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Freedom of Passage Through International Straits: Community Interest Amid Present Controversy

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PREFACE

The Sea Grant Colleges Program was created in 1966 to stimulate research, instruction, and extension of knowledge of marine resources of the United States. In 1969 the Sea Grant Program was established at the University of Miami.

The outstanding success of the Land Grant Colleges Program, which in 100 years has brought the United States to its current superior position in agriculture production, helped initiate the Sea Grant concept. This concept has three primary objectives: to promote excellence in education and training, research, and information services in sea related university activities including science, law, social science, engineering and business faculties. The successful accomplishment of these objectives, it is believed, will result in practical contributions to marine oriented industries and government and will, in addition, protect and preserve the environment for the benefit of all.

With these objectives, this series of Sea Grant Technical Bulletins is intended to convey useful studies quickly to the marine communities interested in resource development without awaiting more formal publication.

While the responsibility for administration of the Sea Grant Program rests with the National Oceanic and Atmospheric Administration of the Department of Commerce, the responsibility for financing the Program is shared by federal, industrial and University contributions. This study, Freedom of Passage Through International Straits: Community Interest Amid Present Controversy, is published as a part of the Sea Grant Program and was made possible by Sea Grant support for the Ocean Law Program.

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I. BACKGROUND FOR THE PRESENT CONTROVERSY

When the 1958 Geneva Conference on the Law of the Sea adjourned on 27 April 1958, the eighty-seven states participating could and did contemplate the results of their efforts with a sense of satisfaction. While there was certainly evident some disappointment that the Conference had failed to resolve the issue of the permissible breadth of the territorial sea, there was also a wide-spread feeling that genuine international accord had been achieved with respect to many of the other controversial issues concerning the legal regime of ocean space.[1] The four Conventions produced by the Conference certainly represented the most ambitious effort at codification of the international law of the oceans ever attempted, and both the participants and observers were more than justified in thinking they had produced works of enduring significance.[2]

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[1] See Dean, "The Geneva Convention on the Law of the Sea: What was Accomplished," 52 AM. J. INT'L. L. 607 (1958); Jessup, "The United Nations Conference on the Law of the Sea," 59 COLUM. L. REV. 234 (1959); Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," 8 INT'L. AND COMP. L.Q. 73 (1959).

[2] The four Conventions referred to are: Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311; Convention on the Territorial Sea and

Optimism was expressed that the thorny problem of territorial sea breadth would soon be ripe for agreement.[3]

Disillusionment was not long in coming. A second Conference met in Geneva in 1960 for the specific purpose of resolving the territorial sea breadth question (and the closely related problem of the relation between coastal state and distant-water fishing fleet rights in waters adjacent to the newly-defined territorial sea). The failure of this Conference to agree upon any of the proposals placed before it made patently obvious what public optimism could no longer conceal. The territorial sea breadth question engaged the perceived vital interests of states in such fundamental and sharply conflicting ways that a compromise agreement seemed more elusive than ever.[4]

Contiguous Zone, [hereinafter cited as The Territorial Sea Convention] 15 U.S.T. 1606; T.I.A.S. 5639, 516 U.N.T.S. 205; and Convention on Fishing and Conservation of Living Resources of the High Seas, [hereinafter cited as The Fisheries Convention] 17 U.S.T. 138, T.I.A.S. 5969, 559 U.N.T.S. 285. All have been ratified and have entered into force for the United States.

[3] Some of the optimism may well have been more ritual than real. See, e.g., the closing address by Prince Wan Waithayakon of Thailand to the 1958 Law of the Sea Conference, II OFFICIAL RECORDS, UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, U.N. DOC. A/CONF. 13/38 (1958) [hereinafter cited as OFFICIAL RECORDS (1958)] at 78.

[4] The record of failure is contained in OFFICIAL RECORDS, SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, U.N. DOC. A/CONF. 19/8 (1960) [hereinafter cited as OFFICIAL RECORDS (1960)]. For an analysis from the U.S. perspective, see U.S. [illegible]

At times thereafter, this dichotomy in perceived state interests seemed to threaten the whole carefully wrought structure of accords produced by the 1958 Conference with collapse into irrelevancy.[5]

Concurrently, other forces were at work eroding the foundations of the international harmony produced at Geneva in 1958. Burgeoning technological development transformed a definitional ambiguity with respect to the outer boundary of the Continental Shelf from a theoretical to a practical problem of major political significance.[6] The failure of machinery established to conserve the living resources of the sea coincided unhappily with mounting evidence of the pressing need for such

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"The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas", 54 AM. J. INT'L. L. 751 (1960).

[5]The pace of ratification of the four Conventions by signatory states has been discouragingly slow. There is thus little assurance that any given dispute will be governed by one of the Conventions. Only 30 states, not including such major fishing nations as Peru, Japan, Norway, the U.S.S.R., and the Peoples' Republic of China, have become parties to the Fisheries Convention. Treaties in Force January 1, 1971, 299. Similarly only 23 non-landlocked states are parties without reservation to the Territorial Sea Convention. Id., at 325.

[6]See Oxman, "Preparation of Article 1 of the Convention on the Continental Shelf," 3 J. OF MARITIME L. 245 (1972). Exploration for both petroleum and hard minerals at water depths in excess of 200 meters has occurred much sooner than conferees apparently expected, giving rise to the current practical importance of establishing the boundary between the "Continental Shelf" over which the coastal state exercises "sovereign rights", and the balance of the seabed, "beyond the

conservation.[7] States of the world began to suspect that the seabeds beneath the deep oceans contained immense and previously unsuspected wealth in both organic and inorganic resources.[8] Finally, the rapid decline of colonialism in the early 1960's, and the militant nationalism of the resultant independent states, radically transformed both the composition and the vital interest range of the international community as a whole.[9]

The net result has been that scarcely twelve years after the first successful Geneva Conference on the Law of the Sea, the United Nations embarked on an extensive program of preparation for a new Conference on the Law of the Sea.[10] Statements

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limits of national jurisdiction", which is as yet subject to no formalized legal regime.

[7] Fisheries regulations continue to be implemented by a variety of multilateral agreements of no force except intra partes and coastal states have continued to claim the only practical way to control overfishing is for them to prescribe unilateral regulations for ever-expanding areas of water adjacent to their coasts.

[8] Some of the more euphoric views are illustrated in Hull, The Bountiful Sea (1964); Eichelberger, "The Promise of the Sea's Bounty", SATURDAY REVIEW, June 18, 1966, at 21; Lindquist and Abel, Inner Space, Sea of Opportunity, U.S. Dept. of Health Education and Welfare (1966); and New Wealth From the Seas, National Association of Manufacturers of the U.S. (1966).

[9] For an analysis of political considerations influencing current United Nations treatment of law of the sea matters, see Dole and Stang, "Ocean Politics at the United Nations," 50 OREGON L. REV. 378 (1970).

[10] U.N. Resolution 2750C (XXV), adopted by the Twenty-Fifth

and proposals submitted thus far to the preparatory committee make clear the fact that participants at the forthcoming Conference intend to open up for discussion and possible revision a great many of the troublesome issues so painstakingly laid to rest in 1958.[11]

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an excess of caution, it will be refer
as "the forthcoming Conference".

[11] The United Nations Committee on
Sea-Bed and the Ocean Floor Beyond the
diction [hereinafter referred to as th
text accompanying note 12] infra] has been constituted th
preparatory body for the forthcoming Conference. For a sum
of specific proposals through January, 1972, see Comparative
Table of Draft Treaties, Working Papers and Draft Articles,
DOC. A/AC. 138/L.10 (1972).

[12] "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

possible to pose vital and controversial questions not clearly answered by the terms of the Convention, the 1958 Conference apparently preferred not to confront such questions in any depth, and the resultant accord was achieved with a minimum of debate or evidence of underlying disharmony.[13]

In contrast, the issue of passage rights through international straits has emerged as potentially one of the most critical and devisive for the forthcoming Conference on the Law of the Sea.[14] For a variety of reasons the unanswered questions can no longer be avoided. The United States has submitted what is thus far the only concrete proposal for the resolution of the issue[15] and the substance of its solution has been

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or the territorial sea of a foreign State." Territorial Sea Convention, Art. 16 §4.

[13] There are some notable exceptions to this broad generalization, particularly in the area of military vessels' rights to transit foreign territorial seas. There is nothing to suggest, however, that the straits issue was a major point of controversy.

[14] In a speech to the U.N. Seabeds Committee on August 3, 1971, while introducing U.S. proposals on territorial sea breadth and straits passage, note 15, infra., Mr. John Stevenson, Legal Advisor to the U.S. Dept. of State, indicated that the U.S. Government "would be unable to conceive of a successful Law of the Sea Conference that did not accomodate the objectives of (these proposals)." Statement of Mr. Stevenson, representative of the United States, in Subcommittee II, August 3, 1971 (mimeographed) at 3; see also U.N. DOC. A/AC. 138/ SC. II/SR. 8 at 2.

[15] Article II of the U.S. Working Paper on the Breadth of

greeted less than warmly.[16] Yet the United States, and perhaps other major maritime powers as well, regard a satisfactory solution to the issue of passage rights through international straits as vital to their respective national interests. Indeed, solution of this issue appears to be a sine qua non of a successful Conference.

Clearly something (or several things) happened since 1958 to transform this once relatively benign issue into one of burning problems of the day. This thesis will first seek to identify the present factual context within which the issue arises - what may, perhaps, be called the new process of interaction in international straits. Highlighted will be considerations which have gradually intruded themselves into the

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the Territorial Sea, Straits, and Fisheries, U.N. DOC. A/AC. 138/SC. II/L.4 (July 30, 1971) [reprinted in 10 INT'L. LEGAL MATERIALS 1018 (1971)], which provides (in part):

> §1. In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight for the purpose of transit through and over straits, as they have on the high seas...

[16] Little useful purpose is served cataloguing negative reaction within the Seabeds Committee since the delegates have not yet gotten down to the business of serious negotiating. A largely critical view of U.S. straits proposals is contained in Knight, "The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits", ____OREGON L. REV._____(1972).

consciousness of states since 1960 to the point where they now constitute some of the most powerful forces shaping both coastal state and international community perceptions of a proper legal order for straits.

Secondly, the study seeks to identify the claims advanced with respect to international straits both by the international community and by coastal states. What types of claims to prescribing competence are advanced by coastal states and how do such claims impact on the claims of the international community to conduct what type of activities in straits? Here sufficient unity of underlying purpose may be discerned among the various types of claims advanced to permit some precise formulation of the straits issue, and answer the question: "What is the real conflict of interests for which accommodation must be sought?"

Next the study will trace the manner in which problems of passage through international straits have engaged the attention of authoritative decision makers in recent times. The objective here is not to build a case for any particular interpretation of received doctrine, but rather an attempt to discern a trend in world community expectations regarding an acceptable form of solution.

Finally, a number of criteria are proposed which it is submitted must characterize an internationally acceptable solution to the problem of passage through international straits,

and a basis for accommodation of the conflicting interests involved will be sketched in broad outline.

A few words about definitions. In the following discussion the terms "straits," "international straits," and "territorial seas comprising international straits," are used synonymously, unless the contrary clearly appears from the context. The terms all refer to 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."[17] The terms further refer only to straits which, at their narrowest point, are totally enclosed by the territorial sea or seas of one or more littoral states.[18] [19]

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[17] Territorial Sea Convention, Art. 16 §4. The language encompasses straits wherein the 1958 Conference determined that a right of "innocent passage" (see Ch. IV hereof) exists on behalf of international navigational interests. Straits, so defined, are also those to which the United States has proposed to apply a right of "free transit". Supra., note 15. The definition leaves in doubt the status of some straits of considerable potential importance in the Arctic and some minor straits elsewhere which are not now, and have not in the past been, "used for international navigation".

[18] For logical consistency, straits where the territorial sea or seas completely enclose the only feasible channel of navigation, even though a non-navigable strip of high seas remains down the geometric center of the strait, should also be included. Under certain assumed conditions of territorial sea breadth (not 12 miles) the Straits of Tiran is such a strait. Under an assumed territorial sea breadth of 12 miles, it is doubtful that any such straits exist in fact, and the information contained in charts and sailing directions available to the author is inadequate for accurate determination. The problem is ignored in the balance of this study.

[19] Throughout the literature, it is common to refer to

Thus, whether a particular strait (in the geographic sense) is within the definitional ambit of the term "straits", as used herein depends in turn on the assumed breadth of the territorial sea. For purposes of this study, the internationally sanctioned breadth of the territorial sea is assumed to be 12 miles and uniform for all coastal states of the world, with the principle of equidistance being applied to those situations wherein different states confront each other across bodies of water less than twenty-four miles wide.[20]

Finally, the term "territorial sea" is used in the same sense, and with the same implications of both coastal state

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straits as "closed" under this or that territorial sea breadth and this study will employ the same terminology. However, such straits are in no real sense closed, but are merely subject to a legal regime different than that of the high seas, and maritime traffic through them is governed by such regime. The central question, then, to which this study addresses itself, is what constitutes a proper legal regime for such "closed" straits.

