Article 25, para. 1.
[49] *Ibid.,* Article 24, para. 1. Article 15, para. 1 of the 1958 Convention-is similar.

State is under a duty not to impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage.[50] The coastal State is also under a duty not to discriminate against the ships of any State or any ships carrying cargoes to, from or on behalf of any State.[51]

It does not mean that a coastal State is prohibited from adopting laws and regulations to regulate the innocent passage of ships in its territorial sea. The 1982 Convention empowers coastal States to adopt laws and regulations, relating to innocent passage through the territorial sea, in respect of eight matters[52] and foreign ships are under an obligation to comply with all such laws and regulations as well as all generally accepted international regulations relating to the prevention of collisions at sea.[53]

What are the eight matters on which a coastal State may adopt laws and regulations? First, the safety of navigation and the regulation of maritime traffic.[54] Can a coastal State adopt laws or regulations requiring ships in innocent passage through its territorial sea to use prescribed sea lanes and traffic separation schemes? The answer is yes, if the safety of navigation makes the adoption of such sea lanes and traffic separation schemes necessary.[55] However, in designating sea lanes or prescribing traffic separation schemes, the coastal State shall take into account the recommendations of the competent international organization, such as the International Maritime Organization; any channels customarily used for international navigation; and the special characteristics of particular ships and channels and the density of traffic.[56] Can a coastal State adopt laws or regulations concerning the design, construction, manning or equipment of foreign ships? The answer is no, unless, such laws and regulations are merely giving effect to generally accepted international rules or standards.[57]

Second, the protection of navigational aids and facilities and other facilities or installations.[58] Third, the protection of cables and pipelines.[59] Fourth, the conservation of the living resources of the sea.[60] This would, for example, enable a coastal State to divert traffic away from the spawning ground or nursery areas of a fish stock. Fifth, the prevention of infringement of the fisheries laws and regulations of the coastal State.[61] Sixth, the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.[62] Seventh, marine scientific research and hydrographic surveys.[63] Eighth, the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.[64]

50 *Ibid.,* Article 24, para. l(a).
51 *Ibid.,* Article 24, para. l(b).
52 *Ibid.,* Article 21, para. 1.
53 *Ibid.,* Article 21, para. 4.
54 *Ibid.,* Article 21, para. l(a).
55 *Ibid.,* Article 22, para. 1.
56 *Ibid.,* Article 22, para. 3.
57 *Ibid.,* Article 21, para. 2.
58 *Ibid.,* Article 21, para. l(b).
59 *Ibid.,* Article 21, para. l(c).
60 *Ibid.,* Article 21, para. l(d).
61 *Ibid.,* Article 21, para. l(e).
62 *Ibid.,* Article 21, para. l(f).
63 *Ibid.,* Article 21, para. l(g).
64 *Ibid.,* Article 21, para. l(h).

The power of the coastal State to adopt laws and regulations on these eight matters is not unqualified. The power must be exercised, "in conformity with the provisions of this Convention and other rules of international law."[65] The coastal State must also give due publicity to all such laws and regulations.[66] A coastal State must give "appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea".[67]

Can a coastal State levy charges upon foreign ships for passing through its territorial sea? No, this is prohibited by the Convention.[68] The only kind of charges which a coastal State may levy upon foreign ships is payment for specific services rendered to the ship, for example, towage.[69] These charges must be non-discriminatory in nature.

Are there any circumstances under which a coastal State may suspend temporarily the innocent passage of ships in specified areas of its territorial sea? A coastal State may do so if such suspension is essential for the protection of its security, including the carrying out of weapons exercises.[70] Such suspension must not discriminate among foreign ships and shall take effect only after having been duly published.[71]

D. Submarines

Do submarines and other underwater vehicles enjoy the right of innocent passage through the territorial sea? Submarines and other underwater vehicles do enjoy the right of innocent passage through the territorial sea but they must navigate on the surface and show their flag.[72]

E. Tankers, Nuclear-Powered Ships and Ships Carrying Dangerous Cargoes

There is one special rule applicable to tankers and two to nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances. The first rule, which applies to all three categories of ships, is that a coastal State may require them to use only the designated sea lanes for passage through its territorial sea.[73] The second rule, which is applicable to nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances, is that they must carry documents and observe special precautionary measures established for such ships by international agreements.[74]

65 *Ibid.,* Article 21, para. 1.
66 *Ibid.,* Article 21, para. 3.
67 *Ibid.,* Article 24, para. 2.
68 *Ibid.,* Article 26, para. 1.
69 *Ibid.,* Article 26, para. 2.
70 *Ibid.,* Article 25, para. 3.
71 *Ibid.*
72 *Ibid.,* Article 20.
73 *Ibid.,* Article 22, para. 2.
74 *Ibid.,* Article 23.

F. Warships

The 1982 Convention defines a warship as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."[75]

Do warships enjoy the right of innocent passage in the territorial sea under the 1982 Convention? This question has always been controversial in international law. Equally eminent authorities on international law have come down on opposite sides of this question. After reviewing the practice of States, the decisions of international tribunals and the views of publicists, in 1977, Franciszek Przetacznik, came to the conclusion that "the right of innocent passage of foreign warships through the territorial sea has yet to be established as a customary rule of international law".[76]

The question was hotly debated in the Third UN Conference on the Law of the Sea. Towards the end of the conference, the delegation of Gabon submitted an amendment to Article 21, paragraph 1, of the Convention.[77] The amendment would empower coastal States to adopt laws and regulations on the navigation of warships through the territorial sea, including the right to require prior authorization and notification for the passage of warships through the territorial sea. Another amendment was jointly submitted by twenty-eight delegations.[78] This would add the word, "security" to Article 21, paragraph (l)(h). The effect of the amendment would be that a coastal State could make laws and regulations on the ground of its "security" even though such laws and regulations might impinge upon the innocent passage of ships in the territorial sea.

The two super-powers, working hand in hand, led the opposition to the two amendments. They could not accept Gabon's amendment because they held the firm view that warships must enjoy the right of innocent passage through the territorial sea. They could not accept the twenty-eight power amendment because they feared that its adoption would confer extremely broad powers on coastal States over navigation in the territorial sea. The two super-powers threatened that if either amendment were adopted, it would alter their attitude towards

[75] *Ibid.,* Article 29. This definition is similar to but not identical with the definition in Article 8, para. 2, of the 1958 Convention on the High Seas, First United Nations Conference on the Law of the Sea, Off. Rec., (1958), Vol. II, pp. 135-139, Document A/CONF.13/L.53; 559 U.N.T.S. 285.

[76] F. Przetacznik, "Freedom of Navigation Through Territorial Seas and International Straits", (1977) 55 *Revue De Droit International De Sciences Diplomatiques et Politiques* 222-240, 299-319, at p. 309.

[77] Doc. A/CONF.62/L.97 of 13 April 1982, Third United Nations Conference on the Law of the Sea, Off. Rec., Vol. XVI, 11th Sess. (1982), p. 217.

[78] Doc. A/CONF.62/L. 117 of 13 April 1982 and Doc. A/CONF.62/L. 117/Corr. 1 of 14 April 1982, *Ibid.,* p. 225. The 28 co-sponsors were: Algeria, Bahrain, Benin, Cape Verde, China, Congo, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea-Bissau, Iran, Libyan Arab Jamahiriya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, Philippines, Romania, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen.

the Convention as a whole. In view of the stand taken by them, the Conference could not afford to take the risk of putting the amendments to the vote for fear that either might be adopted.

The burden of persuading the co-sponsors of the two amendments not to insist on putting them to the vote fell on the Conference president.[79] He enlisted the help of his colleagues in the collegium.[80] The delegation of Gabon agreed not to insist on putting its amendment to the vote. The twenty-eight co-sponsors of the second amendment were, however, adamant and negotiations between them and the two super-powers continued into the dying hours of the Conference. On the afternoon of the 30th of April, 1982, the twenty-eight co-sponsors of the amendment were sequestered in one room, the two super-powers were in another and the collegium were in a third. Negotiations were conducted by the collegium between the United States and the Soviet Union and representatives of the co-sponsors.[81] Various texts were tried but none of them satisfied the two opposing sides. At the last moment, the collegium succeeded in persuading the co-sponsors of the amendment not to insist on putting it to the vote on two conditions. First, the Conference president would read the agreed text of a statement into the record of the Conference. Second, no delegation would ask for the floor to interpret the president's statement or the provisions of the Convention affecting the question.

