

A. NOTES OF CASES

INTERNATIONAL LAW AND MALAYSIAN LAW — INNOCENT PASSAGE IN MALAYSIA'S TERRITORIAL WATERS

*Public Prosecutor v. Narongne Sookpavit*¹

THIS Malaysian case involved the conviction of several fisherman of Thai nationality for being in Malaysian Territorial Waters in possession of fishing appliances in contravention of Regulation 3 (b) of the Fisheries (Maritime) Regulations 1967, which was an offence under section 11(1) of the Fisheries Act 1963 (Rev. 1978). On appeal there were two issues relating to the interpretation of the Act and Regulations — whether Regulation 3(b) created an offence of strict liability, and whether in the absence of conviction, the Court could make an order for the forfeiture of the subject matter of the offence, *i.e.*, the fishing boat and fishing appliances. The court held that Regulation 3(b) was a strict liability offence and that the accused were consequently guilty of an offence under Section 11. It also held that the boat and fishing appliances were the subject matter of the offence and notwithstanding that no person was convicted of such an offence in the Court below, an order for the forfeiture should have been made. The passage of the Fisheries Act 1985² has made any comment on the reasoning of the Court on these two issues purely academic.

The relationship between customary international law and Malaysian law

This case is worthy of comment because, as acknowledged by Shankar J., it also raised an issue concerning the relationship between Malaysian law and international law which may have far reaching consequences. Shankar J. framed this issue as

“the extent to which Malaysia may exert general legislative authority within its territorial waters even if by so doing persons claiming to be exercising the so-called right of innocent passage may be adversely affected.”³

To address this issue, Shankar J. considered the issue of whether under Malaysian law there exists a right of innocent passage for foreign vessels through the territorial waters of Malaysia. He stated that the material before the Court in this case was inadequate to come to any positive conclusion on this issue. He decided the case on an alternative ground, holding that even if it did exist, the passage by the accused in the circumstances of this case could not be regarded as innocent since it contravened Malaysian domestic legislation. It is the reasoning of the Court on this issue which will be the focus of this comment.

¹ [1987] 2 M.L.J. 100.

² Fisheries Act 1985, Laws of Malaysia, Act 317 (1985).

³ *Supra*, note 1, at 101.

The narrow issue discussed in this comment is whether there was a right of innocent passage through the territorial sea of Malaysia. This question is now a moot point as the Fisheries Act 1985 expressly recognises that foreign fishing vessels have a right of innocent passage.⁴ The issues raised in this note are nevertheless of continuing importance because *dicta* in the case raise the issue of whether a rule of customary international law is part of the law of Malaysia.

The possible defence of innocent passage

When apprehended the boat appears to have been in the territorial waters of Malaysia, a few hundred yards to the north of Middle Channel, the main sea lane in the Straits of Singapore connecting the Straits of Malacca and Singapore to the South China Sea, in the area of the Horsburgh light house. The accused claimed that they originally set out from Thailand, and after fishing in international waters, they were heading for Singapore. The accused gave several reasons for why they were in that location when they were apprehended — that they had responded to a distress call from another ship, that they had to hug the coastline because of bad weather and that they were exercising the right of innocent passage. The only claim the Court seemed to take seriously was their claim that they were exercising the right of innocent passage. The accused claimed that by passing through the territorial waters of Malaysia enroute to Singapore by the only route available. It was argued on their behalf that “the vessel was not merely exercising the right of innocent passage, but was negotiating a route that had been used since time immemorial.”⁵

The decision and reasoning on the right of innocent passage

The judgement includes several lengthy quotations from textbook writers Brownlie⁶ and O’Connell⁷ relating to the history of innocent passage and the 1977 Traffic Separation Scheme for the Straits of Malacca and Singapore. Included in the extracts from Brownlie is the statement that the starting point for discussing the right of innocent passage must be Article 14 of the 1958 Convention on the Territorial Sea.⁸ Counsel for the accused had argued that Article 14 corresponded to customary international law as it is applied in England, and was therefore part and parcel of Malaysian law. The main authority cited for this contention appears to have been an article on the relationship between international law and municipal law by H.L. Dickstein in the *Journal of Malaysian and Comparative Law*.⁹

The judge did not question that under customary international law foreign ships, including fishing vessels, have a right of innocent

⁴ Fisheries Act 1985, *supra*, note 2, Section 16.