[20] A territorial sea breadth of 12 miles has been assumed because it currently seems the most likely outcome of the forthcoming Conference. Indeed, the problem, from the standpoint of advocates of a narrow territorial sea, may be to forestall a Conference-sanctioned territorial sea breadth in excess of 12 miles. Brown, "The 1973 Conference on the Law of the Sea: The Consequences of Failure to Agree," in PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE, Univ. of Rhode Island [hereinafter cited as SIXTH RHODE ISLAND CONFERENCE] (1972) 1 at 25.

sovereignty and explicit limitations thereon, as the term is used in the Territorial Sea Convention.[21]

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[21] Supra., note 2. The forthcoming Conference may well recognize special zones of coastal state prescriptive competence, falling short of the traditional legal concept of territorial sea, with a breadth in excess of 12 miles, such as exclusive resource exploitation zones or pollution control zones. Depending on the range of coastal state interests which are accorded paramountcy within such zones, the problems of passage through straits may well have a wider scope than is indicated herein. See, e.g. Wulf, "Contiguous Zones for Pollution Control," SEA GRANT TECHNICAL BULLETIN No. 13, (1971). Such considerations are, however, beyond the scope of this study.

II. THE NEW PROCESS OF INTERACTION IN INTERNATIONAL STRAITS

In classical terms the way in which straits accentuate and sharpen the interplay between littoral and international value processes has been thoroughly explored in the literature.[22] Most obviously, straits lie athwart and dominate navigational routes between various portions of the high seas. From this perspective straits influence and threaten to control both the naval strategic and maritime commercial interests of a multitude of states, geographically widely dispersed from the littoral state or states of the particular strait involved. From another viewpoint, straits often function as connecting links or bridges between coastal states or portions of the same state. In this capacity they may intimately involve the entire range of internal and individual coastal state interests and values.[23]

Of course, the equilibrium point between coastal state

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[22] The classic exposition of the process of interaction in straits is contained in Bruel, International Straits (1947), (hereinafter cited as Bruel), especially Chapters I and II. See also McDougal and Burke, The Public Order of the Oceans, (1962), (hereinafter cited as McDougal and Burke), at 175-176 and 188-190.

[23] I Bruel, at 25-30.

and international interests within straits varies both from one strait to another and through time. It appears to be a function of such factors as the volume and character of maritime traffic through the strait, the proximity of littoral demographic, commercial and trade centers to the strait, the volume and character of the intercourse between the opposing land masses bordering the strait, and the proximity of alternate routes for traffic through or over the strait.[24]

For most of the major straits of the world there is simply insufficient data to permit the analysis of these factors in any quantitative way. Nevertheless the nature of the interaction has, in general terms, been understood for some time. It is clearly not any new perception of this interaction which has elevated the issue of passage rights through international straits to its current intensity of conflict and concern. The following discussion identifies three factors which, it is submitted, account for a large majority of the tension associated with the straits passage issue.

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[24] Ibid. For an example of the consideration of a similarly broad range of socio-economic factors in allocating prescribing competence among competing ocean interests, see The North Sea Continental Shelf Case [1969], I.C.J. REP., 50-53.

A. International Straits and the 12-Mile Limit

The first factor to be observed about international straits in the current context is that there are simply a great many more of them than there were 15 years ago. It has become commonplace to note that a 12-mile territorial sea will completely enclose the waters of from 116 to 125 major straits which have heretofore been high seas under a 3-mile limit.[25] Despite widespread application to the problem, however, the significance of this factor is far from self-evident. It will be analyzed here from the point of view, first, of the impact on coastal state interests, then of the impact on international commercial maritime interests, and finally in relation to its importance to the naval strategic interests of the major powers.

1. Coastal State Interests

The sheer increase in number of international straits which would result from an assumption of an internationally sanctioned 12-mile limit obviously increases the number of

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[25] The qualification "major" has no precise meaning in this context. Given the elasticity of the term some numerical discrepancy is both inevitable and unimportant to the overall argument. The number 116 originated with a study prepared by the Geographer of the U.S. Department of State for the U.S. delegation at the time of the 1958 Conference. The number has undergone some upward revision since that time.

so-called "straits states", i.e., those states which border one or more international straits. The increase, either in number of states involved, or in areas of particularly intense coastal state interest, is nowhere near as dramatic, however, as the bald invocation of numbers of straits might lead one to suppose.

In the first place, however elastic a notion of "major" one is disposed to employ, there are far less than 120 "major straits" involved in an expansion of territorial seas to 12 miles. One observer, employing unspecified criteria, has identified 16 such major straits.[26] This is not to say, however, that a particular non-major strait may not have special or even vital importance to specific interests of an individual state or states.

Even utilizing indiscriminately the larger suggested number of affected straits, the number of straits-states does

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[26] "No listing of critical or key straits has been forthcoming from the (Department of Defense) or the maritime community, but a map recently prepared by the Geographer, Department of State, capitalizes the names of certain straits in order to denote major straits from minor straits. The sixteen major straits were: Gibraltar, Malacca, Bering (West), Bab el Mandeb, Hormuz, Dover, Sunda, Western Chosen, Selat Lombok, Ombai, Juan de Fuca, Old Bahamas Channel, Dominica Channel, and St. Vincent Passage. A brief description of most of these straits may be found in Kennedy, 'A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic', I OFFICIAL RECORDS (1958), 114." Knight, supra note 16 at n.48.

not increase apace. The geographic dispersal of such straits throughout the world is highly non-uniform. Thus 17 such straits occur in the Kuril Island chain and border exclusively Soviet Union state territory.[27] An additional 22 occur in the Indonesian archipelago.[28] Similar concentrations occur in the Ryuku Island chain southwest of the Japanese island of Kyushu, and in the Lesser Antilles in the Caribbean area.[29] Accordingly, a relatively fewer number of states, which were not coastal with respect to an international strait under a 3-mile limit, become so under a 12-mile limit.

Secondly, the large majority of straits affected by a 12-mile limit do not border large coastal state population, trade or commercial centers. Only a small number of such straits function in any obviously significant way as land bridges between states or portions of state territory.[30] The bare increase in numbers of straits involved does not, from the perspective of coastal (or more specifically, straits) states, result in any dramatic new impact on the broad range

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[27] Map, supra, note 26.

[28] Ibid.

[29] Ibid.

[30] The Straits of Dover constitute the most obvious example of this type of interaction.

of coastal state value processes.

The foregoing analysis would suggest cautious optimism regarding the prospects for accommodation. Such optimism is probably misplaced since straits states appreciate that certain members of the world community vehemently oppose both a 12-mile limit and the resulting increase in international straits. Thus, while it may have little demonstrable impact on straits state vital interests, a 12-mile limit provides an opportunity to negotiate for more favorable treatment regarding unrelated issues of more critical interest.

Also the resulting legal regime for straits will probably continue to consist of a comparatively few special regulations superimposed on the general legal regime for territorial seas. As such, it will in some respects at least, reflect the almost accidental result (within straits) of the clash between international interests and the exclusive interests of all coastal states. Thus the opposition which may be expected to international interests in straits is far broader than would be suggested alone by the geography of the new international straits.

2. Commercial Maritime Interests

The degree to which a 12-mile limit and the resultant numerical increase in international straits (with its concomitant implications of broadened coastal state

prescriptive competence) represent a reasonable threat to commercial maritime interests. This question which evokes considerable disagreement. Logically, an examination of this question should begin with an historical analysis of the way in which maritime traffic has functioned under the more traditional notions of a 3-mile limit.

Even if a narrow territorial sea breadth is assumed many of the world's maritime trade routes are geographically so situated that they transit "in passing" the territorial seas of one or more states (in addition to the states of origin and destination).[31] Turning particular attention to international straits, two of the more important commercial maritime routes in the world pass through the Sunda Straits and the Straits of Malacca, both closed under a 3-mile limit by the territorial seas of littoral state(s).[32] Of lesser world-wide

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[31] See McDougal and Burke, 190-191 and references therein cited.

[32] The Sunda Strait has been listed as one of the "major" straits closing under a 12-mile limit. Map, supra, note 26. This is incorrect since the Sunda Strait closes under a 3-mile limit. U.S. Naval Oceanographic Office [hereinafter cited as U.S.N.O.O.] Chart H.O. 16,693-37. All charts in the H.O. 16,693-00 series were prepared in conjunction with the Geographer, U.S. Department of State especially to illustrate the effects of 3, 6, and 12-mile limits for the territorial sea. While the Straits of Malacca proper only close under a 12-mile limit, the southeastern terminus of the strait, called the Singapore Strait closes under a 3-mile limit. U.S.N.O.O. Chart 16,693-30. Thus Malacca cannot be transited without

importance, but still significant, is the commercial traffic passing through the Belts-Sound entrances to the Baltic[33] (the Danish Straits) and through the Bosporus-Dardanelles into the Black Sea.[34] Again, both of these are international straits under a 3-mile limit.

Thus, even under a 3-mile limit, there has been a significant degree of casual contact between commercial maritime traffic and third-state territorial seas, both within and without straits. Yet there is no evidence that these multiple contacts have heretofore been considered detrimental to the commercial maritime community.[35] No reference has been found to any instance where an economically desirable commercial trade route has been altered or abandoned due to a perceived need to avoid the territorial seas of coastal states.

It would seem then that present and past practice of

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intruding into the territorial seas of the littoral states even under a 3-mile limit.

[33] U.S.N.O.O. Chart N.O. 44040.

[34] Kennedy, supra, note 26 at 137-140.

[35] The historical record is remarkably free of controversy between coastal states and commercial maritime interests. The only recorded incident submitted to a third-party decisional process involved the exercise of civil jurisdiction by a coastal state over a vessel passing through its territorial sea. Compania de Navigacion Nacional (Panama v. United States), AMERICAN AND PANAMANIAN GENERAL CLAIMS ARBITRATION 765 (1934); 6 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 382 (1935).

the shipping industry provides little support for the sometimes-asserted proposition that a 12-mile limit will result in immediate, large-scale, uneconomic dislocations of trade routes for the purpose of avoiding territorial seas, with resultant increases in marine shipping costs.[36] To the extent they are reasonable at all, perceived threats to commercial maritime interests from a 12-mile territorial sea would appear to rest on something over and above the resultant incidental increase in casual contacts between shipping and territorial seas. Such perceived threats fall into two general categories.

First is the implicit fear that expanded territorial seas will enlarge the geographic area within which coastal states might be tempted to promulgate regulations inimical to maritime commerce. Despite the lack of historical evidence to support the notion of any such pervasive tendency on the part of coastal states generally, it cannot be denied that, particularly within international straits, broad coastal state regulatory competence, whimsically or tyranically exercised, could be disastrous for maritime commerce. As Chapter IV attempts to show, however, the bulk of such fears are based on an overly-broad or an overly-vague conception of a coastal state's

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[36] This argument was the principal one advanced [illegible] opposition to a 12-mile limit at the Second U.N. Law of the Sea Conference in 1960. OFFICIAL RECORDS (1960), 45.

allowable prescriptive competence over commercial navigation within its territorial sea. Arguably, the legitimate scope for whimsical or tyranical regulation is narrow indeed. To the extent such hypothetical coastal state regulations transgress the current norms of international law, the interests of the commercial maritime community are threatened less by the advent of a 12-mile limit per se, than by the far less tangible problem of how states may be coerced to be law-abiding members of the world community. To the extent applicable current formulations of international law are over-broad or ill-defined, the interests of the maritime community are threatened less by a 12-mile limit, than by a prospective breakdown in the orderly and progressive development of a more highly refined and particularized accommodation within territorial seas between coastal state interests and international shipping.

The second perceived threat to commercial navigation consists in the notion that the resultant increase in numbers of international straits will enable a few states, strategically located adjacent to vital international straits, to impose unilateral solutions to the genuine problems of accommodation between maritime and coastal interests, or to exert a disproportionate influence in the achievement of multilateral solutions.[37] As Section B of this Chapter demonstrates, there

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[37]Apparently this is the aspect of the purported threat

does exist an area of relatively new, genuine conflict between commercial maritime interests and coastal state perceptions of their internal interests. This area of conflict arises from the confrontation between the growing world-wide ecological concern and some radical new developments in the maritime transportation industry. Admittedly, straits do, in some measure, function to accentuate this conflict.[38] And the subject matter is one, moreover, over which international law already accords coastal states a rather broad discretionary competence within their territorial seas.[39]

But maritime commerce does not function solely on the high seas. Rather the essence of maritime commerce is to enter ports and harbors to load and unload cargo, hence to transit territorial seas whatever their legal breadth.[40] Nor are

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which is thought to be self-evident merely from the fact that upwards of 120 straits are affected by a shift to a 12-mile limit.

[38] See text accompanying note 86, infra.

[39] See Article 14 §4, Territorial Sea Convention. A discussion of the relationship between the passage rights of maritime commerce and a coastal state's right to impose regulations designed to enhance its security from environmental damage is deferred to Chapter IV hereof.

[40] The advent of techniques such as off-shore loading of oil tankers may ultimately alter traditional notions of what is a port, but for the foreseeable future the majority of high seas commerce will originate and terminate within the territorial jurisdiction (be it internal waters or territorial seas) of coastal states. Loire, "New Concepts in Superports," Oceanology,

there just a relatively few territorial seas so involved, for maritime commerce is manifestly so catholic as to involve virtually all of the coastal states of the world in some degree.