This is the statement which the president read:

> "Although the co-sponsors of the amendment contained in document L. 117 had proposed the amendment with a view to clarifying the text of the Convention, in response to the President's appeal, they have agreed not to press it to a vote."
>
> "They would, however, like to reaffirm that this is without prejudice to the right of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of this Convention."[82]

Although the Conference was saved from splitting over the question of the passage of warships through the territorial sea, it cannot be said that the position under the 1982 Convention is clear beyond dispute. Indeed, it is more than likely that the great maritime powers would argue that under the Convention, warships enjoy the same right of innocent passage through the territorial sea, as other ships, whereas the twenty-eight States which co-sponsored the amendment would argue that there is sufficient latitude under articles 19 and 25 of the Convention to enable them to enact laws restricting the passage of warships through their territorial seas.

79 Editor's note. The author of this article was the president of the Conference.

80 The collegium consisted of the president, the chairmen of the First, Second and Third Committees, the chairman of the Drafting Committee and the Rapporteur-General.

81 The 28 co-sponsors were represented in the negotiations by China, Malta, Morocco, Philippines, Romania and Sierra Leone.

82 Plenary Meetings, 176th Meeting, Third United Nations Conference on the Law of the Sea, Off. Rec., Vol. XVI, 11th Sess. (1982), p. 132.

The proponents of the first view could point out that article 17, which states that, "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea", makes no distinction between warships and other ships. Therefore, they could argue, the right of innocent passage is applicable to all ships, including warships. They could also state that the legislative history of the Conference on this question was consistent with their view because obviously the delegation of Gabon and the other twenty-eight delegations would not have submitted their respective amendments if the Convention did not confer the right of innocent passage on warships. Those who uphold the opposing view could find support in the pre-existing law. They would have to argue that in view of the uncertainty surrounding the question, the provisions of the Convention should be read as merely codifying the pre-existing law and not as containing new law.

II. CONTIGUOUS ZONE

There was very little discussion of the contiguous zone at the Third UN Conference on the Law of the Sea. Because of this, article 24 of the 1958 Territorial Sea Convention has been incorporated into the 1982 Convention, as article 33. The only change is that the maximum permissible breadth of the contiguous zone has been increased from twelve to twenty-four miles.[83]

It is a pity that the Third UN Conference did not seize the opportunity to reformulate the article in order to rid it of its ambiguity. Article 33, paragraph 1, of the 1982 Convention reads as follows:

> "1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea."

The ambiguity lies in the phrase, "within its territory or territorial sea" in sub-paragraphs (a) and (b). Because of the presence of this phrase, the text is capable of two interpretations. According to the restrictive interpretation,[84] article 33, paragraph 1(a), is applicable only to incoming ships, *i.e.* ships heading towards the territorial sea. When the ship is in the contiguous zone, heading towards the territorial sea, the power of the coastal State includes the conduct of necessary inquiries, investigation, examination and search. The coastal State does not, however, have the power to arrest the ship or to order or conduct it into port. The coastal State does not have such power because, at that point, the ship has not committed an offence

[83] 1982 Convention, *supra* note 1, Article 33, para. 2.

[84] G. Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", (1959) 8 I.C.L.Q. 73.

"within its territory or territorial sea". According to this view, article 33, paragraph 1(b), is applicable only to outgoing ships, *i.e.* to ships which are proceeding from the territorial sea into the contiguous zone. Such ships would already have committed offences "within the territory or territorial sea" of the coastal State. This, therefore, gives the coastal State the jurisdiction to punish such ships.

The restrictive interpretation, favoured by some British scholars and by the British Government, represents a minority view of the law. The majority favours a more liberal interpretation of the text. Those who hold this view, for example, Shigeru Oda,[85] derive their support from State practice and from the legislative history of the text. According to this view, the coastal State may exercise, in its contiguous zone, the same powers in respect of customs, fiscal, immigration or sanitary control, as it does in its territorial sea. In other words, in respect of these four matters, the jurisdiction of the coastal State to enforce its laws is extended beyond its territory and territorial sea into its contiguous zone.

Another point worth mentioning is that the text of article 33 of the 1982 Convention, like the text of article 24 of the 1958 Territorial Sea Convention, does not include the word "security". The story of the fight over the word "security" which took place at the First UN Conference is worth recalling. In its report of 1956, the International Law Commission explained why it had omitted "security" from its recommendation. The report stated:

> "The Commission did not recognise special security rights in the contiguous zone. It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such right was necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures for self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations."[86]

At the First UN Conference, the text proposed by the International Law Commission on the contiguous zone was referred to its First Committee. The delegations of the Philippines, Yugoslavia and Korea respectively submitted proposals to the effect that the concept of security should be included in the provision of the contiguous zone.[87] None of these were put to the vote. The delegation of Poland proposed the following text in place of the text proposed by the ILC:

> "In a zone of the high seas contiguous to its territorial sea, the coastal State may take the measures necessary to prevent and punish infringements of its customs, fiscal or sanitary regulations and violations of its security."[88]

[85] S. Oda, "The Concept of the Contiguous Zone", (1962) 11 I.C.L.Q. 131.
[86] Report of the International Law Commission to the General Assembly, Commentary 4 to article 66, (1956) 2 Y.B.I.L.C. pp. 294-295.
[87] A/CONF. 13/C. 1/L. 13, L.54 and L.84, First United Nations Conference on the Law of the Sea, Off. Rec., (1958) Vol. III, p. x, 226 and 234, U.N. Doc. A/CONF. 13/39.
[88] A/CONF.13/C.1.L.78, *ibid.,* p. 232.

The Polish proposal was adopted. It was adopted by the First Committee of the Whole by 50 votes in favour to 18 against, with 8 abstentions. The proposal was then transmitted to the plenary. In the plenary, in which a two-thirds majority was required, the First Committee's recommendation received only 40 votes in favour, 27 against, with 9 abstentions. The proposal therefore failed to be adopted. Instead, the plenary adopted a US proposal to go back to the ILC's text, with the addition of the word "immigration". The defeat of the Polish proposal in the plenary, after its easy passage in the First Committee, surprised the Conference. It was due largely to vigorous lobbying on the part of the US delegation which objected to the inclusion of "security".[89]

III. Straits Used For International Navigation

The nature of the regime for the passage of ships and aircraft, through, over and under, straits used for international navigation, was one of the most important and controversial questions faced by the Third UN Conference. Why was it such an important question? It was important to the strait States because the question of sovereignty was involved. Some strait States felt strongly that insofar as the waters in a strait are territorial waters, the regime for the passage of ships must be innocent passage. They felt that any proposal to tilt the regime towards the high seas regime, including a *sui generis* regime, was an infringement against their sovereignty in their territorial sea and, therefore, unacceptable.

The question was important to the user States for two reasons. All States, whether East or West, North or South, have a common interest in the promotion of international trade. The bulk of international trade is seaborne. It is a truism that the seas constitute the highways of the world. This is why the freedom of navigation is not only of interest to the maritime powers but it is an interest shared by the entire international community. The straits are the chokepoints in the world's shipping lanes. The world community, therefore, has a strong interest in ensuring the safe and unimpeded passage of ships through these chokepoints without neglecting, at the same time, the environmental and other legitimate interests of the strait States.

The second reason has to do with the strategic importance of ocean space, in general and straits, in particular, to the great military powers, especially to the two super-powers. The United States and the Soviet Union are global powers with allies and interests in areas far from their shores. They need to use the seas and the airspace above for the purpose of projecting their conventional military power. Freedom of navigation and overflight for their military aircraft are therefore strategic imperatives. Since the straits constitute chokepoints in the communication system, the question of passage through, over and under them, becomes even more critical. The nuclear arsenals of the two super-powers are based on land, aircraft and submarines. Each super-power keeps part of its stock-pile of ballistic missiles in submarines at sea. It is important for each super-power not to know the precise locations of its adversary's submarines because this works

[89] Oda, *supra* note 85 at 148-153.

as a deterrent against either of them launching a first strike against the other.[90] The theory is that if one super-power launches a first strike and succeeds in destroying all or substantially all of its adversary's land-based ballistic missiles, the victim will retaliate by launching its submarine-based ballistic missiles at the aggressor. As long as each super-power retains a second strike capability, this acts as a deterrence against the temptation of launching a sneak attack. Since secrecy and mobility of their respective submarine fleets are critical, the two super-powers have, therefore, demanded free and submerged passage for their submarines through straits.

A. The Corfu Channel Case

The pre-existing law can be found in the judgment of the International Court of Justice in the *Corfu Channel Case*[91] and in the 1958 Territorial Sea Convention. The Corfu Channel is a strait, bounded on the west by the island of Corfu, belonging to Greece, and on the east, by the mainland of Albania. The Corfu Channel connects one part of the Mediterranean Sea with another part. The strait varies in width from one mile to six and a half miles. On the 22nd of October 1946, two units of a Royal Navy squadron, HMS Saumarez and HMS Volage, were proceeding through the North Corfu Channel. They struck mines which had been laid in the fairway and as a result forty-four officers and men lost their lives and serious damage was caused to the two ships. The British Government brought its complaint against the Albanian Government to the UN Security Council. The Council recommended that the two Governments should immediately refer the dispute to the International Court of Justice.