⁵ *Supra*, note 1, at 101.

⁶ I. Brownlie, *Principles of Public International Law* (3rd ed., 1979).

⁷ D.P. O’Connell, *The International Law of the Sea* (1982), Vol. 1.

⁸ 1958 Convention on the Territorial Sea and Contiguous Zone, First United Nations Conference on the Law of the Sea, Off. Rec. (1958), Vol. II, p. 132, Document A/CONF.13/L.52; 516 U.N.T.S. 205.

⁹ H. Dickstein, “The Internal Application of International Law in Malaysia: A Model of the Relationship Between International Law and Municipal Law” [1974] J.M.C.L. 204.

passage through the territorial sea of all states. What he did question was whether this rule of customary international law was part of Malaysian law. He gave what appeared to be three separate reasons for concluding that the material before the Court was inadequate to allow him to come to any positive conclusion as to whether there is innocent passage through territorial waters under the law of Malaysia. First, he stated that the cases cited by Dickstein concerning the relationship between customary international law and the common law (and therefore Malaysian law) were not sufficient to permit him to come to a definite conclusion. Second, he expressed the view that the applicable provisions of the Evidence Act required more proof — either evidence of a custom under sections 13 and 14 or expert evidence of foreign law under section 45, and no such evidence had been led in the Court below. Third, he stated that there was no material before him or the Court below to impel one to the conclusion that Article 14 of the 1958 Convention on the Territorial Sea had been imported into Malaysian law. I will now consider each of these reasons.

(1) *Customary international law as part of Malaysian Law*

The dominant principle followed in English law is that rules of customary international law are to be considered part of the law of the land, so long as they are not inconsistent with Acts of Parliament or prior judicial decisions of the highest authority.¹⁰ This is generally referred to as the doctrine of incorporation.¹¹ This principle of incorporation is also followed in most major jurisdictions which have received the common law of England.¹² Although there is no Malaysian case which has carefully considered the question of the relationship between customary international law and the common law, there seems to be no good reason why the Malaysian court should not have adopted the principle followed in England and in the other major jurisdictions which have received the English common law.

Section 3 of the Civil Law Ordinance¹³ would not seem to be a barrier to the courts of Malaysia adopting this approach. The argument would be that customary international law was part of the common law of England which was received in under section 3 and it therefore is part of Malaysian law. The Malaysian courts would be free to accept customary international law which has developed since 1956 in the same way they are free to accept modern decisions of the English courts on questions of common law.¹⁴

Even if the Court were to take a stricter approach and require that the right of innocent passage is not a rule of customary international

¹⁰ Brownlie, *supra*, note 6, p. 45; J.G. Starke, *Introduction to International Law* (9th ed., 1984) p. 74; F.A. Mann, *Foreign Affairs in English Courts* (1986) pp. 120-125.

¹¹ For a review of the doctrines of incorporation and transformation, see the discussion of Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529 (CA) at 553-554.

¹² J.E.S. Fawcett, *The British Commonwealth in International Law* (1963) pp. 35-56; Alexandrowicz, "International Law in the Municipal Sphere According to Australian Decisions", 13 I.C.L.Q. 78-85 (1964); American Law Institute, *Restatement of the Law — The Foreign Relations Law of the United States* (1986), Vol 1, pp. 40-41.

¹³ Civil Law Ordinance 1956 (Rev. 1972), Laws of Malaysia, Act 67 (1972).