Thus the threat to maritime commerce stems not from a 12-mile limit, but from the fact that a genuine conflict of interests exists in the first instance. As factual matters, the geographic straits, the maritime traffic therein, and the rising coastal state fears of the pollution potential of such traffic already exist, and will all continue to exist no matter how narrow a territorial sea were to be sanctioned.[41] A resolution must be found. But the potential for new burdens on maritime commerce which is inherent in any such solution is in no way dependent on characterizing any particular waters as either territorial sea or international strait. Indeed, maritime commerce is so intimately bound up with operation within territorial seas generally that the conflict would continue to pose grave threats to "business as usual" for the maritime community, even should an internationally sanctioned 3-mile limit rise Phoenix-like from the forthcoming Conference.

In short, the basic threat to maritime commerce consists

February 1972 at 22. See generally Alexandersson and Norstrom, World Shipping (1963).

[41] Coffey, "Shipping and Other Commercial Interests to be Protected," in SIXTH RHODE ISLAND CONFERENCE 137.

in the proliferation of inconsistent unilateral anti-pollution regulations within ports, harbors, and territorial seas however narrow.[42] Continued existence of the marine transport industry requires that uniform, or at least compatible, solutions be achieved. Such solutions will inevitably resolve much of the genuine conflict between littoral interests and international maritime commerce in international straits.

3. Naval Mobility Interests

While it has proven difficult to discern any critical impact due to the increase of international straits on either coastal state value processes or maritime commercial interests, the impact on the naval mobility of the major powers is both apparent and far-reaching. The precise extent of the impact is difficult, however, to delineate with confidence.[43] Consider, first, the impact of a 12-mile limit on the naval role in the operation of strategic nuclear deterrence forces, and secondly, on operational naval mobility for all other

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[42] Id. at 138-139.

[43] One of the first to identify straits as the heart of the problem from a military point of view was Carlisle, "Three Mile Limit - Obsolete Concept?," U.S. Naval Institute Proceedings, February 1967 at 24. The adverse consequences in general, of a 12-mile limit are catalogued in Lawrence, "Military Legal Considerations in the Extention of the Territorial Sea," 29 MIL. L. REV. 47 (1965).

purposes.

By the late 1950's, a shift had occurred in the factors influencing military planning in both the United States and the Soviet Union. This shift, which continues to dominate military planning today, was marked by the emergence, in both countries, of the deployment and operation of integrated nuclear deterrence systems as the fundamental and principal mission of military forces. With the declining probability of a land war in Europe, these systems became both the linchpin of the strategic power balance and the umbrella under which both countries have sought to advance their increasingly global interests.[44]

For the United States, this development quite early heralded the assignment of a major new role of the most critical importance to the naval forces, i.e., the operation of the Fleet Ballistic Missile Submarine weapon system. The reasons for this turn to the sea for nuclear deterrence forces are varied, and perhaps not all publicly known. Of major importance, however, must have been the relative invulnerability from preemptive attack which is conferred by submerged operation of mobile launching platforms.[45]

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[44] Much of this historical presentation is adapted from MacDonald, "An American Strategy for the Oceans," in Uses of the Sea (1968) at 171 and ff.

[45] Craven, "Seapower and the Seabed," U.S. Naval Institute Proceedings, April 1966 at 36.

Much more recently, the Soviet Union has developed and is deploying a nuclear-powered, ballistic-missile-carrying submarine.[46] While present Soviet numerical strength in operational systems is approximately half that of the comparable U.S. Polaris-FBM system, under the recent tentative strategic arms limitation agreement, the Soviets would be allowed a numerical superiority (62 boats to 44) in such systems.[47] Thus, for the near term, the United States and the Soviet Union are the two major powers which have assigned a large-scale nuclear deterrence role to submarine naval forces.

The essence of the impact on naval mobility is rooted in international law. Whatever may be the merits of the various arguments regarding the proper application to warships generally of existing legal norms covering international straits,[48] it is reasonably clear that both under customary international law and the Territorial Sea Convention, submarines operating in territorial seas must navigate on the surface and show their flag.[49] The requirement applies to international straits and

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[46] As late as 1967, MacDonald concluded: "The Soviets have not exploited to any great degree submarine based ballistic missiles..." MacDonald, op.cit supra, note 44 at 186.

[47] Miami Herald, August 13, 1972, at 9.

[48] See infra, Chapter IV.

[49] E.g. Article 14 of the Territorial Sea Convention provides that anywhere in a foreign territorial sea, submarines are required to navigate on the surface and to show their flag."

ordinary territorial seas alike.

What then is the form and substance of the threat posed to sea-borne nuclear deterrence systems by the application of this existing law to an additional 120-odd straits throughout the world? It is in confronting this precise question that the lack of access to classified data hobbles an outside observer to a perhaps insuperable degree. For without some reasonably accurate notion of how the system actually operates, it is impossible to make sound judgments as to how operations would be affected by any given alteration in the legal regime for ocean space.[50] But the inherent difficulties should not become an excuse to reject thoughtful consideration of what information is available. For the participants at the forthcoming conference will formulate their positions on the straits issue from just this inadequate data base.

Some effects are fairly obvious. The requirement that submarines surface when transiting straits would provide competing states with the opportunity of keeping at least rough

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[50]There is every indication that those who presumably do know consider the threat very serious indeed. Ratiner, "National Security Interests in Ocean Space," 3 NATURAL RESOURCES LAWYER 582 (1971); Ratiner, "United States Oceans Policy: An Analysis," 2 J. MARITIME L. AND COMM., 225 (1971). For a perceptive analysis which disclaims any access to classified information, see Knauss, "The Military Role in the Ocean and its Relation to the Law of the Sea," in SIXTH RHODE ISLAND CONFERENCE at 77.

track of how many of its adversary's boats were on patrol in which general areas of the ocean at any given time. Shifts in concentration of forces in the face of such monitoring might assume a disproportionate international significance, posing foreign policy problems for the operating state. No doubt, this is not the most attractive set of conditions under which to operate a deterrent force.

Some have argued that requiring a submarine to surface as it transits international straits would seriously degrade its real-time undetectability, and hence, diminish or eliminate its invulnerability to successful preemptive attack. Others argue that such a requirement would not have the adverse result predicted, since immediately after passage, it could submerge and shortly be lost to any potential antagonist.[51]

In addition, at least two "time-frame" arguments are offered to prove that the requirement to surface poses no real threat to submarine deterrence systems. One holds that major naval powers either now have, or soon will have, sufficiently

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[51] These various "time frame" arguments are reviewed with apparent approval in Knight, supra, note 16 at 32-35. See also Burke, "Consequences for Territorial Sea Claims of Failure to Agree at the Next Law of the Sea Conference," in SIXTH RHODE ISLAND CONFERENCE (1972) at 37. These arguments surface in one form or another in virtually every reaction to the United States proposal for "free transit through international straits" supra, note 15. So far as is known, no one manifestly competent to assess their validity has ever reacted publicly.

sophisticated detection systems that submerged passage will be equally obvious (at least to the major protagonists) as surface passage. Secondly, it is sometimes argued that ultimate deployment of such systems as TRIDENT with its much longer missile range will virtually eliminate any need for transit through international straits.[52]

Any but the most superficial analysis of these arguments is impossible drawing only on unclassified data, and manifestly the analysis will be beyond the capabilities of most state participants at the forthcoming Conference. In contrast, there exist geographic considerations less subject to technological imponderables, which may be expected to have a correspondingly greater impact on state views.

As has already been noted, enormously important strategic passages linking the Indian Ocean and the South China Sea, the Mediterranean and the Black Seas, and the North and Baltic Seas are all closed under a 3-mile limit.[53] Thus, while significant limitations to strategic mobility exist in these areas, the limitations are irrelevant to a discussion of the

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[52] Ibid. TRIDENT (formerly ULMS) is the popular designation of the proposed new long-range missile-carrying submarine system, whose development is currently being debated by the United States Congress.

[53] Supra, notes 32 (Malacca and Sunda), 33 (Danish Straits-Belts Sound passages), and 34 (Dardanelles-Bosporus).

consequences of extending territorial sea breadth to 12 miles.

The Straits of Gibraltar also figure prominently in most discussions of the adverse impact of a 12-mile limit, yet they would actually close under a 6-mile limit.[54] And at the Second Law of the Sea Conference in 1960, the United States proposed and backed a 6-mile limit proposal which contained no provision

that such closure would result in some degradation of U.S. defense capability, but he argued that the degradation was "within tolerable limits".[56]

There are some important straits which close under a 12-mile limit and only under such a limit. The Straits of Dover[57] and the Bering Straits[58] are examples. But the alternate to Dover is a fairly accessable passage around the British Isles, and both current operators of sea-borne nuclear deterrence systems are littoral states with respect to Bering and hence relatively protected from adverse strategic consequences. The Straits of Hormuz,[59] forming the entrances to the Persian Gulf also closes under a 12-mile limit. However, these straits give access to a body of water which appears (to the novice observer, at any rate) to be completely unsuitable for sustained submarine operations.[60]

The remaining areas affected by a 12-mile limit may be roughly summarized as follows. Throughout the world, numerous

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[56] OFFICIAL RECORDS (1960), 106.

[57] U.S.N.O.O. Chart H.O. 16,693-45.

[58] U.S.N.O.O. Chart N.O. 16008.

[59] U.S.N.O.O. Chart H.O. 16,693-46.

[60] The Persian Gulf nowhere exceeds 50 fathoms in depth and has no significant thermocline. Supra, note 59.

channels and passages running between small islands and adjacent mainland would close.[61] Such passages are of no conceivable importance to the operation of strategic nuclear deterrence systems. Several straits in the eastern Indonesian archipelago and the Philippine archipelago, which from the point of view of nuclear deterrence system operation appear to lie athwart the road to nowhere. also close.[62] Several commercially important straits in the Lesser Antilles, giving access to the Caribbean Sea, also close.[63] Likewise access to the sea of Okhotsk is impeded by the closing of some 18 straits in the Kurile Island chain. In both the latter cases, open passages sufficient both in number and spatial distribution to insure some access to the area remain, but the reduction in number of legally-permissible submerged entrances would no doubt simplify the detection problems for any surface anti-submarine force monitoring submerged passage into the area. Finally, the closing of the Tsugaru Kaikyo,[64] which separates the Japanese islands of Honshu and Hokkaido would interfere with submerged transit

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[61] Map, supra, note 26.

[62] Ibid. See also the following charts: U.S.N.O.O. Charts H.O. 16,693-31, -34, -35, -36, -39, -40, -41 and -42. But see, supra, note 54.

[63] Map, supra, note 26.

[64] [illegible]

between the western Pacific and the Sea of Japan.

As some of the comments accompanying the foregoing litany indicate, the strategic significance of this geography is at best debatable. It is certainly possible that some combination of missile range and vital target location would require access by the submerged launching platform to some of the bodies of water mentioned (perhaps even to some of the areas characterized as inhospitable to submarine operations). The possibility exists, however, only so long as one postulates targets on the Euro-Asian mainland. It is virtually impossible to find any suitable missile launching areas adjacent to the North American continent where access is significantly affected by a 12-mile limit.

Accordingly, it appears then that a 12-mile limit, with its accompanying ban on submerged transit through international straits, could constitute a serious impediment in certain areas to the mobility of U.S. strategic nuclear deterrence systems. Whatever degradation of undetectability would result, either from surface transit through affected straits or increased concentration of submerged traffic through a reduced number of unaffected straits, would occur at a most disadvantageous point, i.e., entry by the submarine into the relatively shallow and confined waters of a vital launching area.

An expanded territorial sea limit does not appear to

present the Soviets with the same degree of difficulty with respect to their submarine missile systems. Nowhere is their access to patrol areas within range of their assumed targets on the North American continent impeded to any significant degree. The classic Soviet strategic problem of maintaining adequate access to the open oceans is also not rendered significantly more difficult by a 12-mile limit. The net result then may be an alteration, unfavorable to United States interests, in the current strategic power balance and resulting nuclear stalemate.

Turning from the operation of nuclear deterrence systems to the classical uses of naval mobility - the protection of ocean commerce and trade routes and the projection of national power to foreign shores through employment of naval forces - the impact of a 12-mile limit is even more dramatic. Here the difficulty is not lack of submerged passage rights but the possible lack of any passage rights at all by warships through international straits.

All major naval powers perceive in some degree a need for naval mobility in this traditional sense. Obvious to all are the large number of U.S. bases and outposts in countries around the globe ultimately dependent on naval forces for logistics support.[65] Likewise known are the variety of mutual

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[65] MacDonald, op.cit supra, note 44, at 174-176.

defense treaties and alliances, with a potentially global scope of operation, to which U.S. naval forces must be prepared to respond.[66] Similarly, the recent dramatic expansion in numbers and areas of operation of Soviet surface naval forces has enjoyed widespread publicity.[67] To a lesser extent several other states perceive a need for comparably far-reaching conventional naval mobility, in support of either alliances with the major powers or independent national objectives. A final critical point is that many straits which were dismissed as of no real importance to the operation of nuclear deterrence systems become very important indeed when considering the geographic needs of surface naval forces.[68]

At the same time it is just this sort of conventional naval mobility, with its accompanying aroma of great power interference in the internal affairs of small states, which

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[66] Ibid.

[67] For excellent discussions of the Soviet naval build-up in the Indian Ocean, see Griswold, "From Simontown to Singapore," in U.S. Naval Institute Proceedings, November 1971, at 52; for comparable treatment of the Mediterranean, see Schratz, "Red Star Over the Southern Sea," in U.S. Naval Institute Proceedings, June 1970, at 22.