In its memorial to the Court, the British Government argued, *inter alia,* that the North Corfu Channel, being a natural channel of navigation between two parts of the high sea, constituted an international highway, subject under international law to a right of innocent passage in favour of foreign shipping. In its counter-memorial, Albania argued that the Corfu Channel was not a strait but only a means of lateral traffic of secondary and limited importance. Albania recalled that it had informed the British Government that it required to be notified of the passage of British warships. This had not been done in this case. Albania said that on that occasion, the British squadron entered Albanian waters without any warning or information whatever given to the Albanian authorities. In its reply, the United Kingdom argued that, even though the Corfu Channel may not have been used by shipping on a large scale, its character as an international route depended on the fact that it connected two parts of the open sea, thus making it useful to navigation. It was true that no notice had been given to Albania of the intended passage of the British squadron on 22nd October 1946 but no such notice was necessary.

[90] M. Reisman, "The Regime of Straits and National Security: An Appraisal of International Law Making," (1980) 74 A.J.I.L. 48 at pp. 48-54; J. Moore, "The Regime of Straits and the Third UN Conference on the Law of the Sea", (1980) 74 A.J.I.L. 77 at pp. 78-85.

[91] I.C.J. Rep. 1949, p. 1.

On the question whether the Corfu Channel was a strait, the Court ruled that the test was not the volume of traffic passing through the strait or in its importance to international navigation. The decisive criterion, the Court said, was the geographical situation of the strait as connecting two parts of the high seas coupled with the fact that it was actually used for international navigation. To qualify as a strait, a channel need not be a necessary route. The fact that the Corfu Channel was a useful route for international maritime traffic was enough. Turning to the question of the legality of the Royal Navy's passage, the Court said that it was 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 authorisation of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace."[92]

The Corfu Channel Case may be viewed as having established two propositions. First, to qualify as a strait, a channel must satisfy two criteria: it must connect two parts of the high seas and it must actually be used for international navigation. Potential use is not enough. On the other hand, the volume of usage and its importance to international navigation are irrelevant. Second, warships have a right of innocent passage through straits in times of peace.

B. 1958 Territorial Sea Convention

The judgment of the International Court of Justice in the *Corfu Channel Case* must have influenced the International Law Commission and through it, the First UN Conference, which adopted the 1958 Territorial Sea Convention. In that Convention, the whole question of passage through straits used for international navigation was disposed of in one paragraph. Article 16, paragraph 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 and another part of the high seas or the territorial sea of a foreign State."

The position under the 1958 Territorial Sea Convention can be summed up in the following propositions. First, a strait used for international navigation must satisfy two criteria: the one geographical, the other functional. The geographical criterion is that it must connect one part of the high seas with another part of the high seas or one part of the high seas with the territorial sea of a State. The functional criterion is that, as stated in the *Corfu Channel Case,* the strait must actually be used for international navigation. Second, all ships, including warships, enjoy the right of "non-suspendable" innocent passage through straits used for international navigation. Third, submarines do not have the right of submerged passage through straits used for international navigation but, as required by article 14, paragraph 6 of the 1958 Territorial Sea Convention, must navigate on

[95] *Ibid,* at p. 28.

the surface and show their flag. Fourth, there is no right of overflight by aircraft over straits used for international navigation.

Were the great powers prepared to accept the mere repetition of the provisions of the 1958 Territorial Sea Convention in the new Convention? They were not. Why were they not prepared to do so? The answer lies in the progressive extension by coastal States of their territorial seas. The following table by William T. Burke[93] will make the point clear:

Number of Territorial Sea Claims Over Time

Territorial Sea Claimed (Nautical Miles)	Year	3	4	5	6	9	10	12	18	30	50	100	130	200
	Before 1930	32	5		5			1						
	1930	15	4		10			1						
	1958	41	4	1	11	1	1	11						4
	1960	40	4	1	12	1	1	16						4
	1973	27	4		11		1	52	1	3	1	1	1	9
	1974	25	4		13		1	51	1	4	3	1	1	10

In 1958, the majority of the international community, 41 out of 74 States, claimed a territorial sea of three miles. By 1974, the number of States claiming a territorial sea of three miles has declined to 25 and the number claiming more than three miles has increased to 89. The significance of this change lies in the fact that there are 116 straits used for international navigation which are between six and twenty-four miles in width. There were high sea corridors in these straits when the strait States claimed a territorial sea of three miles. But, when the strait States extended their territorial seas to twelve miles, the high sea corridors disappeared and all the waters within these straits became territorial waters. This was the reason which led the great powers to demand that the extension of the territorial sea to twelve miles must be balanced by either the preservation of a high sea corridor in straits used for international navigation or the establishment of a *sui generis* regime for passage through, over and under straits used for international navigation.[94]

C. Position Under the 1982 Convention

Unlike the 1958 Territorial Sea Convention, which had only one paragraph of an article dealing with passage through straits used for international navigation, the 1982 Convention has 12 articles which deal directly with the question. The second significant fact is that these 12 articles are not located in Part II of the Convention, dealing with

[93] W. Burke, "Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty", (1977) 52 Wash. L. Rev. 193 at p. 195.
[94] *Ibid.*

the territorial sea and the contiguous zone, but form a separate part of the Convention, Part III, entitled, "Straits Used For International Navigation". This is clear evidence of an intention to depart from the position under the 1958 Territorial Sea Convention.

D. Definition of Straits Used For International Navigation

How does the 1982 Convention define straits used for international navigation? Actually, the Convention does not define the term as such. What it does is that article 37 states that section 2 of Part III of the Convention, entitled "Transit Passage", applies to "straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive zone". From article 37, it is possible to infer that for a strait to qualify as a strait used for international navigation, it must satisfy two criteria: a geographical criterion and a functional criterion. The geographical criterion is that it must connect: (a) one part of the high seas with another part of the high seas or (b) one part of the high seas with an exclusive economic zone or (c) an exclusive economic zone with another exclusive economic zone. The functional criterion is that it is used for international navigation. How should the second criterion be interpreted? Does it require any volume of usage? Does the strait have to constitute an important route of international navigation?

The second criterion is borrowed from article 16, paragraph 4, of the 1958 Territorial Sea Convention, which has never been the subject of an authoritative interpretation. This leaves us with no choice but to fall back on the judgment of the International Court of Justice in the *Corfu Channel Case.* In that case, it will be recalled that the Court said that evidence of actual usage of the strait for international navigation was sufficient. The Court rejected the idea that the usage of the strait must attain a certain volume. It also rejected the notion that the strait must achieve a requisite degree of importance to international navigation. If we accept the views of the Court on the meaning of the functional criterion, and there is no reason not to, it is relatively easy to apply. What we would be looking for is evidence that a strait is actually being used, the volume of such usage being irrelevant, for international navigation.

Arvid Pardo[95] has referred to the difficulties of identifying straits used for international navigation. In this respect, it should be pointed out that statements made by representatives of strait States are not necessarily correct or controlling. Pardo has suggested that the uncertainty surrounding the identification of straits used for international navigation could and should have been overcome by listing, in an annex to the Convention, all such straits. There is certainly some merit in such an approach but it also suffers from one defect. The defect is that it seeks to freeze what is essentially a dynamic situation. A strait which may not be used, at present, for international navigation may be so used in the future. Conversely, a strait which is being used for international navigation, at present, may cease to be so used in the future.

[95] A. Pardo, "An Opportunity Lost", in Oxman, Carmon and Buderi (editors), *Law of the Sea: U.S. Policy Dilemma* (1983), p. 17.

E. Nature of Regime Applicable To Straits Used For International Navigation

What is the nature of the regime or regimes applicable to straits used for international navigation? A careful reading of Part HI of the 1982 Convention reveals four different kinds of regimes applicable to straits used for international navigation. To put it another way, one can say, along with John Norton Moore,[96] that the Convention distinguishes four different categories of straits used for international navigation. The four categories are as follows:

First, straits in respect of which there are long-standing conventions in force.[97] The legal regime for passage through, over and under such straits would, of course, be governed by their respective conventions. Examples of this category would be the Turkish Straits, *viz.* the Bosphorus, the Sea of Marmora and the Dardanelles, which are governed by the Montreux Convention of 1936,[98] and the Straits of Magellan.[99]

Second, straits used for international navigation in which a route through the high seas or an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics, exists. If such an alternative route exists, article 36 seems to require international shipping and aviation to use the alternative route. Since the alternative route goes through the high seas or an exclusive economic zone, the regime of passage will be governed by the relevant provisions of Parts VII and V respectively.