¹⁴ On the authority of modern English decisions, see the statement of Lord Scarman in the Privy Council decision in *Jamil bin Harun v. Yang Kamsiah* [1984] 2 W.L.R. 668 at 672.

law which is part of the common law in Malaysia unless there is evidence that this rule of customary international law has been accepted by Malaysia, this would present no difficulty. There is a strong argument that Malaysia has accepted the rule even though there is no Act or court decision expressly recognising it. The fact that Malaysia became a party to the 1958 Convention on the Territorial Sea which has an express provision on the right of innocent passage shows that the right is accepted by Malaysia.¹⁵ Also, an examination of the legislation of Malaysia indicates that it impliedly accepts that foreign vessels, including fishing vessels, have the right of innocent passage. The Fisheries Act 1963 (Rev. 1978) and the Fisheries (Maritime) Regulations 1967 did not attempt to prohibit the passage of foreign fishing vessels through Malaysian territorial waters. They merely attempted to ensure that such vessels do not engage in fishing activities within the territorial waters.

(2) *Applicable provisions of the Evidence Act*

As for the judge's statement that the provisions of the Evidence Act¹⁶ relating to proof of custom or proof of foreign law had not been complied with, it can be argued that Shankar J. failed to understand one of the fundamental principles relating to the relationship between international law and municipal law in systems based upon the common law. Because international law is incorporated into the common law, courts do not require proof of international law as they would a foreign law.¹⁷ English courts take judicial notice of principles of international law as they do other branches of English law.¹⁸ When determining the existence of rules of customary international law, the courts examine the same evidence of state practice as would an international court examining the same issue. Sections 13 and 14, relating to local rights or customs and the existence of a state of mind, have no relevance to this issue. If the practice in England is accepted then Sections 56 and 57, relating to judicial notice, should have been considered and applied.²⁰

(3) *Effect of the Emergency (Essential Powers) Ordinance*

Another reason given by Shankar J. for his decision regarding Article 14 of the 1958 Convention on the Territorial Sea was that before a Convention can come into force in Malaysia, Parliament must enact a law to that effect. No Malaysian Act had been cited to show that Article 14 had become part of Malaysian law. In fact the judge argued that Emergency (Essential Powers) Ordinance No. 7 of

¹⁵ Malaysia filed an instrument of accession with the Secretary-General of the United Nations on 21 December 1960.

¹⁶ Evidence Act 1950, Laws of Malaysia, Act 56 (Reprint No. 1 of 1983).

¹⁷ Brownlie, *supra*, note 6, p. 45; Starke, *supra*, note 10, page 78; Mann, *supra*, note 10, pp. 125-129; Fawcett, *supra*, note 12, pp. 72-73.

¹⁸ *Halsbury's Laws of England* (4th ed.), Vol. 17, page 73, Evidence, para. 100

¹⁹ Mann, *supra*, note 10, pp. 126-127. For example, see the approach of the Judicial Committee of the Privy Council when determining the existence of rules on international law on piracy in *Re Piracy Jure Gentium* [1934] A.C. 586, [1934] All E.R. Rep. 506 at 507.

²⁰ This is confirmed by the commentary to section 57 in *Sarkar's Law of Evidence*, which was cited by Judge Shankar in his discussion of this issue. Sarkar & Sarkar, *Sarkar's Law of Evidence* (13th ed. 1981), pp. 595.

1969²¹ had the opposite effect because that Ordinance and its Schedule only incorporated Articles 3 to 13 of the Convention into Malaysian law. His Lordship then concluded that the irresistible inference must be that Article 14 was not intended to be imported into Malaysia.

The judge's reasoning is sound in principle.²² It is less sound, however, when one carefully examines the relationship between the 1958 Convention and the Ordinance. The Ordinance declared that the breadth of the territorial waters of Malaysia shall be twelve nautical miles, and that such breadth shall be measured from baselines delimited in accordance with Articles 3 to 13 of the 1958 Convention, the provisions of the 1958 Convention setting out the rules on the delimitation of baselines. Given the limited purpose of the Ordinance, it was natural that the schedule included only those articles, and not the articles relating to the sovereignty, rights and jurisdiction of the coastal state, or relating to the passage of foreign ships. This does not mean, however, that it is correct to draw the inference that the Ordinance intended to exclude the right of innocent passage in Article 14 from Malaysian law.