[68] The world map, supra, note 26, provides an excellent background against which one can play out an almost endless succession of scenarios requiring movement or response by U.S. naval forces. With a modicum of imagination, the constricting effect of a real "closure" of these 116 plus straits to naval vessels becomes obvious.

many of the developing countries profess to find most objectionable.[69] Colonial practices of former days appear to have left a legacy of genuine fear of the potential for unwelcome meddling inherent in sea-power. The fear is perhaps, as some have argued, more the product of the emotional tug of emerging nationalism than of actual,[70] wide-spread abuse, at least in recent history - it is none the less real.

Into this caldron of conflicting perceptions of national interest by the various states of the world, one must stir the current legal order dealing with warships rights of passage through foreign territorial seas. As Chapter IV attempts at length to demonstrate, that legal order is presently in a considerable state of disarray. Moreover, there is presently no legal order applicable specifically to warships rights of passage through international straits. It is here ultimately argued that an internationally acceptable resolution of the issue of passage rights through international straits requires that this disarray be supplanted by a measure of clarity

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[69] See statements of Mr. Kusumaatnadja, representative of Indonesia, in Subcommittee I of the Seabeds Committee, August 6, 1971 (mimeographed), at 8-9; and statement of Mr. Vohrah, representative of Malaysia in Subcommittee II, August 12, 1971 (mimeographed), at 4. See also U.N. DOCS. A/AC.138/SC.I/SR.16 at 5 and A/AC.138/SC.II/SR.11 at 2-3.

[70] McDougal and Burke at 193. See also note 98, infra.

enshrined in Convention articles. But the new clarity must take into account all of the perceptions inherent in this new process of interaction in international straits.

B. International Straits and Supertankers - The Environmental Problem

At least since December 7, 1917, when the French freighter MONT BLANC, carrying 1,000 tons of ammunition, collided with the Belgium relief ship IMO in the channel leading to the harbor of Halifax, Nova Scotia, states have perceived, though dimly, that vessels of commerce can occasionally pose an enormous threat to their internal value merely by passing through adjacent waters.[71] To a lesser extent, the catastrophic explosion of the SS GRANDCAMP in the harbor of Texas City, Texas on April 16, 1947,[72] conveyed elements of the same message. While neither disaster occurred in an international

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[71] The collision appears to have been caused by an error in navigation committed by IMO's master. The explosion resulted in 1,635 townspeople killed, over 5,000 injured and virtual destruction of the town of Halifax. Bird, The Town That Died, (1962).

[72] The explosion of GRANDCAMP, which had been loaded with amonium nitrate, sent a fire-ball whirling across the water to ignite another nitrate-ladened vessel, S.S. HIGH FLYER, which exploded 17 hours later. Over 500 people ashore died and the physical damage was beyond any possibility of accurate compilation. Ulmer, "The Monsanto Chemical Co. Disaster at Texas City," in AMERICAN MANAGEMENT ASSOCIATION, ADVANCES IN INSURANCE COVERAGE, ACCIDENT PREVENTION & CONTROL: Vol. 78, (1948).

strait as such, both events broadly illustrate that under certain combinations of ship cargo, shore-side topography, and human error, maritime commerce can inflict almost incalculable damage to lives and property of c

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[73]"Dead weight ton" identifie
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[74]Searle, "New Salvage Techni
national, Sept./Oct. 1968 at 29.

s: Privileged or Burdened?", in
September 1970, at 40.

[75]Oliver, "Gargantuan Tankers
U.S. Naval Institute Proceedings,

g, June 15, 1972, at 91.

[76]Note, Marine Engineering/Lo

sometime in 1974 is GLOBTIK TOKYO, a vessel of 477,000 dwt,[77] and the end is not in sight. It has been estimated that by May, 1973, supertankers in excess of 200,000 dwt will comprise one-half of the total tonnage capacity of the world's crude oil transport fleet.[78]

As size has increased, the maneuverability of these mammoth vessels has been drastically curtailed. Perhaps the best measure of a vessel's ability to avoid the two most dreaded casualties which can befall it[79] (from the standpoint of hull rupture and resultant cargo spillage) - collision and stranding - is the vessel's ability to come to a crash stop.[80] The T-2 class tanker, traveling at its full speed ahead, 15-17 knots, could come to a crash stop in 5 minutes, covering a distance of 0.5 miles in the process. In contrast, IDEMITSU MARU, traveling at the same speed, requires 2.5 miles and 21

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[77] Ibid.

[78] MARINE SCIENCE AFFAIRS - A YEAR OF BROADENED PARTICIPATION, THE THIRD REPORT OF THE PRESIDENT TO CONGRESS ON MARINE RESOURCES AND ENGINEERING DEVELOPMENT 113 (1969).

[79] Oliver, supra, note 75, at 41.

[80] A crash stop is accomplished by operating the vessel's engines at full power in reverse. During the period of backing full, the vessel's master is unable to steer her or regulate the speed. A normal stop, accomplished by stopping the engines, requires over an hour for a 300,000 dwt vessel to come to rest. Id. at 41.

minutes to attain a full stop under emergency conditions. To accomplish the same maneuver, vessels in the 400,000 dwt class require between four and five miles and 30 minutes time.[81]

The potential for pollution damage resulting from cargo spillage has also increased dramatically. TORREY CANYON, whose stranding on Seven Stones Reef on March 18, 1967, did so much to focus international attention on the dangers posed by super-

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[81] Ibid.

[82] See Nanda, "The Torrey Can
Aspects," 44 DENVER L. J. 400,

[83] Oliver, supra, note 77 at

[84] Id. at 41.

figure so prominently in the international straits issue. Routes of maritime traffic tend to converge at important international straits with a consequential increase in traffic density.[85] Moreover, the navigable channels through straits are often sinuous and cluttered with a variety of visible and submerged obstructions to navigation. Because of these several factors, plus the reduced maneuverability of supertankers, and other evidence suggesting something less than uniform high standards of seamanship on the part of the operators of world tanker fleets,[86] it is impossible to view coastal states' concern with this aspect of the straits passage issue without some measure of sympathetic understanding.

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[85] Actual traffic statistics through straits are notoriously unreliable. It has been reported that over 300,000 vessels per year pass through the Straits of Dover, Oceanology International, January 1971, at 17. In contrast, a preliminary survey in Singapore reported only 1,769 vessels per month through the Straits of Malacca. New York Times, October 4, 1970, V, 16:3. A more recent traffic volume estimate for the Straits of Malacca puts the figure at 40,000 vessels per year. Miami Herald, August 13, 1972, 4-H.

[86] For a report of a series of clear-weather collisions and strandings inexplicable on any basis other than poor seamanship, including one incident where a dog was the only individual "on watch" on a tanker's bridge when she entered restricted waters, see Oceanology International, April 1971, at 20. The report of investigation by the Canadian Ministry of Transport into the grounding of a tanker off Nova Scotia in 1969 concluded, "We are appalled by the callousness and sloppiness that we find in the operation of the world's tanker fleets." Miami Herald, August 13, 1972, at 1-H.

The supertanker experience is being extrapolated to other types of ships and cargos with perhaps more debatable potential for shore-side damage. Despite the less than satisfactory experience with the United States prototype nuclear-powered cargo ship, NS SAVANNAH, nuclear power for commercial vessels is not an improbable future development.[87] Regardless of the technical legitimacy of fears occasioned thereby, there is no evidence of a diminution in coastal state concern for radioactive contamination which might result from a casualty involving such a vessel. A related problem arises from coastal state fears regarding the transport of thermonuclear weapons through waters near their coasts.[88] From a coastal state point of view, perhaps the worst of all possible worlds

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[87] Will, "Are Nuclear Ships the Answer?," in Oceanology International, July/Aug. 1969, at 33; "Nuclear Power Plants for U.S. Merchant Ships?," in Oceanology International, November 1971, at 22; "Nuclear Power for Supertankers," Marine Engineering/Log, June 1972, at 9.

[88] The 1958 Conference decisively rejected a Yugoslavian proposal which would have prohibited the carrying of nuclear weapons through foreign territorial seas. III OFFICIAL RECORDS (1958) at 131. Developing states in particular continue to express concern on the matter. One commentator has demanded "weighty evidence...that the carrying (of nuclear weapons) is an ultra-hazardous activity" before he would accord coastal states competence to prohibit their passage through the territorial sea. Franklin, "The Law of the Sea: Some Recent Developments," in U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 1959 - 1960, at 142. Presumably one catastrophic accident would suffice.

is illustrated by the General Dynamics Corporation's proposal to construct nuclear powered, 170,000 dwt, submarine oil tankers to move Arctic crude oil under the ice through the Northwest Passage to ice-free North Atlantic ports.[89]

Coastal state response to fears engendered by these considerations has thus far been varied. Malaysia, bordering the Malacca-Singapore Straits which carries a heavy volume of tanker traffic between the Middle East and Japan, has from time to time claimed that all supertankers are inherently "non-innocent", with potential consequences to be explored in Chapter III.[90] More recently, Indonesia has suggested that all tankers in excess of 200,000 dwt be barred from both the Malacca and Sunda Straits and be diverted several hundred miles southeastward to the Selat Lombok and Makassar passages.[91] The economic consequences of such proposals are obviously of

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[89] Oceanology International, February 1970, at 22. The proposal appears to be moribund, at least for the moment. But see Cohen, "Running the Ice Blockade by Submarine," in Oceans, January 1971, at 32.

[90] See statement of Mr. Vohrah, representative of Malaysia in Subcommittee II of the Seabeds Committee, Supra note 69.

[91] Indonesian Communications Minister Seda urged the alternate route because "giant tankers passing through the Strait of Malacca will endanger navigation and safety of the straits by pollution". Ocean Industries Magazine, May 1972, at 42.

substantial significance.[92]

Similar considerations in the crowded Straits of Dover have motivated the United Kingdom to advance its more moderate proposals for mandatory traffic separation lanes.[93] Perhaps the most commented upon unilateral response has been the Canadian Arctic Waters Pollution Prevention Act, with its claims not only to a 100-mile contiguous zone, but also to almost pervasive competence to regulate maritime traffic in what are arguably international straits in the Northwest Passage.[94] Various other straits states, most notably Spain, have made statements indicating their growing concern with

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[92] The far less drastic diversion of supertankers from Malacca to the Sunda Strait requires such detours that up to two and a half days are added to the transit time between the Arabian Gulf and Japan. New York Times, supra, note 85. It is possible that the additional costs could be absorbed without major difficulties, however.

[93] Masters are urged to comply "voluntarily" with presently established traffic separation lanes in the Straits of Dover, which even on this basis, have reduced collisions in the area by half. The International Maritime Consultive Organization has been asked to explore means of making the use of such lanes mandatory, but a major difficulty lies in finding means to accomodate cross-channel traffic. Oliver, supra, note 75; see also Oceanology International, April 1971, at 20.

[94] The Canadian initiative has drawn both praise and condemnation, with most of the latter directed toward the unilateral character of her action. For a balanced view, compare Bilder, "Canadian Arctic Waters Pollution Prevention Act: New Stress on the Law of the Sea," 69 MICH. L. REV. 1, (1970), with Beesley, "Rights and Responsibilities of Arctic Coastal States," 3 J. MARITIME L. 1, (1971).

the potential dangers resulting from the maritime commerce which passes through the straits which they border.[95]

It is impossible at this juncture to determine to what extent these various claims represent merely a jockeying for negotiating advantage prior to the forthcoming Conference. Likewise, ecological concern has become a banner under which may be garnered approbation for all sorts of proposals actually advanced for less altruistic motives - an advantage by no means lost on many coastal states. But apply to the claimed concerns whatever rate of discount one will, it is apparent that another new factual interaction exists in international straits. For the first time in history, coastal states look out from their shores and perceive with legitimate concern a growing number of commercial vessels, which, by their presence alone in proximity to the shore, constitute a threat of enormous damage, if not devestation, to coastal state lives, property, and interests. An internationally

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. DOC. A/AC.138/SR.48, at 13.

[95] E.g., statement of the Spa
Committee, March 16, 1971. U.N

C. International Straits and the Demilitarization of Ocean Space

The area chosen for discussion as the third component of the new process of interaction in international straits, the growing pressure for demilitarization of ocean space, is less susceptible of clear delineation than the previous two. It is not a fact or trend capable of statistical demonstration. Yet as a relatively new component of the complex milieu of international oceans policy, it is destined to play a critical role in the resolution of the straits passage issue.

From preceeding sections of this study, it is apparent that a significant portion of the straits passage issue is represented by disagreements regarding the passage of warships. The tone of commentary in the Seabeds Committee to date suggests the depth of feeling generated by this aspect of the issue.[96] It is possible to dismiss these public statements as merely the largely extraneous march and counter-march of the major-naval-power protagonists in the East-West confrontation.[97] Alternatively, they may be minimized as "campaign rhetoric" of

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[96] Supra, note 69.

[97] For the view that the demilitarization movement is inspired by the Soviet Union and her allies with the purpose of impairing free-world defense capabilities, see Hanks, "The Paper Torpedo," in U.S. Naval Institute Proceedings, May 1969, at 27.

smaller states in the course of pre-Conference maneuvering for negotiating advantage.[98] Neither view seems to represent accurately what is actually happening in the world arena.