Third, the regime of "non-suspendable" innocent passage is applicable to the following two types of straits used for international navigation.[1] The first is a strait formed by an island of a State bordering the strait and its mainland and where there exists seaward of that island, a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.[2] Two examples of such a strait would be the Strait of Pemba, formed by the island of Pemba (belonging to Tanzania) and the mainland of Tanzania and the Strait of Messina, formed by the island of Sicily (belonging to Italy) and the mainland of Italy. The second is a strait used for international navigation connecting one part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.[3] Some examples of such a strait would be the Strait of Georgia and the Gulf of Honduras. What about the Strait of Tiran? The Strait of Tiran satisfies both the geographical and the functional criteria but Moore[4] has correctly pointed out that the passage regime applicable to the Strait of

96 Moore, *supra* note 90 at p. 111.
97 1982 Convention, *supra* note 1, Article 35, para. (c).
98 173L.N.T.S. 213.
99 Treaty concluded in 1881 between Chile and Argentina, in Martens, *Nouveau recueil general de traites,* 2nd ser., Vol. 12, p. 491.
1 1982 Convention, *ante* note 1, Article 45.
2 *Ibid.,* Article 45, para. l(a) and Article 38, para. 1.
3 *Ibid.,* Article 45, para. l(b).
4 Moore, *supra* note 90, at p. 113.

Tiran is contained in UN Security Council Resolutions 242[5] and 338[6] which override article 45 of the Convention. Those two UN Security Council Resolutions, *inter alia,* affirm "the necessity for guaranteeing freedom of navigation through international waterways in the area."

Fourth, the most important category is article 37 straits to which the regime of transit passage applies. Most of the 116 straits affected by the extension of the territorial sea, including such important straits as Gibralter, Dover, Hormuz, Bab-Al-Mandeb, Malacca-Singapore, fall within this category. The term, "transit passage" has no antecedent. It was not used in the 1958 Territorial Sea Convention or in customary law. The concept of transit passage is new and represents one of the many creative innovations of the Third UN Conference.

F. Regime of Transit Passage

What is transit passage? Article 38, paragraph 2, states that transit passage means the exercise, in accordance with Part III of the Convention, of "the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait... " The phrase, "freedom of navigation and overflight" is normally used in connection with the high seas as in article 87, paragraph l(a) and (b). What is the significance of using this phrase in the definition of transit passage? The first significance could be to distinguish clearly the regime of transit passage from the inferior regimes of "non-suspendable" innocent passage and innocent passage .simpliciter. The second and more important significance is to denote that transit passage is like the freedom of navigation and the freedom of overflight in the high seas except for the limitations on those freedoms imposed by Part III of the Convention. The most important of these limitations is that the freedom of navigation and overflight must be exercised, "solely for the purpose of continuous and expeditious transit of the strait... "[7] In other words, the freedom of navigation and overflight must be exercised solely for the purpose of transit through the strait and that transit must be continuous and it must be expeditious.

There is one exception to the requirement of continuous and expeditous transit. The exception covers the case of a ship or aircraft which is going through the Strait for the purpose of entering, leaving or returning from a State bordering the strait.[8] An illustration of this exception would be the case of a ship going through the Straits of Malacca and Singapore from the Indian Ocean. The ship stops in Singapore to pick up cargoes and proceeds through the Strait of Singapore eastward into the South China Sea. Although the ship's passage is not "continuous" because of the stoppage in Singapore, it still enjoys the right of transit passage by virtue of the exception.

5 Security Council Res. 242 of 22 Nov. 1967, UN Security Council Off.Rec., 22nd year (1967).
6 Security Council Res. 338 of 22 Oct. 1973, UN Security Council Off.Rec., 28th year (1973).
7 1982 Convention, *ante* note 1, Article 38, para. 2.
8 *Ibid.*

G. Aircraft, Warships and Submarines

Under the 1958 Territorial Sea Convention, the regime of non-suspendable innocent passage through straits used for international navigation does not extend to the overflight of such straits by aircraft. Under the 1982 Convention, transit passage applies to both ships and aircraft. Article 38, paragraph 1, states, "all ships and aircraft enjoy the right of transit passage..." Article 39 lays down the rights and duties of ships and aircraft during transit passage. Article 42, paragraph 5, refers to "the state of registry of an aircraft..." and article 44 refers to "any danger to navigation or overflight..."

The fact that the regime of transit passage applies to warships is also clear beyond dispute. Article 38 states that "all ships" enjoy the right of transit passage. The clearest evidence is in article 42, paragraph 5, which refers to ships entitled to sovereign immunity.

Under the 1958 Territorial Sea Convention, submarines must navigate on the surface and show their flag. Does the regime of transit passage include the submerged passage of submarines? An interesting and learned disputation on this question has taken place among four American legal scholars. William T Burke,[9] John Norton Moore[10] and Horace B Robertson Jr[11] have argued that transit passage includes the submerged passage of submarines, whereas Michael Reisman[12] has taken the position that the provisions of the Convention are ambiguous and can be interpreted to exclude such passage.

The conclusion that submarines may transit straits used for international navigation in submerged passage is not explicitly stated in the text but has to be derived from the text by way of interpretation. The conclusion was, however, agreed by the negotiators and the text was intended to convey that meaning. Article 38, paragraph 2, uses the term "freedom of navigation" when defining transit passage. The expression, "freedom of navigation" is a term of art. It is used in article 87 of the Convention dealing with the freedom of the high seas. The term was used in article 2 of the 1958 Convention on the High Seas.[13] The term was deliberately chosen for use in the straits articles and none of the negotiators ever argued seriously that it was meant to exclude submerged transit. Secondly, the phrase, "their normal modes of continuous and expeditious transit" in article 39, paragraph l(c), was also understood by the negotiators to cover submerged passage by submarines. It is, after all, undeniable that submerged transit is a "normal mode" of transit for submarines.

H. Rights and Duties of Strait States

What are the rights of strait States relating to transit passage? Subject to the provisions of section 2 of Part III of the Convention, strait States have the right to adopt laws and regulations in respect of four matters. First, in respect of the safety of navigation and the regulation

9 *Supra* note 93.
10 *Supra* note 90.
11 H. Robertson, "Passage Through International Straits: A Right Preserved In the Third UN Conference on the Law of the Sea", (1980) 20 Va. J. Int'l L. 801.
12 *Supra* note 90.
13 *Supra* note 75.

of maritime traffic. The power of strait States to adopt laws and regulations in respect of the safety of navigation and the regulation of maritime traffic is, however, severely circumscribed. It can only be exercised as provided in article 41 of the Convention. Article 41 permits strait States to designate sea lanes and prescribe traffic separation schemes where it is necessary to promote the safe passage of ships. In doing this, strait States must observe two conditions. The sea lanes and traffic separation schemes must "conform to generally accepted international regulations".[14] The sea lanes and traffic separation schemes must be submitted to and adopted by the relevant international organization which, in this case, is the International Maritime Organization (IMO), before the strait States can designate or prescribe them. The strait States, therefore, cannot designate sea lanes or prescribe traffic separation schemes until they have been adopted by the IMO. On the other hand, the IMO cannot adopt sea lanes and traffic separation schemes without the agreement of the strait States. There is, therefore, a balance between the interests of the strait States and those of the international community which has been built into the decision-making process.

In the case of a strait where the sea lanes or traffic separation schemes pass through the waters of two or more strait States, they shall cooperate in formulating proposed sealanes and traffic separation schemes in consultation with the IMO.[15] The Straits of Malacca and Singapore are examples of such a case. The three strait States, Indonesia, Malaysia and Singapore have acted in accordance with article 41, paragraph 5, by cooperating with one another, by consulting IMO, and even, consulting the major user States. The IMO has adopted the proposals of the three strait States to maintain a single, under-keel clearance of 3.5 metres, to prescribe traffic separation schemes in three critical areas and to designate a sea lane in the Strait of Singapore for ships whose draught exceeds 15 metres.[16]

The second matter on which strait States may adopt laws and regulations is the prevention, reduction and control of pollution.[17] This power of the strait States is also limited. It is limited in two ways. The laws and regulations can only deal with "the discharge of oil, oily wastes and other noxious substances in the strait" and not other kinds of pollutants. The laws and regulations of the strait States must give effect to applicable international regulations. What this seems to say is that the strait State cannot adopt laws and regulations if there were no applicable international standards and the laws and regulations must neither exceed nor be below the applicable international standards.