It can be argued that the Court should not have concluded that Article 14 and the other articles on innocent passage in the 1958 Territorial Sea Convention were not imported into Malaysia because of the provisions of the Emergency (Essential Powers) Ordinance. Such a conclusion is inconsistent with a fundamental presumption of English statutory interpretation which applies when a statute is capable of more than one meaning. There is a *prima facie* presumption that Parliament does not intend to act in breach of international law, and if one of the meanings which can be ascribed to a statute is consistent with international law and the other is not, the former is to be preferred.²³ Therefore, unless the Ordinance had provided by clear and unambiguous language that Article 14 and the other articles on innocent passage were not to be part of Malaysian law, the court should interpret the Ordinance as having no effect on the right of innocent passage of foreign fishing vessels which existed at customary international law. To do otherwise, might put Malaysia in breach of its international obligations under both customary international law and treaty law.

1958 Convention as Malaysian Law

Although it was not considered by the Court, the question arises as to whether it could be argued that Article 14 and the other provisions setting out the rules governing innocent passage may be part of Malaysian law without the passage of implementing legislation. Although the general rule under English law is that treaties are only part of English law if implementing legislation is passed by Parliament,²⁴ this rule

²¹ P.U.(A) 307A of 1969.

²² On the relationship between treaty law and municipal law, see Brownlie, *supra*, note 6, pp. 49-51; Starke, *supra*, note 10, pp. 78-80; Mann, *supra*, note 10, pp. 87-94.

²³ Brownlie, *supra*, note 6, pp. 50; Starke, *supra*, note 10, pp. 78; Mann, *supra*, note 10, pp. 102-104; Cross, *Statutory Interpretation* (2nd ed. by J. Bell & G. Engle, 1987), pp. 162-163, 167-168; P.St.J. Langan, *Maxwell on the Interpretation of Statutes* (12th ed. 1969), pp. 183-186.

²⁴ *Supra*, note 22.

does not apply to all types of treaties. It applies to treaties which affect private rights or liabilities, result in a charge on public funds, or require modification of the common law or statute for their enforcement in the courts.²⁵ It might be argued that except for the rules relating to the delimitation of baselines and breadth of the territorial sea, no further modification of Malaysian law was necessary. Malaysia had always claimed sovereignty and jurisdiction in its territorial waters, and foreign merchant ships, including fishing vessels, had always enjoyed the right of innocent passage through the territorial waters, subject to local laws and regulations. Admittedly, since this argument would have to be framed as an exception to the general principles of English law, it seems more controversial than the argument that the right of innocent passage was part of the law of Malaysia because it was a rule of customary international law which was part of the common law.

Article 14(4) and the decision that the passage was not innocent

As stated earlier the judge made no decision on the question of whether there was a right of innocent passage under Malaysian law. Instead, he decided the case on the ground that the passage in the circumstances of this case could not be regarded as innocent because it contravened Malaysian domestic legislation which had been made to prevent fishing in the territorial sea. His decision on this point is essentially correct. He relied on paragraph (5) of Article 14 of the 1958 Convention. Paragraph 5 provides that any passage of foreign fishing vessels which is in violation of laws and regulations of the coastal state which are made in order to prevent fishing in the territorial sea is not to be considered innocent. Since the accused persons had fishing appliances in their possession aboard the vessel in violation of Regulation 3(b), their passage was deemed not innocent, and their arrest was justified. The decision of the judge was therefore correct on this point.

The legality of the regulations under international law

This does not mean, however, that the Malaysian regulations in question were free from controversy. It should be noted that the provision in Article 14(4) has been criticised by writers, including both Brownlie and Sir Gerald Fitzmaurice.²⁶ Fitzmaurice feared that it could lead in practice to the total exclusion of fishing vessels if states passed local regulations which were too onerous. It could be argued that Regulation 3(b) was the very type feared by Fitzmaurice as so onerous that it could have the practical effect of taking away the right of innocent passage of fishing vessels. Regulation 3(b) would require fishermen to either obtain a license or dispose of their fishing appliances before entering the territorial waters of Malaysia, even if they were merely passing through the territorial sea enroute to Thailand or Singapore.

Brownlie, *supra*, note 6, p. 49; Starke, *supra*, note 10, pp. 79-80.