The bare bones of the historical record may be summarized as follows. On August 17, 1967, Malta submitted to the United Nations General Assembly a proposed agenda item relating to a "...declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction and the use of their resources in the interests of mankind."[99] One of the objectives of the proposed treaty was that the seabed and the ocean floor beyond the limits of present national jurisdiction should be reserved exclusively for peaceful purposes in perpetuity.

In response to the Malta proposal, the General Assembly, on December 18, 1967, established an Ad Hoc Committee, composed of 35 nations, to "study the peaceful uses of the seabed

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[98] "The fact of the matter is that the desire to keep the military away from coasts is a bogeyman ...If developing countries want to use it as a bargaining lever, that is one thing. 'Hold out on military issues...and we'll get everything we want,' they might say. I think the time is rapidly passing when this will be an effective strategy."
Ratiner, "Military Interests to be Negotiated," in SIXTH RHODE ISLAND CONFERENCE, (1972) 91 at 93.

[99] U.N. DOC. A/PV 1583 (1967) at 83.

and ocean floor beyond the limits of national jurisdiction.[100] This Ad Hoc Committee held three meetings during 1968, and by the second session in July, 1968, it was apparent that the phrase "peaceful purposes" was a loaded one indeed.[101] Comments during the session make clear that in the view of some states, "peaceful purposes" encompassed nothing less than complete demilitarization of, at minimum, the seabed and ocean floor. Malta and Tanzania proposed a ban on any activities on the ocean floor for any military purposes whatsoever.[102] The Soviet Union proposed a treaty to prohibit the military use of the ocean floor beyond the territorial seas.[103] In a subsequent grandiloquent gesture the Soviets proposed that nuclear missile-carrying submarines be prohibited from patrolling in any area of the oceans from which their missiles could reach the frontiers of the contracting parties.[104] In the third meeting of the Ad Hoc Committee, the United States protested that in its view, "...peaceful purposes did not preclude

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[100] U.N. DOC. A/RES/2340 (XXII).

[101] Brown, "The Legal Regime of Inner Space," 22 CURRENT LEGAL PROBLEMS 181 (1969), at 194-195.

[102] U.N. DOC. A/C.1/PV.1589, at 22.

[103] U.N. DOC. A/7230, at 52. See also U.N. DOC. A/AC. 135/SR.11, at 3.

[104] Soviet Union Memorandum on Disarmament of July 1, 1968, in Brown, supra, note 102, at 196.

military activities in pursuit of peaceful aims or in fulfillment of peaceful intents, consistent with the obligations of the United Nations Charter and international law."[105]

The United States was successful in having the various demilitarization proposals and its counter-proposal to ban emplacement of weapons of mass destruction on the seabed removed from the agenda of the Ad Hoc Committee, and referred instead to the 18-Nation Disarmament Committee (during 1969 enlarged and renamed the Conference of Committees on Disarmament). Once there, the negotiators of the major powers were able to make relatively rapid progress toward what ultimately became the Treaty on the Prohibition of the Emplacement of Nuclear and other Weapons of Mass Destruction on the Seabed and Ocean Floor.[106] Even in this forum however, advocates of the demilitarization of ocean space were sufficiently influential to force the inclusion in the Treaty of a clause pledging the contracting parties to continue good-faith negotiation toward more comprehensive disarmament agreements in the ocean environment.[107] In commenting on the Treaty, U.N.

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[105] U.N. DOC. A/C.1/PV.1590, at 13.

[106] For the full text of the Treaty, see 10 INT'L. LEGAL MATERIALS 145 (1971).

[107] Article V, Treaty on the Prohibition of Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor, Id. at 149.

Secretary General, U Thant, commented:

> "I attach particular importance to the fact that the Treaty contains the specific undertaking on the part of all parties...to continue negotiating in good faith concerning further measures in the field of disarmament for the prevention of an arms race in this vast and increasingly important area."[108]

A New York Times editorial was somewhat more blunt when it criticized the Treaty as "far from adequate" because it failed to ban nuclear-armed submarines from the ocean environment.[109]

Meanwhile, on December 21, 1968, the Ad Hoc Committee was transformed into a permanent U.N. committee, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (hereinafter: the Seabeds Committee).[110] Then in December, 1970, the General Assembly adopted a Declaration of Principles, recommended by the Seabeds Committee, which included the pronouncement that the seabed and ocean floor should be reserved for peaceful purposes.[111] There is every indication that the phrase "peaceful purposes" continues to obscure the same fundamental disagreement among states

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[108] Statement of the Secretary General, U.N. Monthly Chronicle, March 1971, at 13.

[109] New York Times, February 17, 1971, at 38.

[110] U.N. DOC. A/RES/2467 (XXIII).

[111] U.N. DOC. A/RES/2749 (XXV).

which was so evident in the July, 1968 meetings of the Ad Hoc Committee.

One can interpret this record in a variety of ways.[112] It is possible to state (quite accurately, in the narrow sense) that the entire thrust of the proceedings in the Seabeds Committee has been seabed resources and not seabed arms, and to take comfort in the observation that: "At no time during this entire process (the 1968 Ad Hoc Committee debates) did the United Nations ever seriously attempt to anchor the world's navies permanently."[113]

Alternatively, one may view the record from the perspective of the simplistic and dangerous notion of "creeping jurisdiction"[114] - a bit of Law of the Sea folklore which holds that grants of limited or special purpose jurisdiction, a la the Contiguous Zone concept, tend to become pervasive jurisdiction, and, as a corollary, that restrictions for the seabed will tend

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[112] For general discussions of the problems involved, see Craven, "International Security and the Seabed," and Brill, "Disarmament Interests on the Shelf," both in THIRD RHODE ISLAND CONFERENCE, (1969), at 234 and 414. See also Poirier, "Arms Control for the Seabed," FIFTH RHODE ISLAND CONFERENCE (1971), at 109.

[113] Clift, "Of Diplonauts and Ocean Politics," in U.S. Naval Institute Proceedings, July 1970, 31 at 37

[114] This perspective finds apparent approval in Zeni, "Defense Needs in Accomodating Ocean Users," in THIRD RHODE ISLAND CONFERENCE (1969) 334, 337; and Breckner, "Some Dimensions of Defense Interest in the Legal Delimitation of the Continental Shelf," in FORTH RHODE ISLAND CONFERENCE (1970), 188.

to creep upward into the superjacent water column.[115]

The notion is simplistic because, like Evolution or Parkinson's First Law of Work Expansion, it conveys a flavor of mindless inexorability which rather misrepresents the facts. The notion is dangerous because it suggests facile, but untenable, solutions. Attention becomes focused on resisting any allocation of prescriptive competence to coastal states, whatever the legal or geographic dimensions of such competence, apparently on the theory that if small moves toward accommodation are prevented, there will be nothing to "creep" upward and outward to devour the freedom of the seas. Unfortunately, although the status quo hold undeniable attractions for a major operator of naval weapons systems, it is no longer a viable candidate for adoption (or confirmation) as the solution

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[115] The phenomenon of "creeping jurisdiction" (sometimes referred to as Craven's Law) is a chestnut of such vague intellectual dimensions that anyone who undertakes to refute it may be accused of knocking down his own strawman. The classic "creep" is illustrated by the way in which over-broad interpretations of the 1945 Truman Proclamation on the Continental Shelf supposedly spawned the plethora of South American 200-mile claims. Similar usage is illustrated in the title of a recent law review article, "Creeping Jurisdiction in the Arctic: Has the Soviet Union Joined Canada?" 13 HARVARD INT'L. L. J. 271 (1972). But the word "jurisdiction" connotes an exercise of prescriptive competence sanctioned by international law. Since unilateral claims, not accorded reciprocal recognition, do not constitute international law, a spate of such claims, of and by itself, says little about the present status of jurisdiction. Jurisdiction (in the international law sense) may be said to exist only through the processes of multilateral agreement or claim, counterclaim, and reciprocal recognition

to all current vexing problems of ocean policy.[116]

While most of the demilitarization debate to date has taken place in the context of legal regimes for the seabed, it would be a mistake to minimize the potential impact on the

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and Burke could confidently assimilate naval interests in ocean space with the inclusive interests of the international community as a whole.[117] The stark truth today is that a number of

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military ships and it is probable...that the forthcoming Conference will by two-thirds agreement expressly exclude such ships from this right or rights of transit or from any equivalent concepts."[118] If this assessment is correct, the prospects for solution to the straits passage issue are not encouraging.

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[118] Burke, supra, note 51, at 41.

III. THE PROCESS OF CLAIM

The principal claim in support of world community interests in shared access to the oceans is the claim to freedom of the seas. In the oceans beyond the limits of national jurisdiction, international interests are accorded a high degree of primacy under this doctrine. As the geographic focus of attention moves closer to the shore, the interaction between international interests and coastal state value processes becomes increasingly intense. Within the territorial sea, claims to absolute freedom of the seas have undergone a relatively formalized process of attenuation in recognition of the increasing exclusive interests of coastal states. For the present, the result is that the basis of shared access within the territorial sea is subsumed under the label of the doctrine of innocent passage.[119]

Innocent passage is a doctrine with neither immutable nor fully ascertainable genuine content. It is not a claim on behalf of navigational interests nor a counterclaim on behalf of coastal interests, but at best a label describing

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[119] See Chapter IV hereof for a more complete discussion of the doctrine, its evolution, and codification by the 1958 Geneva Conference in Articles 14 through 23 of the Territorial Sea Convention.

the existing status of accomodation between the two at any point in time. An appraisal of the doctrine's efficacy in protecting all legitimate interests involved is deferred until Chapter V of this study. In the following sections it is proposed merely to describe the various claims which interact within the territorial sea, and to relate them specifically to international straits.

A. Claims in Support of Shared Access to Straits

The broadest, most comprehensive claim in support of shared access to straits is the claim to pass through any international strait, from one end to the other, in any type of vessel, without hinderance from the littoral state(s). Whether the claim is subsumed under the label "passage" (as in innocent passage), "transit" (as in free transit), or some more imaginative nomenclature, the genuine interest involved is the international interest in free communication between any and all portions of the oceans.

The international community advances no claims in support of shared access to straits involving the conduct of activities within straits which are manifestly prejudicial to coastal state value processes. Thus is it not deemed essential to international interests in shared access to straits that foreign vessels be allowed to fish, conduct naval

maneuvers, "hover" in derrogation of coastal state customs regulations, or discharge noxious substances into the waters of the strait.[120] Even such claims as do exist to stop and anchor within territorial seas incident to ordinary navigation, distress, or force majeure are directed more toward sheltered waters of bays and roadsteads than toward international straits.[121]

So long as coastal state regulation within international straits is not of such a nature as to result in a de jure or de facto abrogation of the international interest in passing through the strait, no genuine conflict between navigational and coastal state interests is perceived. Regulations governing navigation, designation of approved sealanes and channels, and regulations prohibiting discharge of pollutants in territorial seas are well known examples of an exercise of coastal state prescriptive competence which give rise to no genuine clash with international interests.[122]

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120 "Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or making for the high seas from internal waters." Territorial Sea Convention, Article 14 §2.

121 "Passage includes stopping and anchoring but only insofar as the same are incident to ordinary navigation or are rendered necessary by force majeure or by distress." Id., Article 14 §3

122 Such regulations are exemplified by the United States Federal Water Quality Improvement Act, as amended, 33 U.S.C. §1151, et seq.; for additional examples of accepted coastal state regulation, see 4 Whiteman, Digest of International Law, (1965).

The real conflict between international and coastal state interests within straits arises only when coastal states perceive the mere act of passage through a strait by a particular type or class of vessel as a threat to internal coastal state value processes. From the perspective of international interests then, the coastal state claim to deny passage through international straits to particular types or classes of vessels is identified as the generic coastal state claim of paramount interest in straits.

B. Coastal State Claims to Exclusive Authority Within Straits

In assessing coastal state claims to prescriptive competence within straits, it is important to recognize the potential divergence between the manifest and genuine content of such claims. However it seems safe to assert that coastal states generally do not claim a pervasive competence to terminate or suspend international rights of passage through straits, either arbitrarily or upon the occurrence of particular identifiable conditions. Likewise states do not claim any general exclusive competence to discriminate, during time of peace, among the multiple members of the world community in the matter of access to straits. Thus an examination of coastal state claims also supports the view that all such claims perceived as being in conflict with the international

interest in straits may be encompassed within the coastal state claim to deny passage through straits to vessels of particular types or configurations.

This general claim in behalf of coastal state prescriptive competence may be advanced in either of two forms. It cannot be stressed too strongly, however, that the following two forms of claim are functional equivalents. The problems of innocence determination are intimately related to the problems of the scope of coastal state regulatory competence, and most coastal states which advance some claims do so under each form. Although it is subdivided here for convenient description, the broad coastal state claim must be viewed as a coherent whole in studying the straits passage problem.

1. Claims to the Competence to Determine Innocence

One way in which the broad coastal state claim is asserted consists in claiming that current formulations of the doctrine of innocent passage allow the coastal state to exclude certain classes of vessels from its territorial sea. In this category may be listed the various claims that the passage of particular types or classes of vessels is inherently prejudicial to coastal state value processes, and hence that passage of vessels of the identified class, even through

international straits, is a matter of sufferance within coastal state decisional competence.