If a foreign ship violates the laws and regulations, properly adopted by a strait State, on the safety of navigation and the regulation of maritime traffic or the prevention, reduction and control of pollution, can the strait State take enforcement measures against the foreign ship? According to article 233, the strait State can only take enforcement action against the foreign ship if the violation of its laws and regulations causes or threatens to cause major damage to the

[14] 1982 Convention, *ante* note 1, Article 41, para. 3.
[15] *Ibid.,* Article 41, para. 5.
[16] The relevant documents are contained in K.L. Koh, *Straits in International Navigation* (1982), Appendix A, B and C.
[17] 1982 Convention, *ante* note 1, Article 42, para. 1(b).

marine environment of the strait. In taking appropriate enforcement measures against the foreign ship, the strait State must observe the safeguards contained in section 7 of Part XII of the Convention on Protection and Preservation of the Marine Environment. No enforcement measures can be taken against warships and other ships which enjoy sovereign immunity.[18]

The third matter on which strait States may adopt laws and regulations is with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear.[19] The fourth matter is the loading or unloading of any commodity, currency or person in contravention of the custom, fiscal, immigration or sanitary laws and regulations of strait States.[20]

These are the only rights and powers which Part III of the Convention confers on strait States. What duties or obligations does the Convention impose on strait States?

The first duty of strait States is not to suspend, hamper or impede transit passage.[21] The second duty of strait States is to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge.[22] The third duty of strait States is to indicate clearly all sea lanes and traffic separation schemes designated or prescribed by them, pursuant to articles 41 and 42, paragraph l(a), on charts and to give due publicity to such charts.[23] The fourth duty of strait States is not to discriminate among foreign ships, in form or in fact, in the adoption and application of the laws and regulations referred to in article 42, paragraph 1, which would have the practical effect of denying, hampering or impairing the right of transit passage.[24] The fifth duty of strait States is to give due publicity to all the laws and regulations adopted pursuant to article 42, paragraph 1.[25]

I. Duties of Ships and Aircraft during Transit Passage

What are the duties of ships and aircraft during transit passage? Article 39 of the Convention imposes four duties common to ships and aircraft. In addition, the article imposes two duties on ships and two on aircraft. What are the four duties shared in common by ships and aircraft during transit passage? The first duty is to proceed without delay through or over the strait.[26] This duty flows logically from the requirement of continuous and expeditious transit in the definition of transit passage.[27] The second duty is to "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the

[18] *Ibid.,* Article 233 and 236.
[19] *Ibid.,* Article 43, para. l(c).
[20] *Ibid.,* Article 43, para. l(d).
[21] *Ibid.,* Article 44 and 38.
[22] *Ibid.,* Article 44.
[23] *Ibid.,* Article 41, para. 6.
[24] *Ibid.,* Article 42, para. 2.
[25] *Ibid.,* Article 42, para. 3.
[26] *Ibid.*. Article 39, para. l(a).
[27] *Ibid.,* Article 38, para. 2.

Charter of the United Nations".[28] The second duty is a mere restatement of one of the duties which the UN Charter imposes on all member States. The third duty is to "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress".[29] Under this duty, the conduct of activities such as naval exercises or weapons practices would be forbidden.

The fourth duty of ships and aircraft in transit passage is to comply with other relevant provisions of Part III of the Convention. There do not appear to be other provisions in Part III which impose duties on aircraft. There are three provisions in Part III which are relevant to ships. Article 40 states that ships in transit passage may not carry out marine scientific research or hydrographic surveys without prior authorization of the strait State. Article 41, paragraph 7, states that ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with that article. Finally, article 42, paragraph 4, requires ships in transit passage to comply with the laws and regulations adopted by strait States, pursuant to that article.

In addition to the four duties which article 39 imposes on both ships and aircraft, the article imposes two separate duties on ships and two others on aircraft. Therefore, the fifth duty of ships in transit passage is to comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea.[30] The sixth duty of ships in transit passage is to comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.[31]

The fifth duty of aircraft in transit passage is to observe the Rules of Air established by the International Civil Aviation Organization.[32] If the aircraft is a State aircraft, it will normally comply with such safety measures and will, at all times, operate with due regard for the safety of navigation. The sixth duty of aircraft in transit passage is to monitor, at all times, the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[33]

J. How the Straits Provisions were Negotiated

The negotiation on the regime for passage of ships and aircraft, through, over and under straits used for international navigation, began in 1971, during the preparatory stage, in the UN Seabed Committee. During the summer 1971 session of the Committee's meeting, the United States submitted draft articles on the breadth of the territorial sea, passage through straits and fisheries.[34] In 1971, the

[28] *Ibid.,* Article 39, para. 1(b).
[29] *Ibid.,* Article 39, para. 1(c).
[30] *Ibid.,* Article 39, para. 2(a).
[31] *Ibid.,* Article 39, para. 2(b).
[32] *Ibid.,* Article 39, para. 3(a).
[33] *Ibid.,* Article 39, para. 3(b).
[34] Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Gen.Ass.Off.Rec., 26th Sess. (1971), Supp. No. 21, pp. 241-245 (UN Doc. A/8421).

Soviet Union submitted its proposals which were rather similar to those of the United States.[35] In 1973, the last year of the preparatory stage before the commencement of the Conference, about 50 proposals were submitted.[36] The two most important proposals were those submitted by Fiji,[37] and by a group of strait States, *viz.* Cyprus, Greece. Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen.[38] Because of the contradictions between the various proposals, the Seabed Committee was unable to produce a single draft text for the consideration of the Third UN Conference. All that the Committee succeeded in doing was to reduce the number of variants to a more manageable number.

The second session of the Third UN Conference, held in Caracas in 1974, devoted six sessions to the discussion on the straits issue. A number of proposals were submitted to the Second Committee of the Conference. The most important of these were submitted by the United Kingdom,[39] the Soviet Union and its East European allies,[40] Denmark and Finland,[41] Oman,[42] Fiji[43] and Algeria.[44] The British proposal was the one which contained the novel concept of "transit passage" through straits used for international navigation. Views were still too divergent at that stage and the session concluded without the adoption of any draft text. The Chairman of the Second Committee, in summing up the work of the session, stated that the idea of a territorial sea of twelve miles and an exclusive economic zone of up to 200 miles was a keystone of the compromise solution favoured by the majority of States provided satisfactory solutions could be found to other issues, one of which being the issue of passage through straits used for international navigation.[45]

The straits issue was substantially resolved at the third session of the Conference, held in Geneva in 1975. It was one of the first, if not the first issue to be resolved. This was a remarkable feat given the intrinsic difficulty of the question, the divergent views held by different delegations and groups of delegations and the strong feelings held by the two super-powers, on the one hand, and some of the strait States, on the other. How was this negotiating feat accomplished? It was accomplished as a result of an initiative taken jointly by Fiji and the United Kingdom. Those two delegations co-chaired a small, private and informal negotiating group on straits. They were not authorised by the Conference to convene such a group and the group's composition was determined by the co-chairmen and not by the conference. In

35 Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Gen.Ass.Off.Rec., 27th Sess. (1972), Supp. No. 21, pp. 161-163 (UN Doc. A/8721).

36 Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Gen.Ass.Off.Rec., 28th Sess. (1973), Supp. No. 21, Vol. I, pp. 40, 61-66 (UN Doc. A/9021).

37 *Ibid.,* Vol. III, p. 91.

38 *Ibid.,* Vol. III, p. 3.

39 UN Doc. A/CONF.62/C.2/L.3, Third UN Conference on the Law of the Sea, Off.Rec., Vol. III, (2nd Sess., 1974) p. 91.

40 UN Doc. A/CONF.62/C.2/L. 11, *ibid.,* p. 183.

41 UN Doc. A/CONF.62/C.2/L. 15, *ibid.,* p. 191.

42 UN Doc. A/CONF.62/C.2/L. 16, *ibid.,* p. 192.

43 UN Doc. A/CONF.62/C.2/L.19, *ibid.,* p. 196.

44 UN Doc. A/CONF.62/C.2/L.20, *ibid.,* p. 198.

45 UN Doc. A/CONF.62/C.2/L.86, *ibid.,* p. 243.

addition to the two co-chairmen, the group consisted of the following 13 countries: Argentina, Australia, Bahrain, Bulgaria, Denmark, Iceland, India, Italy, Kenya, Nigeria, Singapore, United Arab Emirates and Venezuela.

On what bases did the co-chairmen compose the group? The co-chairmen excluded the two super-powers, on the one hand, and the radical strait States, on the other, probably on the ground that their views were too extreme. The British chairman, Harry Dudgeon, no doubt, kept in touch with the United States and the Soviet Union and the Fijian chairman, Satya Nandan, kept in touch with the strait States. Those invited to attend were probably selected because they held moderate views and because they were influential delegations in the politics of the Conference. When the existence of the group became known, the radical strait States criticised the composition of the group on the ground that the United Kingdom's interests on straits were identical to those of the US and USSR whereas the point of view of the radical strait States were not represented in the group. The group used the proposals of Fiji and the United Kingdom as the bases of their negotiations. Because the group had no official status in the Conference, it had no access to the Conference facilities. It is perhaps ironical that one of the most successful negotiating groups of the Conference held all its meetings in one of the delegates' lounges at the United Nations in Geneva!