²⁶ Brownlie himself states that the paragraph is ill-drafted. Brownlie, *supra*, note 6, at 204-205; Sir Gerald Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea" (1959) 73 *Amer. J. Int'l L.* 73 at 97-98.

In further support of this position, it can be argued that the coastal state can legitimately protect its interests in preventing fishing in its territorial sea through less onerous regulations. For example, it is generally recognised that it is permissible to pass regulations requiring that all fishing vessels passing through the territorial waters must pass on certain prescribed routes and have all fishing appliances stored under the deck. This would allow foreign fishing vessels to fish outside Malaysian waters and then pass through Malaysian waters.

Nevertheless, given the wording of Article 14(4) and Regulation 3(b), Shankar J. probably had no choice but to hold that the regulation had been contravened on the facts of this case, and that the passage was therefore not innocent. Shankar J. was also correct in calling for inter-governmental action to clarify the right of innocent passage by fishing vessels through the territorial sea of Malaysia. In the end a fair balance must be struck between the interests of Malaysia in preventing unlicensed fishing by foreign fishermen in its territorial waters and the right of foreign fishing vessels to exercise the right of innocent passage through those waters. If states whose vessels pass through the territorial waters of Malaysia believe that the laws of regulations of Malaysia respecting the passage of foreign fishing vessels are not consistent with international law, they should make their positions known and attempt to work out an acceptable solution with the Malaysian authorities through negotiation. This is a matter better left to the executive than the judiciary.

The Position under the 1982 Convention

It should be noted that the 1982 Convention on the Law of the Sea²⁷ does not contain a provision similar to Article 14(4), although it does permit the coastal state to pass laws and regulations for the prevention of infringement of its fisheries laws and regulations.²⁸ It also contains provisions which place some limits on the type of local regulations a coastal state can make to prevent fishing in its territorial sea. Article 21(2) provides that "Such laws and regulations shall not apply to the design, construction manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards." Article 24(1) (a) provides that the coastal state shall not "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage". There is a strong argument that a regulation making mere possession of fishing appliances an offence would have the practical effect of hampering innocent passage as it is too onerous.

It would be beyond the scope of this comment to examine the provisions of the Fisheries Act 1985 in light of the 1982 Convention, or to consider the extent to which the relevant provisions in the 1982 Convention reflect existing customary international law. It is interesting to note, however, that the Fisheries Act 1985 requires, among other things, that fishing vessels exercising the right of innocent passage observe regulations relating to "the stowage of fishing

²⁷ 1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122, 7 October 1982; the text is reprinted in (1982) 21 Int'l Legal Materials 1245. Neither Thailand nor Malaysia has ratified the Convention.

²⁸ *Ibid.*, Article 21(1)(e).

appliances”²⁹ The mere possession of fishing appliances is not an offence under the 1985 Act.

Relevance in future cases

Since the decision in this case, the underlying problem has taken on a new dimension. Malaysia's interest in protecting its fishing resources now extends beyond its 12 mile territorial sea to its Exclusive Economic Zone.³⁰ Similar problems with foreign fishing vessels are likely to arise as Malaysia attempts to assert its rights and jurisdiction over the living resources in its Exclusive Economic Zone. Foreign fishing vessels are likely to claim that subject to reasonable regulations to prevent fishing, they may continue to exercise freedom of navigation and pass through the Exclusive Economic Zone of Malaysia, as provided in the 1982 Convention on the Law of the Sea.³¹ In interpreting and applying the Fisheries Act 1985 and the Exclusive Economic Zone Act 1984, Malaysian courts may have to examine the applicable rules of international law and apply the presumption that Parliament does not intend to act in violation of international law. If so, some of the issues raised in this comment on the relationship between international law and Malaysian law may once again have to be addressed.

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²⁹ Fisheries Act 1985, *supra*, note 2, Article 16(4).

³⁰ Exclusive Economic Zone Act 1984, Laws of Malaysia, Act 311 (1984).

³¹ 1982 Convention, *supra*, note 27, Articles 55, 56 and 58.

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