Historically, states have asserted their claim to exclusionary competence in this form in reference to warships. This is the basis for the almost universal reference in discussions of warships' passage rights to Elihi Root's classic comment that warships are inherently non-innocent because "they threaten."[123]

A slightly different way of articulating the same form of claim to coastal state competence consists in denying that a particular type or class of vessels is entitled to the benefits of the regime of innocent passage. Claims directed against warships generally are sometimes articulated in this fashion. A better example, however, is the claim that no submerged vessel, regardless of nationality, cargo, purpose of passage, destination, or other conduct while within the territorial sea, may exercise the rights and prerogatives of a vessel in innocent passage.[124]

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[123] 11 Proceedings, North Atlantic Coast Fisheries Arbitration 2007, (1912). The degree to which authority is claimed for or perceived in this comment is all the more surprising since it was an ad hominem argument by an advocate in the course of a discussion of problems totally unrelated to warships rights of innocent passage.

[124] See note 49, supra. Of the same general nature are the almost universally rejected claims that fishing vessels are not entitled to exercise a right of innocent passage. See Selak, "Fishing Vessels and the Principle of Innocent Passage" 48 AM. J. INT'L. L. 627, (1954). In both cases, the thrust

The implications of a coastal state claim to determine innocence (or to exclude classes of vessels whose passage is determined to be non-innocent) are far broader, however, than is suggested by reference only to the actual controversies regarding warships. Implicit therein are subsidiary claims both to a relatively unrestricted coastal state decisional competence with respect to the process of classification, and for the competence to apply pervasive and relatively vague decisional criteria.

The collection of subsidiary claims thus articulated give rise to what might, until quite recently, have been characterized as the "theoretical problem of innocence." Since heretofore such claims were not asserted in any specific factual context, they engaged the attention of international decision-makers largely on the theoretical plane. World community reactions to such claims will be examined in the next chapter.

However, this modality of coastal state claim is no longer of merely theoretical interest. In form it amounts to a claim to consider a vessel's configuration, cargo,

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of the claim seems to be not that every such passage is inherently prejudicial to coastal state security (however broadly the term is construed), but merely that the opportunity for undetected prejudicial conduct is so great that the coastal state ought to be relieved of the burdens which arise if the claim is rejected.

destination, and perhaps other more remote factors in determining innocence. The new processes of interaction, particularly within international straits, as exemplified by the growing environmental concern and the supertanker experience, threaten to infuse this modality of coastal state claim with dramatic practical significance for commercial navigation interests. The rejection of such claims seems to imply either the total elimination of coastal state decisional competence or the interjection of a substantial degree of specificity and/or international review into the decisional process.

2. Claims to the Competence to Prescribe and Apply Regulations Within Straits

A second way in which the broad coastal state claim to exclude particular types or classes of vessels from straits is asserted is under the guise of claims to a pervasive competence to promulgate and enforce regulations within international straits. Since violation of a valid coastal state regulation by a vessel within the territorial sea may in itself constitute sufficient justification for a determination of non-innocence, the functional equivalency of these two modalities of coastal state claim is obvious. Thus, even if coastal states were required to determine innocence primarily or exclusively with reference to a vessel's

acts within the territorial sea, the scope of the broad claim to exclude classes of vessels is as unlimited as the scope of permissible coastal state regulatory competence. As will be seen in the following chapter, international decision-makers have largely ignored this underlying unity.

Claims to a relatively unrestricted coastal state competence to prescribe and apply regulations within international straits provide a useful cover under which states may advance a variety of exclusive interests of dubious international legitimacy. Admittedly there have been no claims advanced whose manifest content is to manipulate international navigational interests for internal political, economic, or ideological advantage. But the stated objectives of a coastal state claim to regulatory competence are not necessarily reflective of the real motives for its advancement.

Particularly in the area of environmental protection, the difficulty of even identifying the myriad regulatory claims which might result in de facto exclusion of classes of vessels is enormous. The opportunity thus presented of pro-

IV. TRENDS IN DECISION

Insofar as international straits are concerned, the doctrine of innocent passage prescribes the existing accommodation between the international community's right of passage and coastal state claims to exclude certain classes of vessels. The metes and bounds of the present accommodation are uncertain, however, due to pervasive disagreement regarding some aspects of the genuine doctrinal content subsumed under the term, innocent passage. The following summary of the ways in which recent authoritative decision-makers have dealt with conflicting international and coastal state claims will assist in clarifying present community expectations regarding an appropriate legal regime for straits.

Successive decision-makers have reacted to the questions of warships' right of innocent passage, the more general problem of the constituents and the determination of innocence, and to the question of the permissible scope of unilateral regulation by coastal States within international straits. The following chronological summary focuses on whichever of these specific questions was at issue at any given time. This general area of investigation is treated

exhaustively elsewhere[125] and the emphasis in this treatment will be on those features of the record subject to conflicting interpretation.

A. Historical Background

The period prior to World War II may be called the period of theoretical debates on the issue of warship access to foreign territorial seas. Differing philosophies regarding the nature and basis of the right of innocent passage led some commentators to conclude that warships were entitled to transit foreign territorial seas as of right, while others concluded that such access was a mere privilege susceptable of being withdrawn at will by the coastal state.[126] As McDougal points out, however, the debate did not reflect any corresponding divergence in state practice.[127] Bruel concluded,

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[125] For historical treatments of the doctrine of innocent passage, see Walker, "What is Innocent Passage?," in NAVAL WAR COLLEGE REVIEW 53 (1964); Slonim, "The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea," 5 COLUM. J. OF TRANSNATIONAL L. 96 (1966); Pharand, "Innocent Passage in the Arctic," VI CANADIAN Y'BK. OF INT'L. L. 3 (1968).

[126] In favor of warships rights of innocent passage: 1 Moore, Digest of International Law 700-01 (1906); 1 Westlake, International Law 296 (1910); Hyde, International Law c. (1945). Opposed to such a right: Hall, International Law 163 (1917); Jessup, The Law of Territorial Waters and Maritime Jurisdiction 120 (1927); "Harvard Research in International Law," 23 AM. J. INT'L. SPEC. SUPP. 295 (1929); 1 Oppenheim, International Law 494, 853 (Lauterpacht) 1955).

[127] McDougal and Burke, at 202.

writing in 1939, that the passage of warships through territorial seas appeared to be permitted by all states in time of peace.[128]

The Conference Committee on Territorial Waters to the 1930 Hague Conference on Codification produced the following draft article on the matter:

> As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require previous authorization.[129]

Neatly straddling the issue, however, the accompanying Observation states: "...existing practice leaves to states the power, in exceptional cases, to prohibit the passage of foreign warships in its territorial sea."[130] Whether the net result is a qualified right or an unqualified privilege, it is not particularly authoritative in any case. The

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[128] I Bruel, at 230.

[129] Conference for the Codification of International Law, Report of the Second Commission (Territorial Sea) (L.N. PUB. NO. C.230 M.117 - 1930 V.) at 10. [Reprinted in 24 AM. J. INT'L. L. SUPP. 187 (1930)]. At the Conference the United States delegation had expressed the view that "The right of innocent passage is one in favor of commerce primarily and, so far as warships are concerned, the question is one of usage and comity of nations wholly." Miller, "The Hague Codification Conference," 24 AM. J. INT'L. L. 674, 690 (1930).

[130] Ibid. International straits were distinguished, however, and the same observation also provides: "Under no pretext, however, may there be any interference with the passage of warships through straits constituting a route for international traffic between two parts of the high seas."

Observations were never accepted by the Conference and the articles themselves were approved only as the basis for further negotiations.[131] With the controversy relegated to the level of academic inquiry, the scholarly opinions divided, and the only general international Conference plainly disposed to hedge its bets, Bruel was undoubtedly correct when he concluded that, as of 1939, the right of warships to transit foreign territorial seas had not been established.[132]

Turning specifically to the issue of warships' rights of passage through international straits, there are a few instances of state practice available to illuminate state attitudes. The Straits of Magellan were opened to free transit by ships (including warships) of all nations by treaty between Chile and Argentina in 1881, and have remained so to the present.[133] To this extent the event may properly be interpreted as a component of a trend toward declining coastal state competence over warships in international straits. These straits, however, are quite remote from the major population centers of the coastal states involved and were of little strategic interest to the major naval powers

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[131] McDougal and Burke, at 203-204.

[132] Supra, note 128.

[133] McDougal and Burke, at 198.

of the day. Thus the intensity of value-involvement on both sides of the issue was minimal, and to that extent, the significance of the treaty may be overstated.

In contrast, the straits of the Dardanelles-Bosporus system involved the interests of the coastal state with a high degree of intensity. Throughout history the land-bridge aspect of these straits, providing the principal connection between the trading centers of Europe and the Near and Far East, has outweighed their significance as the connecting link between the Black Sea and the Mediterranean.[134] It is not surprising then to find a high degree of prescriptive competence accorded to the coastal state. The Ottoman Empire's traditional policy was to prohibit the passage of foreign warships through these straits, and despite occasional forced concessions to elements of Russia's Black Sea Fleet, the Empire and later Turkey have continued to manifest resistance to the transit of foreign warships. The Montreux Convention of 1936 continues a systematic "discrimination" against warships, requiring prior notice for transit of such ships, including provisions designed to prevent a non-littoral state from aggragating superior naval strength in the Black Sea.

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[134]See II Bruel, at 254-424 for an exhaustive review of history and policy in the Dardanelles-Bosporus.

The Convention further accords Turkey the plenary discretion to prohibit the passage of all warships through the Dardanelles-Bosporus, "should (she) consider herself threatened with imminent danger of war."[135]

In the Sound and Belts entrances to the Baltic, Denmark historically had claimed the authority to prohibit passage by warships and for long periods the claim seems to have been accorded recognition by other states.[136] Special restrictions continued to be imposed on warships long after the Sound Dues Treaty opened the passages to unrestricted innocent passage by merchant vessels, but the trend since 1918 has been for Denmark to reduce and finally eliminate unilateral restrictions (principally notice requirements) on foreign warships using the Danish Straits.[137]

With the exception of these specific instances, the question of warships' rights of innocent passage through international straits does not seem to have engaged authoritative decision-makers in the years prior to World War II. The paucity of genuine conflict results in part from the fact that under a 3-mile limit there are relatively few important

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[135] Id., at 399-400.

[136] Id., at 45. Part I of this volume treats the Danish Straits in detail. See also, McDougal and Burke, at 198.

[137] Id., at 99-100.

international straits which might have provided a locus of controversy.[138] Then too, during this period of history the nominal "littoral states" with respect to such important 3-mile international straits as Sunda and Singapore, were major naval and colonial powers. The extent to which their conduct reflected the actual littoral interests and values involved is at least debatable.[139]

In regard to merchant shipping, there did develop "a fairly strong trend over the past century to restrict coastal state competence in straits."[140] But the context was largely that of a declining coastal state competence to exact payment of tribute, dues or fees in exchange for passage rights.[141] Since during this period merchant shipping posed little physical threat to littoral interests in passing through straits, there was no occasion to discuss the problems of the determination of innocence and the permissible scope of coastal state

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138 While literally thousands of named straits close under a 3-mile limit, only Singapore, Sunda, the Turkish and Danish Straits, and perhaps one or two others, demonstrate an intense value involvement for both naval mobility and coastal interests.

139 The United Kingdom in Singapore and Malaysia, and The Netherlands in present-day Indonesia.

140 McDougal and Burke, at 213.

141 But see Id., at 199, where the trend is interpreted more broadly. The evidence relied upon, however, suggests no sharp delineation of issues raised by contemporary ecological concern.

regulation in a context relevant to present problems. If the historical record with respect to warships is largely ambiguous, it is virtually nonexistent with respect to these more generic aspects of the coastal state claim to exclude classes of vessels from its territorial seas which comprise international straits.

B. The Corfu Channel Decision

Shortly after noon on 22 October 1946, a British Royal Navy Task Group sortied from the harbor of the Greek town of Corfu and turned northward toward the North Channel of the Corfu Strait.[142] The ships were in column formation, with the cruiser, HMS MAURITIUS in the van, followed by the destroyer SAUMAREZ, the cruiser LEANDER, and the destroyer VOLAGE. The intended track of the force followed the centerline of the navigable channel which would take the ships well inside Albanian territorial seas as they traversed the northernmost reaches of the channel.[143]

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142 The North Channel separates Albania from the Greek island of Corfu and is barely more than a mile wide at its narrowest point and less than six miles wide elsewhere. For a sketch map and a more detailed description of the pertinent geography, see Hudson, "The Twenty-Eighth Year of the World Court," 44 AM. J. INT'L. L. 1 (1950) at 6.

143 The international boundary followed the median line of the Strait and not the thalweg, since the navigable channel was artificially created by Royal Navy minesweeping operations during World War II. The navigable channel had been "check-swept" a number of times and was considered safe

At about 1:30 P.M. local time, the force was observed and reported to Albanian coastal defense authorities. Almost two hours later, at 2:55 P.M. when the ships had passed the narrowest constriction in the Corfu Strait and were steaming in that portion of the navigable channel closest to the Albanian coast, SAUMAREZ struck an underwater mine and was heavily damaged. VOLAGE went to the assistance of the stricken vessel and took her in tow, but in the process VOLAGE also struck a mine and her bow was blown off.[144]

The appearance of a force of British warships steaming up the North Channel on that particular day had been anything but fortuitous. Five months before, the British cruisers, ORION and SUPERB, had been fired on by Albanian shore batteries in the same area.[145] Then on September 21, 1946, the

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for navigation. One of the objectives of Albanian intransigence seems to have been to force a shift in the navigable channel so that it would more nearly coincide with the international boundary. Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. REP. 33

144 British casualties, as announced in the House of Commons two days later were 1 officer and 37 ratings killed and 2 officers and 43 ratings wounded. The Times, (London) October 24, 1946, at 6. The United Kingdom ultimately proved materiale damage of £844,000. [1949] I.C.J. REP. 250.