The group succeeded in producing a consensus text on straits before the end of the 1975 Geneva session. The co-chairmen submitted the draft articles to the then chairman of the Second Committee, Galindo Pohl. That was the session during which the Conference requested the chairmen of the three main committees to produce an informal single negotiating text. Galindo Pohl included, without any change, the draft articles on straits worked out in the private group on straits.[46] The draft articles initially received a cold reception by many of the strait States but the attitude of most of them changed with the passing years. Although the informal single negotiating text was to undergo six transformations before being adopted as the 1982 Convention, the articles on straits used for international navigation, prepared by the private group on straits in 1975, survived those transformations and repeated challenges by radical strait States, practically intact. The first successful use of a private group to negotiate a difficult issue created a procedural precedent which would be followed later.

K. Transit Passage Compared With The Pre-Existing Law

Under the pre-existing law, whether conventional law as contained in the 1958 Territorial Sea Convention or customary law as reflected in the judgment of the International Court of Justice in the *Corfu Channel Case,* the passage regime through straits used for international navigation, was non-suspendable innocent passage. Under the 1958 Territorial Sea Convention, the passage regime did not include overflight by aircraft and submarines had to navigate on the surface and show their flag.

46 A/CONF.62/WP.8/PART II, Third UN Conference on the Law of the Sea, Off.Rec., Vol. IV (1975), p. 152.

Under the 1982 Convention, the regime for passage through, over and under straits used for international navigation has been clearly distinguished from the regime of innocent passage through the territorial sea. Transit passage includes overflight by aircraft and submerged passage by submarines. There is to be no discrimination against military vessels or aircraft. The strait State's regulatory competence, to protect the safety of navigation, the marine environment and the security of the strait States, are carefully circumscribed and balanced against the world community's interest in the freedom of navigation. The right of transit passage is not subject to suspension, impairment or impediment by the strait State on the ground that the passage is not "innocent" or on the basis of any subjective criteria.

L. The Importance of Transit Passage to the Great Powers

The great military powers, especially the United States and the Soviet Union, have identical strategic interests in ocean space and the air space above it. Reflecting this fact, the delegations of the United States and the Soviet Union were able to work in unison, in pursuing their common strategic interests, on the straits issue. On the whole, representatives of the two super-powers are satisfied with the provisions of the 1982 Convention. Elliot Richardson, the leader of the United States delegation from 1977 to 1980 has written that, "... our fleet missile ballistic submarines ... depend on complete mobility in the oceans and unimpeded passage through international straits. Only such freedom makes possible the secrecy on which their survival is based".[47] He has also said that, "the transit passage regime will satisfactorily protect and enhance the legal regime in straits that is essential for the continued mobility and flexibility of air and naval forces".[48]

IV. ARCHIPELAGIC STATES

What is an archipelago? The 1982 Convention defines an archipelago as "a group of islands, including ports of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such".[49] According to this definition, not every group of islands constitutes an archipelago. To qualify as an archipelago, a group of islands must satisfy one of two criteria. First, the islands and the interconnecting waters must be so closely interrelated as to form an intrinsic geographical, economic and political entity. Second, the islands have, historically, been regarded as constituting an archipelago.

What is an archipelagic State? The 1982 Convention defines an archipelagic State as "a State constituted wholly by one or more

47 E. Richardson, "Power, Mobility and the Law of the Sea", (1980) 58 Foreign Affairs 902 at p. 905.

48 E. Richardson, "Law of the Sea: Navigational and Other Traditional National Security Considerations", (1982) Vol. 19, No. 3, San Diego L. Rev. 554 at pp. 565 & 566.

49 1982 Convention, *ante* note 1, Article 46, para. (b).

archipelagoes and may include other islands."[50] It follows from this definition that whilst every archipelagic State is an archipelago, not every archipelago is an archipelagic State. An archipelago, such as Hawaii, which belongs to a continental State, the USA, is obviously not an archipelagic State.

A. Nature of Claim Made in Respect of Archipelagoes

In the case of a single island, a territorial sea would be drawn around it. In the case of an archipelago, the claim made was to replace the normal method of drawing a territorial sea around each island by applying the system of drawing straight baselines. The proposal was to draw straight baselines connecting the outermost points of the outermost islands of the archipelago. The territorial sea would be measured from such baselines. The claim made no distinction between archipelagic States and archipelagoes belonging to continental States.

B. The Position of Archipelagoes Under the Pre-Existing Law

What is the position of archipelagoes under the pre-existing law? At the First UN Conference, Philippines[51] and Yugoslavia[52] raised the question but the Conference did not take it up, arguing that it required more study. At the Second UN Conference, both Philippines[53] and Indonesia[54] urged the Conference to recognise their status as archipelagic States. Because the Philippines based its case on historical grounds, the Conference decided it was inopportune to discuss the matter since the UN General Assembly had decided to embark upon a special study of historic waters.[55] The 1958 Territorial Sea Convention contains no provision which specifically refers to archipelagoes or archipelagic States. There is, therefore, nothing in the pre-existing conventional law on archipelagoes.

The position under customary law is less clear. The trend towards the recognition of the concept of archipelagic States was spearheaded by Indonesia and the Philippines. In 1955, the Philippines sent a Note Verbale to the Secretary-General of the United Nations,[56] claiming exclusive rights over the waters within the coordinates of the Treaty of Paris of 1898. By the Treaty of Paris and another treaty concluded in 1900, Spain ceded the Philippines to the United States. The said treaties defined the Philippines by reference to geographical coordinates which, according to the Filipino view, involved the cession of maritime as well as land territory. The note verbale was followed by the enactment of national legislation in 1961,[57] which described the waters enclosed by the strait baselines as inland waters. This legislation was protested against by the United Kingdom, United States, Japan and Australia. In 1968, the Philippines required prior authori-

50 *Ibid.,* Article 46, para. (a).
51 UN Doc. A/CONF.13/C.1/L.98, First UN Conference on the Law of the Sea, Off.Rec., Vol. III, (1958) p. 239.
52 UN Doc. A/CONF. 13/C. 1/L.59, *ibid.,* p. 227.
53 Second UN Conference on the Law of the Sea, Off.Rec., Vol. III (1960), pp. 51-52.
54 *Ibid.,* p. 93-94.
55 *Ibid.,* p. 151.
56 Doc. A/CN.4/99, (1956) 2 Y.B.I.L.C. 69-70.
57 Republic Act No. 3046, which was amended in 1968 by Act No. 5446.

zation for the passage of warships through its inland waters, a move which met with further protests.

Indonesia followed the Philippines in adopting archipelagic baselines in 1957. On the 14th of December 1957, the Indonesian Government issued a Declaration[58] stating that the geographical form of Indonesia, as a country composed of thirteen thousand islands, was unique; that in view of the territorial integrity and of the need to preserve the wealth of the Indonesian State, it was necessary to consider all the islands and seas between them as a unit. The Declaration guaranteed the peaceful passage of foreign vessels through the waters enclosed by the islands so long as the passage was not contrary or harmful to the sovereignty of Indonesia. The twelve-mile territorial sea would be measured from the straight baselines connecting the outermost parts of the islands. In spite of protests by Australia, France, the United States, United Kingdom, Japan, New Zealand and the Netherlands, the Indonesian Government enacted national legislation[59] on the 18th of February, 1960, to strengthen its claim. Under the Indonesian law, foreign warships are required to give notice unless they follow the normal shipping routes and submarines are required to navigate on the surface.

Why were the major maritime nations opposed to the claims of Indonesia and the Philippines? They were opposed because in some cases, the waters over which archipelagic status was claimed, *e.g.* the Java Sea, was not only vast in area but covered important Straits and navigation and overflight routes, *e.g.* the Sunda strait and the Lombok strait, critical to the movement of their military forces.

C. How Was the Question Successfully Negotiated?

There were two groups of claimant States at the Third UN Conference on this question. There were, first of all, the archipelagic States, such as, Indonesia, Philippines, Fiji, Mauritius and Bahamas. Secondly, there were the continental States which owned archipelagoes, such as India and Greece. Although the two groups cooperated with each other, the first group realised, very early in the Conference, that the claim of the second group was unlikely to win wide acceptance. Hence, the five abovementioned archipelagic States formed a group of their own to further their common interests. In order to gain leverage, they joined the eighty-six-member group of Coastal States, thus securing the support of approximately two-thirds of the members of the Conference. The archipelagic States had to negotiate their claim with the great maritime powers, especially the United States and the Soviet Union, and with some of the neighbours of the archipelagic States whose interests were adversely affected by the establishment of archipelagic baselines.

[58] An English translation of the Indonesian text was published in the *Hokum* (Indonesian Law Journal) (1958), Nos. 5-6, Annex I. This text is reprinted in J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International* Law (1961) at pp. 173-174.