145 [1949] I.C.J. REP. 27. This incident combined with U.K. support of Greece in her border dispute with Albania, and the general state of East-West tension in the immediate post-war era, to produce a distinctly chill climate of relations between Whitehall and Tirana.

British Admiralty had sent the following message to Admiral Sir Algernon Willis, the Commander-in-Chief of the British Mediterranean Fleet:

> Establishment of diplomatic relations with Albania is again under consideration by His Majesty's Government who wish to know whether the Albanian Government have learned to behave themselves. Information is requested whether any ships under your command have passed through the North Corfu Strait since August and, if not, whether you intend them to do so shortly.[146]

Admiral Willis took the broad hint and issued orders which ultimately resulted in the only judicial pronouncement in modern times dealing with warships' rights to innocent passage.

In the form the controversy between Albania and the United Kingdom was finally submitted to the International Court of Justice, two questions, stipulated to by the parties, were presented for decision.

> 1. Was Albania responsible under international law for the explosions which occurred on October 22, 1946, in Albanian waters and for the damage and loss of human life which resulted from them?
> 2. Has the United Kingdom under international law violated the sovereignty of the Albanian Peoples' Republic by reason of the acts of the Royal Navy in Albanian waters...?[147]

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[146] Id., at 28.

[147] After the calamitous passage of October 22, the United Kingdom undertook extensive minesweeping operations in Albanian territorial waters on November 12 and 13, without Albania's consent. Twenty-two moored mines were discovered in the

The Court delivered its opinion on April 9, 1949, and from the perspective of one seeking an authoritative delineation of the scope of the right of innocent passage, it is a distressingly cursory treatment indeed.

A major share of the Court's attention was engaged by the question of state responsibility. The Court accepted Albania's contention, never effectively challenged by the United Kingdom, that she was incapable of laying the offending minefield, having neither access to the type of mines used, nor sufficient naval vessels with which to accomplish the task. The main British contention was that the field had been laid by Albania's ally, Yugoslavia, either at the request of Albania or with her tacit acquiescence.[148] Responsibility was therefore premised on Albania's alleged collusion with Yugoslavia. The Court somewhat reluctantly dismissed this contention as not proven.[149]

However, in the Court's view, Albania's particularly sensitive attitude toward encroachments into her territorial

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general area where VOLAGE and SAUMAREZ had been damaged. Albania's claim that this intrusion also violated her sovereignty is not treated in the text. See Id., at 6. Likewise omitted are the claims that injured parties are entitled to compensation or satisfaction.

148 [1949] I.C.J. REP., 16-23.

149 Judge Badawic Pasha developed a "strong suspicion of connivance," however. [1949] I.C.J. REP. 58.

seas, the relative ease with which she could have observed mine-laying operations in the North Channel, and her failure to issue a general warning to shipping after the presence of the minefield had been conclusively established, all coalesced to prove Albania's knowledge of the minefield on October 22. Once actual knowledge is shown, Albania's responsibility follows for failure to provide the British Task Group such warning as circumstances permitted. The Court based the duty to warn on:

> ...elementary considerations of humanity... the principle of the freedom of maritime communication, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[150]

Nowhere, however, does the Court hold that the United Kingdom's right to receive a timely warning was contingent upon her lawful presence in Albanian waters in the first instance.[151] It is only in an analysis of the Court's handling of the second submitted question that specific attitudes toward the right of innocent passage are found.

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[150] Id., at 22.

[151] The entire ratio decidendi is reminiscent of an Anglo-American property owner's duty to warn a discovered trespasser of latent dangers.

1. Innocent Passage for Warships

After the earlier incident involving ORION and SUPERB, Albania had published regulations purporting to make all innocent passage (warship and commercial traffic alike) through the North Channel subject to prior notice and authorization. During the litigation, however, she abandoned these sweeping claims and asserted only that in the exceptional circumstances which existed in the area in the autumn of 1946, she was entitled to regulate the passage of foreign warships through her territorial sea, and that this regulation might validly take the form of a requirement for obtaining prior authorization. Albania also contended that the particular passage of British ships on October 22 had not been "innocent" in character.[152]

The Court made short work of the "exceptional circumstances" argument, disposing of the contention in one terse but sweeping paragraph, without discussion or citation to authority or precedent of any kind:

> It is in the opinion of the Court generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without

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[152] [1949] I.C.J. REP. 12.

> the previous authorization of the coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage in time of peace.[153]

On any fair assessment, Albania was not totally unreasonable in seeing herself as the victim of some genuine "exceptional circumstances" in the area of the North Channel at the time in question. The failure of the Court to confront this issue in any meaningful way is regretable.

The Court does reveal its expansive view of international rights of navigation in its handling of a subsidiary issue. Albania had briefly contended that whatever the status of innocent passage for warships through straits generally, the North Channel was not such an important strait as to call for the invocation of the right. In a widely quoted holding, the Court announced its test for determining whether a right of innocent passage exists in a given strait:

> ...the decisive criterion is rather (the strait's) geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation.[154]

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[153] Id., at 28. The form of the opinion may be due in part to the different judicial tradition obtaining in civil law countries. However, with virtually every prior observer discerning some merit, both pro and con, on the vital question of warships' rights of innocent passage, some explanation might have led to a more widespread acceptance of the result by the community of Nations.

[154] Ibid.

The critical issue in the case, however, was not the balancing of one strait against another. It was rather the balancing of the importance to the international community of innocent passage for warships in the North Channel in the autumn of 1946 against the importance of Albania's perceived need to protect herself against the clandestine intrusions of irregular forces into a politically unstable sector of her state territory.

The Court labored under no misconception regarding the state security basis of Albanian claims:

> ...it is a fact that the two coastal states (Greece and Albania) did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that Greece had declared that she considered herself in a state of war with Albania, and that Albania, invoking the danger of Greek incursions, had considered it necessary to take certain measures of vigilance in this region.[155]

Any searching examination of the legitimacy of Albanian concern and apprehension regarding these matters was scrupulously avoided. The Court contented itself with the cryptic announcement that:

> Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect

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155 Id., at 29.

> of the passage of warships through the strait, but not in prohibiting such passage or in subjecting it to the requirement of previous authorization.

The Court ventured no suggestion regarding what other regulations might have offered Albania, with the miniscule naval power at her disposal for enforcement of duty, any reasonable prospect of protecting her legitimate interests.[156]

The Corfu Channel decision is frequently cited as a sweeping vindication of international community interests in straits, and particularly of warships' rights of innocent passage.[157] Its persuasive force is limited, however, by the lack of any geo-political balancing of Albanian security interests in the North Channel viz a viz British naval mobility interests in this strait of admittedly minor strategic importance.

2. The Determination of Innocence

Broadly speaking, the Court was concerned throughout the Corfu Channel decision with the general problem of

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156 The Court itself had found Albanian naval forces inadequate even to the task of laying the mines. See text accompanying note 148, and id. at 29, supra.

157 E.g., Deddish, "Right of Passage by Warships Through Territorial Waters," 24 JAG J. 79 (1970); Harlow, "Legal Aspects of Claims to Jurisdiction in Coastal Waters," 23 JAG J. 81 (1969); see also Walker and Pharand, both supra, note 125.

innocence. But in rejecting the notion that warships are inherently non-innocent because of their function or configuration, the Court found it necessary to examine the broader question of how innocence is to be determined. Here it was necessary to sift the circumstances surrounding the specific passage of the British Task Group.

Albania claimed that the particular passage was not innocent and therefore resulted in a violation of her sovereignty. The claim was premised on allegations that the transit on October 22 had been conducted both in a "non-innocent" manner and for improper motives. Before generalizing about the relative importance, in the Court's view, of manner and motive in determining the innocence of a particular passage, it is crucial to note precisely what disposition was made of these Albanian contentions.

Four of the specific charges that the transit has been conducted in a "non-innocent" manner were rejected by the Court as unsupported by the evidence. The Court determined that the British ships were not maneuvering or in combat formation but, at least until the first explosion, were proceeding in column.[158] The charge that the ships had soldiers

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158 The Court seems to assume that proceeding in column was some indicia of innocence, but in a swept channel well less than a mile wide, little else in the way of "combat formation" is possible, and if shore bombardment had been the objective,

aboard, the Court dismissed as a "misunderstanding probably arising from the fact that the two cruisers carried their usual detachment of marines." Likewise the Court accepted British testimony that the ships' guns were trained fore and aft, their normal position at sea in peacetime, and not loaded, thus undercutting the Albanian contention that the position of the guns was inconsistent with innocent passage.[159]

Finally the Court rejected the Albanian claim that during the transit, the British ships had conducted an extensive and systematic reconnaissance of Albanian coastal defenses. Even in the most charitable view of the evidence, this finding is poorly supported. In an "After Action" report, the Captain of VOLAGE stated: "The most was made of the opportunity to study Albanian defenses at close range."[160] The Court, nonetheless concluded that the observations of Albanian coastal defenses had taken place after the mine explosions and, under these circumstances, found them to be

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a column might well have been the tactical formation of choice. At best the disposition of the ships was a neutral factor in determining innocence, but the Court does not treat it as such. Id., at 30-31.

[159] Ibid. Having regard to the speed with which modern naval guns can be loaded and trained, the weight of this evidence in demonstrating innocence is less than the Court assumes.

[160] Id., at 32.

prudent, justified, and not inconsistent with innocent passage.[161]

This is a most unfortunate and unsatisfactory section of the Court's opinion. It strains credulity to believe that warships, in transiting waters where their sister ships had come under fire from coastal batteries only months before, would not conduct a continuous reconnaissance of coastal defenses; and in adopting such a strained factual interpretation, the Court managed to avoid deciding the one really serious question raised by the evidence regarding the manner of warships' passage.

Some visual reconnaissance of the coast is an almost unavoidable concomitant of a warship's presence within the territorial sea, and sophisticated electronic surveillance techniques may be undetectable from the coast. If these activities are prohibited to a warship in innocent passage, the coastal state is virtually powerless to ensure compliance, short of excluding warships altogether. If, however, such activities are not in fact inconsistent with an innocent passage, the Court, with more agility than candor, avoided a seemingly appropriate factual opportunity to say so.

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[161] Ibid. The issue was clouded by British refusal to produce a classified document mentioned in the "After Action" report, but the Court was kind enough to accept British assurances that nothing contained therein reflected any "non-innocent" intentions toward Albania.

Finally, the Court did determine that the crews of all British ships in the force were at battle stations during the transit, but, under all the circumstances, concluded that this was merely a prudent precaution and not inconsistent with innocent passage.[162] Only in this area did the Court address itself to the manner of passage to the extent of sanctioning specific acts in foreign territorial seas.[163] If one accepts the Court's factual determinations regarding the Albanian contentions, there is little in the manner of passage of the British force on October 22 which any objective observer could find threatening to coastal state security. The Court ventured no opinion on the propriety of the actions which a coastal state might reasonably interpret as threatening, e.g., surveillance of coastal state defenses, because it concluded that such actions had simply not occurred in the case before it. Under these circumstances, it is difficult to agree with

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[162] Id., at 31.

[163] The Court did, of course, roundly condemn the British minesweeping operation of November 12 and 13, in the face of attempts to justify it as either a self-help measure or an evidence-gathering expedition. Id., at 32-35. Certainly, such activities are something more than mere "passage" under any accepted definition of the term, but straits may be closed at least as effectively by moored mines as by shell-fire. If self-help in the form of threatened counter-battery fire is permissible under international law, it is difficult to understand why the no more socially disruptive activity of mine-sweeping is prohibited.

analysts who maintain that the Court's judgment gives primary emphasis to the manner of passage in determining innocence.[164]

Indeed, it seems indisputable that the Court answered the Albanian "non-innocence" objection primarily with reference to British motives in effecting the passage.[165] The cursory fashion in which it disposed of the "motive" objection may have contributed to mislead commentators.

Albania contended that the passage was undertaken for motives other than mere desire to get from one end of the strait to the other; to this extent the United Kingdom agreed. Albania contended it was a political mission designed to intimidate her by threat of force into changing her diplomatic position regarding the requirement that warships obtain authorization prior to transiting Albanian territorial seas.[166] The Court accepted, however, the semantically different United Kingdom assertion that the motive for the passage was to "test" Albanian attitude, and to affirm by a show of force a right which had been denied by force.[167]

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[164] Glenir, supra, note 125 at 100-101. See also, Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law," 27 BRIT. Y.B.K. INT'L L. 1 (1950) at 28.

[165] McDougal and Burke, at 244-246, are in agreement with this proposition.

[166] [1949] I.C.J. REP., at 30.

[167] Ibid.