[59] Indonesia Act No. 4 of 18 February 1960. An English text of the Act was published in UN. Doc A/CONF.19/5 Add. 1, p. 3 (1960). This document is also reprinted in Syatauw, *ibid.,* at pp. 175-176.

It will be recalled that in the case of passage through straits used for international navigation, a private negotiating group was convened by Fiji and the United Kingdom. In the case of archipelagoes, no negotiating group was established. Instead, the Rapporteur of the Second committee, Satya Nandan, who was also the representative of Fiji, took it upon himself to negotiate a compromise text between the archipelagic States, on the one hand, and the major maritime powers and certain affected neighbouring States, on the other hand. This took place during the third session of the Conference, held in 1975 in Geneva. By the end of that session, Nandan had succeeded in drafting a compromise text which was incorporated into the informal single negotiating text.[60] With only a few subsequent embellishments, the Nandan text has survived the test of time.

D. The Position Under the UN Convention

The 1982 Convention has accepted the claim of archipelagic States to draw straight baselines or "archipelagic baselines", joining the outermost points of the outermost islands. The system of archipelagic baselines is not, however, applicable to archipelagoes belonging to continental States. Thus, the islands of Hawaii,[61] the Nicobar and Andaman Islands, the Greek islands, amongst others, are not entitled to the system of archipelagic baselines.

E. Archipelagic Baselines

An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago if four criteria can be satisfied. The first criterion is that the main islands of the archipelago must be included within such baselines.[62] The second criterion is that the area of water enclosed by such baselines must not be greater than nine times the area of land.[63] In other words, the ratio between the area of water and the area of land enclosed by such baselines must not exceed 9:1. If the ratio does exceed 9:1, then the archipelagic baselines must be redrawn in order to conform to the ratio. If this cannot be done then the archipelagic State in question is not entitled to the system of straight archipelagic baselines under the Convention. For the purpose of calculating the area of land enclosed by archipelagic baselines, land includes atolls[64] and "waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying of the perimeter of the plateau".[65]

The third criterion is that the length of archipelagic baselines shall not exceed 100 nautical miles.[66] There is an exception to this criterion. The exception is that three per cent of the baselines may be between

60 *Supra* note 46.
61 "Archipelagoes and Archipelagic States under UNCLOS HI: no special treatment for Hawaii", (1981) 4 Hastings Int'l & Comp. L. Rev. 509.
62 1982 Convention, *ante* note 1, Article 47, para. 1.
63 *Ibid*
64 *Ibid*
65 *Ibid,* Article 47, para. 7.
66 *Ibid,* Article 47, para. 2.

100 and 125 nautical miles.[67] If the baselines drawn by an archipelagic State do not satisfy this criterion either because more than three per cent of the total number of baselines exceed 100 miles or because some of the baselines exceed 125 miles, then, the baselines will have to be redrawn in order to conform to this criterion. If this cannot be achieved, then the archipelagic State in question is not entitled to the system of straight archipelagic baselines under the Convention. The fourth criterion is that the archipelagic baselines must not depart, to any appreciable extent, from the general configuration of the archipelago.[68]

An archipelagic State must show its baselines either on charts of a scale or scales adequate for ascertaining them or by listing their geographical coordinates.[69] The archipelagic State must give due publicity to such charts or lists of geographical coordinates and must deposit a copy with the Secretary-General of the United Nations.[70]

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from the archipelagic baselines drawn in accordance with article 47 of the Convention.[71] The waters enclosed by the archipelagic baselines are called archipelagic waters.[72]

F. Status of Archipelagic Waters

What is the status of archipelagic waters? It will be recalled that archipelagic waters are situated on the landward side of archipelagic baselines and archipelagic baselines are the baselines from which the territorial sea of an archipelagic State is measured. Normally, the waters on the landward side of the baseline of the territorial sea are the internal waters of a State.[73] However, article 8, paragraph 1, specifically provides that this proposition has an exception and the exception is in Part IV of the 1982 Convention dealing with archipelagic States. The implication that archipelagic waters generally do not constitute "internal waters" is confirmed by article 50 which states that, "Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11." Article 9 deals with the drawing of a straight baseline across the mouth of a river, article 10 deals with the drawing of straight baselines across the mouths of bays and article 11 deals with the problem posed by ports. The implication of article 50 is clear: only the waters enclosed by the baselines drawn across the mouths of rivers and bays and the waters landward of the outermost permanent harbour works are the "internal waters" of an archipelagic State. It follows logically from the foregoing that archipelagic waters do not have the status of "internal waters".

If archipelagic waters are not internal waters, what is their status? The Convention does not pin a label to describe the status of archipelagic waters. The Convention does, however, describe the

67 *Ibid.*
68 *Ibid.,* Article 47, para. 3.
69 *Ibid.,* Article 47, para. 8.
70 *Ibid.,* Article 47, para. 9.
71 *Ibid.,* Article 48.
72 *Ibid.,* Article 49, para. 1.
73 *Ibid.,* Articles, para. 1.

rights and duties of archipelagic States and the rights and duties of the international community, in archipelagic waters. The archipelagic State has sovereignty over its archipelagic waters, the air space above, the bed and subsoil and the resources contained therein.[74] The sovereignty which an archipelagic State enjoys over its archipelagic waters is, however, subject to two qualifications. The first qualification is that "Ships of all States enjoy the right of innocent passage through archipelagic waters...."[75] In this respect, the status of archipelagic waters is similar to the status of the territorial sea because in both cases the sovereignty of the coastal State is subject to the right of innocent passage. Article 52, paragraph 2, permits an archipelagic State to suspend, temporarily, in specified areas of its archipelagic waters, the innocent passage of foreign ships if such suspension is essential for the protection of its security and provided two conditions are met. First, the suspension must not discriminate, in form or in fact, among foreign ships.[76] Second, such suspension shall take effect only after having been duly published.[77]

G. Archipelagic Sea Lanes Passage

The second qualification to the sovereignty of archipelagic States over their archipelagic waters can be best explained by the following analogy. A strait State has sovereignty over its territorial sea. However, in the case of a strait used for international navigation, the sovereignty of the strait State over its territorial sea is qualified by the right of transit passage. Similarly, where routes normally used for international navigation traverse archipelagic waters, the sovereignty of the archipelagic State is qualified by the right of archipelagic sea lanes passage.[78] This was a concession which archipelagic States had to make in return for the support of the great maritime powers for the concept of archipelagic States.

What is archipelagic sea lanes passage? Archipelagic sea lanes passage is defined as "the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high sea or an exclusive economic zone."[79] The right of archipelagic sea lanes passage includes the right of overflight by civilian and State aircraft.[80] It also includes submerged passage by submarines.[81]

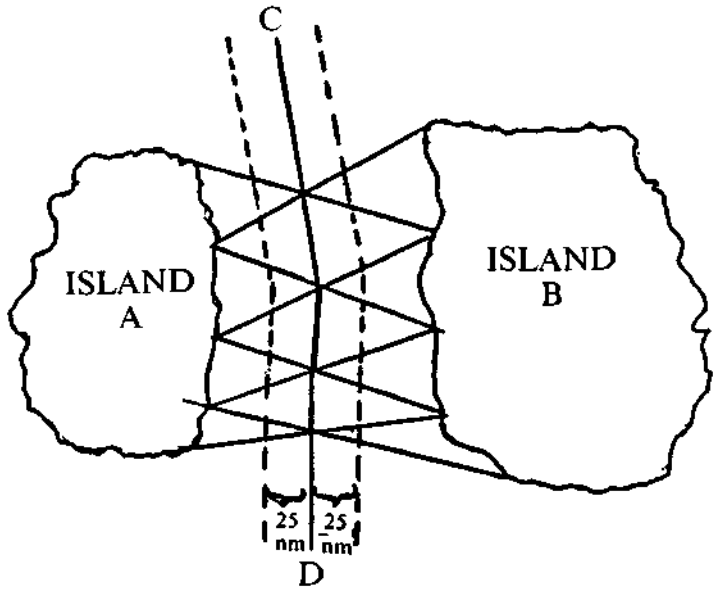
Where can the right of archipelagic sea lanes passage be exercised? If an archipelagic State designates sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea, the right must be exercised in such sea lanes and air

74 *Ibid.,* Article 49, para. 1 and 2.
75 *Ibid.,* Article 52, para. 1.
76 *Ibid.,* Article 52, para. 2.
77 *Ibid.*
78 *Ibid.,* Article 53.
79 *Ibid.,* Article 53, para. 3.
80 *Ibid.,* Article 53, para. 1, 2, 3, 4, 5, 12; Article 54.
81 This conclusion is derived from textual construction. The argument is similar to that in the case of transit passage through straits used for international navigation.

routes.[82] If the archipelagic State does not designate such sea lanes and air routes, the right may be exercised through the routes normally used for international navigation.[83]

If an archipelagic State wishes to designate sea lanes and air routes, are there any criteria it must comply with? The 1982 Convention prescribes several criteria. First, the sea lanes and air routes must traverse the archipelagic waters and the adjacent territorial sea.[84] Second, the sea lanes and air routes shall include all normal passage routes used as routes for international navigation and overflight through or over archipelagic waters.[85] In the case of ships, the routes shall include all normal navigational channels. The third criterion is an extremely difficult one to explain. Article 53, paragraph 5, states that sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points and that ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage. There is also a proviso that ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on the islands bordering the sea lane. Figure 3 may help to explain this complex rule. The figure shows a sea lane bounded by 2 islands, A and B. CD is the axis lines. The dotted lines on either side of CD is 25 nautical miles away from the axis lines. Ships and aircraft in archipelagic sea lanes passage may travel within the two dotted lines which is 50 nautical miles wide. Suppose that the distance between the nearest points on islands A and B is 100 miles. Ships and aircraft shall not navigate closer than 10 nautical miles of the coasts of islands A and B.

FIGURE 3



82 1982 Convention, *ante* note 1, Article 53, para. 1.
83 *Ibid.,* Article 53, para. 12.
84 *Ibid.,* Article 53, para. 4.
85 *Ibid.*

An archipelagic State which designates sea lanes may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.[86] Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.[87] Before such sea lanes and traffic separation schemes can be designated and prescribed respectively, they must first be adopted by the International Maritime Organisation.[88] The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which the publicity shall be given.[89]

The rights and duties of strait States and the rights and duties of foreign ships and aircraft in transit passage, as contained in articles 39, 40, 42 and 44 apply, *mutatis mutandis,* to archipelagic sea lanes passage.[90]

H. Accommodating Interests of Archipelagic States and Their Neighbours

The establishment of archipelagic waters, in some cases, adversely affects the rights and interests of the States immediately adjacent to the archipelagic States. Negotiations were therefore held between the archipelagic States in question and the affected neighbouring States. The negotiations were successfully concluded with the adoption of three provisions. First, article 47, paragraph 5, states that the system of archipelagic baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone, the territorial sea of another State. Second, article 47, paragraph 6, states that if a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected. An example of a situation to which article 47, paragraph 6, applies is the case of Indonesia and Malaysia. A part of the archipelagic waters of Indonesia lies between East and West Malaysia.

Third, article 51 states that an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The proposition that archipelagic States shall respect existing agreements with other States is axiomatic and needs no explanation. The second limb of the sentence can be illustrated by the following example. If Malaysia and Singapore, two immediately adjacent neighbouring States of Indonesia, can show that their fishermen have traditionally fished in certain areas of Indonesian archipelagic waters, Indonesia must recognize such traditional fishing rights. The rights of the immediately adjacent neighbouring States include "other legitimate activities", a somewhat imprecise category.

86 *Ibid.,* Article 53, para. 6.
87 *Ibid.,* Article 53, para. 8.
88 *Ibid.,* Article 53, para. 9.
89 *Ibid.,* Article 53, para. 10.
90 *Ibid.,* Article 54.

The terms and conditions for the exercise of such rights, including the nature, the extent and the areas to which they apply, shall be regulated by bilateral agreements between archipelagic States and their immediately adjacent neighbouring States. Such rights shall not be transferred to or shared with third States or their nationals.

The Convention also provides that archipelagic States shall respect existing submarine cables laid by other States and passing through its waters without making a landfall.[91] An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

V. The New Passage Regimes and States Not Parties to the 1982 Convention

In the late 1960's, the primary interest of the United States in convening a new conference on the law of the sea was to secure international agreement on navigational and overflight rights. In the face of unilateral claims by coastal States to extend their territorial seas from three to twelve miles, thereby abolishing the high seas corridor in 116 straits used for international navigation, and in the face of claims by archipelagic States such as Philippines and Indonesia, the United States felt the need for a new international legal consensus concerning the maximum breadth of the territorial sea, concerning a special regime of passage for ships, including submarines and aircraft, through, under and over straits used for international navigation and through archipelagic waters.

The provisions of the 1982 Convention have strengthened the regime of innocent passage through the territorial sea compared to the corresponding provisions in the 1958 Territorial Sea Convention.[92] The 1982 Convention contains special regimes of passage through straits used for international navigation and archipelagic waters. The United States Government has decided not to become a party to the 1982 Convention. The question which arises is whether the United States could stay outside the Convention and yet enjoy the special regimes of passage through straits and archipelagoes.

Representatives of the United States Government have argued that it could stay outside the Convention and enjoy the regimes of transit passage and archipelagic sea lanes passage on the ground that they are not new law but are customary international law or evidence of the emerging customary law.[93] At the meeting of the Conference, on the 30th of April, 1982, the Chairman of the Group of 77 stated that no rights could accrue to States which were not parties to the Convention. He argued that the rights in the Convention were contractual in nature, that they were not customary law and that States

91 *Ibid.,* Article 51, para. 2.

92 Moore, *ante* note 90.

93 Statement of Brian Hoyle, Director of the Office of Oceans Law and Policy in the U.S. State Department, at a Workshop of the Law of the Sea Institute in January, 1984 in Hawaii, J. Van Dyke (Editor), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985) pp. 292-293.

had no right to pick and choose among the provisions of the Convention, taking those they like and rejecting the rest.[94] In his closing statement to the Conference, on 10th December 1982, the president of the conference said:

> "This Convention is not a codification Convention. The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit passage through Straits used for international navigation and the regime of archipelagic sea lanes passage are two examples of the many new concepts in the Convention."[95]

The question when a rule in a Convention becomes part of the general international law was dealt with in the judgment of the International Court of Justice in the *North Sea Continental Shelf Case*.[96] The Court said that it could do so in three circumstances. First, when the rule in the Convention merely codifies the pre-existing law. Second, when the rule in the Convention reflects the emerging customary law. Third, when the subsequent practice of States subsumes a rule of law in a Convention into the body of general international law. Using this analytical tool, we can proceed to examine the provisions of the new Convention on passage rights.

In the case of the regime of innocent passage through the territorial sea, although the Convention makes some improvements to the regime as contained in the 1958 Territorial Sea Convention, it is probably correct to say that this aspect of the Convention satisfies the first and second criteria in the *North Sea Continental Shelf Case*. Therefore, a State which stays outside the Convention may, nevertheless, invoke the provisions of the Convention on innocent passage through the territorial sea.

In the cases of transit passage through straits used for international navigation and archipelagic sea lanes passage through archipelagic waters, the position is more doubtful. Under the 1958 Territorial Sea Convention, the regime of passage for ships (not aircraft) through straits formed by territorial sea is non-suspendable innocent passage. The regime excluded the submerged passage of submarines. The provisions of the new Convention on transit passage was the result of intensive negotiations among the parties and reflect a *quid pro quo*. In view of this, it is difficult to argue convincingly that it satisfies either the first or the second criteria. However, with the passage of time, and if the Convention is ratified by a large number of States, the third criterion could be satisfied and non-parties to the Convention, such as the United States, would then enjoy the benefits of a free ride. This reasoning applies equally to archipelagic sea lanes passage.

The answer to the question, whether a non-party to the Convention, could enjoy the benefit of the Convention's provisions on transit passage and archipelagic sea lanes passage, is, to put it mildy, unclear. In practice, straits States and archipelagic States may apply the rules of

94 Third UN Conference on the Law of the Sea, Off.Rec., Vol. XVII, (Resumed 11th Sess., 1982), 183rd Meeting, p. 3.
95 *Ibid.,* 193rd Meeting, pp. 135-136.
96 I.C.J. Rep. 1969, p.1.

the Convention uniformly, not differentiating between States which are parties to the Convention and those which are not. If this were the case, the non-parties would not be faced with any problem. However, one cannot exclude the possibility of a dispute arising between a non-party such as the United States and a strait State or an archipelagic State over the assertion by the United States of the right of transit passage or archipelagic sea lanes passage. The dispute could take place with countries which are generally friendly to the United States. Spain and Indonesia, for example, have declared that they did not regard the regimes of transit passage and archipelagic sea lanes passage, respectively, as conforming to customary international law. It would be impolitic for the United States to use force against such friendly countries. When force has to be used, it is surely better to use it with the law on your side than to do so with the law on the side of your adversary or in the context of legal uncertainty. The United States may also find itself confronted by demands by some strait States and archipelagic States for the conclusion of bilateral agreements to regulate the passage of US ships, including submarines, and aircraft through, under and over critical sea lanes. Such bilateral agreements could be costly and would provide less security and certainty for the United States than a widely accepted multilateral treaty.

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