The notion of a mere "test of Albanian attitude" seems a bit more innocuous than is warranted by the evidence. Assuming that an Albanian shore battery had fired a few rounds across the bow of MAURITIUS as an unmistakable signal that the Albanian legal and diplomatic position remained unchanged since the earlier incident involving ORION and SUPERB, there is nothing in the record of British preparations suggesting that the force would have retired considering its mission accomplished. Rather, the unmistakable inference is that the force was prepared to shoot its way through if opposition developed.[168]

Whichever version of the motive for the transit is accepted, the question of motive does seem to be crucial. The Court's handling of the issue is, however, almost perfunctory.

> The intention must have been not only to test Albania's attitude but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard ...to all the circumstances of the case

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168 In determining that the passage was innocent, the Court seems to have attached some importance to the fact that after striking the mines, the British ships did not open fire on coastal defenses. Id., at 32. Shooting up the Albanian coast might well have provided an outlet for the undoubted rage and frustration on the Flag Bridge of LEANDER; it would have accomplished nothing toward protecting the force from further unwelcome encounters with mines. The passive retirement of the force falls somewhat short of indicating benign motives.

> ...the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.[169]

The Court never reached the broad problem of under what circumstances the threat or use of force is permissible, under the United Nations Charter or otherwise, to affirm a right under international law which another state seeks to deny by the use of force.[170] Presumably this would depend to some degree on how firmly established and widely accepted was the right in the first instance. Both Albania and the United Kingdom had acted in 1946, some three years prior to the Court's Fiat Lex, and at that time the scrutiny of existing international law yielded at best a trend on behalf of innocent passage for warships. The Court chose to condemn the use of force in opposition to the trend, and uphold the threat of force in its advancement. This may have seemed prudent in light of the political realities of the immediate post-war years. It may also have vitiated any persuasive force the decision might otherwise be accorded by authoritative decision makers in the 1970's.

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[169] Id., at 31.

[170] McDougal and Burke read the case as merely affirming the proposition that the concept of innocent passage is sufficiently vague to sanction acts otherwise prejudicial to coastal state security when the purpose of such acts is to affirm a right intimately connected with the territorial sea in the first instance. McDougal and Burke, at 246.

C. The International Law Commission and the First Law of the Sea Conference

Innocent passage, in all its various aspects, was the subject of frequent comment, discussion, and action throughout the work of the International Law Commission and at the 1958 Conference itself. The following analysis of the record of deliberations of these two bodies is presented to illustrate contemporaneous attitudes toward the three forms of coastal state claims to exclude classes of vessels from international straits.

1. Innocent Passage for Warships

Upon first considering the question in 1954, the International Law Commission took the position that warships were to be accorded the right of innocent passage and that coastal states "should not require prior authorization or notification."[171] Couched in such hortatory terms, the statement falls short of a meaningful delineation of the limits of coastal state authority, and perhaps marks the beginning of the Commission's predilection for obfuscation on the warship issue.

Whatever may have been the import of this original

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[171] II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1956), at 276-277.

formulation, the following year brought a complete reversal of the Commission's position. At its seventh session in 1955, the Commission, "after noting the comments of certain Governments and reviewing the question, felt obliged to amend this article so as to stress the right of the coastal state to make the right of passage of warships through the territorial sea subject to previous authorization or notification." (Emphasis added.)[172] In other words, the navigation of warships through foreign territorial seas was a privilege and not a right.

The Commission considered the matter again at its eighth session in 1956, but the "majority of the Commission saw no reason to change its view."[173] Thus, in its final report to the United Nations General Assembly, the Commission recommended the following draft article 24 for consideration by the 1958 Conference:

> The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage...[174]

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[172] Ibid.

[173] Ibid.

[174] Id., at 259.

With regard to the specific problem of warships' rights of innocent passage through international straits, the Commission was even less forthright. The members were, of course, mindful of the International Court's decision in the Corfu Channel case.[175] In 1955 they had given express recognition to the Court's holding by adopting the following second paragraph of draft article 24:

> (The coastal State) may not interfere in any way with innocent passage (by warships) through straits normally used for international navigation between two parts of the high seas.[176]

This paragraph was deleted from the final 1956 draft on the ostensible grounds that the matter was already sufficiently covered by the general article (article 17 §4 of the draft)[177] barring suspension of innocent passage through international straits. The Commentary of the 1956 report to the General Assembly apparently recognized that some misunderstanding might arise from the deletion and took considerable pains to avoid it.

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[175] Supra, note 171.

[176] Ibid.

[177] Article 17 §4 provided: "There shall be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas. Id., at 258

> In deleting this paragraph the Commission ...nevertheless wishes to state that article 24, in conjunction with paragraph 4 of article 17, must be interpreted to mean that the coastal State may not interfere in any way with the innocent passage of warships through straits normally used for international navigation between two parts of the high seas; hence the coastal State may not make the passage of warships through such straits subject to any previous authorization or notification.[178]

Thus the Commentary at least is four-square for warships' rights of innocent passage through straits "normally" used for international navigation.

Unfortunately, the view that the deleted paragraph was unnecessary is plainly incorrect. Article 17 §4 prohibits only the suspension of a right of innocent passage, and the then-current version of article 24 rather specifically denied any such right to warships in the first instance. The Commentary itself recognized that article 24 is intended to and does limit the broad general article according the right of innocent passage to "all ships."[179] To be consistent the Commission should have recognized that article 24 also limits article 17 §4, the more general

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[178] Supra, note 171.

[179] Article 15 §1, which provided: "Subject to the provisions of the present rules, ships of all States shall enjoy the right of innocent passage through the territorial sea. Id., at 258.

suspension article.

Rather obviously the final draft Convention produced by the International Law Commission and its accompanying Commentary do not form a coherent whole on this issue. Almost equally plainly, a majority of the members of the Commission, with more or less subtlety, were attempting to overrule the Corfu Channel decision. Even for those disagreeing with this proposition, there is little in the record thus far to indicate any clear trend of community expectation in favor of innocent passage through straits for warships.

The underlying disagreement was aired anew when the International Law Commission's draft article 24 came up for consideration in the First Committee of the 1958 Geneva Conference. The Federal Republic of Germany proposed an amendment to delete from the article the words "authorization or".[180] The effect of this amendment, if adopted, would have been to recognize warships' rights of innocent passage subject only to the coastal state's right to require prior notification. The amendment was rejected by a vote of 35 votes to 22, with 8 abstentions.[181]

The Netherlands next proposed to delete the entire

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[180] U.N. DOC. A/CONF. 13/C.1/L.48.

[181] III OFFICIAL RECORDS (1958) 131.

draft article 24, and substitute therefor a yet more optimistic article (from the point of view of naval mobility interests) to read:

> Save in exceptional circumstances warships shall have the right of innocent passage through the territorial sea without previous authorization or notification. The coastal State has the right to regulate the conditions of such passage. Subject to article 17, paragraph 3, it may suspend such passage under the conditions envisaged in article 17, paragraph 1.[182]

This proposal too was rejected, by a vote of 38 to 17, with 10 abstentions.[183]

In a last-ditch effort to salvage some explicit recognition of warships' rights in international straits, Sir Gerald Fitzmaurice introduced a United Kingdom proposal to add a second paragraph to the draft article 24, worded as follows:

> The right of warships to innocent passage through straits used for international navigation between two parts of the high seas may not be made subject to previous authorization or notification.[184]

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[182] U.N. DOC. A/CONF. 13/C.1/L.51.

[183] Supra, note 181.

[184] U.N. DOC. A/CONF. 13/C.1/L.37/CORR. 2. Unfortunately, it is not completely clear from the record, in what precise form the proposal was actually voted upon. The official record reflects a vote on the proposal as above quoted. However, moments before the vote, Sir Gerald announced that in order to meet some of the views expressed during the discussion, he would withdraw the words "or notification" from the United Kingdom proposal. Apparently the first Committee voted on the proposal as orally modified.

Here again naval mobility lost, as the proposal was rejected by the close vote of 27 to 25, with 13 abstentions.[185]

Thus, only 25 of the 68 states composing the First Committee are on record as clearly favoring a provision which would have made explicit warships' rights of innocent passage through international straits, and would have prohibited coastal state requirements for advance authorization therein while recognizing their right to require advance notification.[186] There is no indication in the record of discussions how many of the 27 negative votes were influenced by the ILC Commentary's specious argument that such an explicit clause was superfluous. There is certainly no suggestion that any of the negative votes were influenced by a view that the notification requirement was too onerous. The provision clearly represented the most favorable result the major naval powers were likely to achieve.

At the conclusion of these maneuvers, the original draft article 24, permitting an advance authorization requirement, and hence, denying a right of innocent passage to warships at least in ordinary territorial seas, was reported favorably out of the First Committee by a vote of

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185 Supra, note 181.

186 Supra, note 184.

54 to 5, with 8 abstentions.[187] No explicit provision dealt with warships in straits. And the ambiguity which had inhered in the final ILC draft and accompanying Commentary was passed on to the Plenary Session of the Conference unresolved.

At its twentieth Plenary Session, the Conference considered article 24 as recommended by its First Committee. Italy proposed that a separate vote be taken on the words "authorization or" and on this vote the words were deleted from article 24.[188] Thus the maneuver which had failed in the First Committee succeeded in the Plenary Session. The import of the article, as it then stood, was to recognize warships' rights of innocent passage subject only to a coastal state's right to require prior notification of an intended passage. In its amended form, article 24 failed to achieve the necessary concurrence of two-thirds of the states present and voting, and was not adopted.[189]

In view of the clear and unambiguous provisions of articles 14 §1[190] and 16 §4,[191] the Territorial Sea Convention,

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[187] Supra, note 181.

[188] II OFFICIAL RECORDS (1958) 67.

[189] The result was 43 votes in favor of the amended article, 24 against and 12 abstentions. Id., at 68. Fifty-three favorable votes would have been required for adoption.

[190] "Subject to the provisions of these articles, ships of all States,...shall enjoy the right of innocent passage through the territorial sea." Art. 14 §1, Territorial Sea Convention.

[191] Supra, note 12.

as finally adopted, rather explicitly provides that warships are entitled to a right of innocent passage and that such right may not be suspended in international straits. Granted, reference to the travaux preparatoires raises substantial and perplexing questions as to whether this is what the conferees intended. However, since none of the various versions of article 24 was adopted, there is little reasonable ambiguity within the four corners of the Convention, and reference to the confusion in the Conference record may be inappropriate.[192]

The likelihood is that the Convention will not be applicable to genuine disputes between straits states and naval powers.[193] The value of the record, if any, then consists in the light it may shed on contemporary expectations. By emphasizing one or another feature of the debate commentators have managed to discern community support for

[192] An ambiguity has been suggested in that sub-section A of the Convention, including article 14, is captioned as applying to all ships, sub-section C, dealing with different types of government ships, is made subject to sub-section A by specific reference, and sub-section D, dealing with warships, omits any specific incorporation by reference. Slonim, supra, note 125, at 119. The intellectual struggle required to perceive ambiguity is apparent.

[193] Such "major straits" states as Spain, Indonesia, Singapore, Iran and Saudi Arabia have not ratified the Convention. Seven Soviet-bloc states have filed reservations denying that a right of innocent passage exists for warships.

propositions ranging across the entire spectrum of possible attitudes toward warships and innocent passage.[194] But the real lesson of the 1958 Geneva experience seems to be that the conferees were both willing and able to obscure the depth of disagreement on the issue without involving incompatible interests of critical importance to participating states. The prospects for repeating the feat in 1973 are not auspicious.

2. The Determination of Innocence

In the development of the doctrine of innocent passage, attempts to specify criteria for the determination of innocence have occasioned both controversy and confusion. Since only those ships are accorded rights whose passage through a foreign territorial sea is innocent, the very existence of this controversy represents a limitation of the doctrine as a sufficient guarantee of shared access to the oceans. Unfortunately the Conference was not totally successful in dispelling uncertainty, and under its formulation the determination of innocence remains to some extent obscure.

Attempts at codification prior to 1958 had placed

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[194] Perhaps the extreme antipodes are occupied by Deddish, supra, note 157, at 85 (obviously Conference intended innocent passage for warships), and Sorensen, "Law of the Sea," 520 INT'L. CONC. 236 (1958)(no room for doubt that majority of delegations opposed innocent passage for warships).

primary emphasis in ascertaining innocence on the manner of passage, i.e., the actual conduct of the vessel while in transit through the foreign territorial sea.[195] It has been suggested above that the International Court, in the Corfu Channel decision, took a somewhat broader view of the factors to be considered.[196] The record suggests, however, that the participants in the International Law Commission's deliberations and the Conference itself read the decision as emphasizing manner at the expense of motive.[197]

In conformity with this view, the draft article prepared by the Commission defined innocence in the following terms:

> "Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State..." (emphasis added)[198]

The difficulty of extracting any clear intellectual content from the phrase "prejudicial to the security of the coastal State" prompted strong criticism of this formulation. None

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[195] See article 3 of the Hague Conference draft, reprinted at 24 AM. J. INT'L. L. 185 (SUPP. 1930).

[196] See text accompanying note 165, supra.

[197] In this regard, see the comments of Sir Gerald Fitzmaurice and Mr. Sorensen, criticizing the United States proposal (note 199, infra) at III OFFICIAL RECORDS (1958) at 83.

the less this definition does rather clearly exclude reference to a vessel's configuration, cargo or destination in assessing innocence.

For reasons never adequately made clear, the Conference rejected the Commission's draft and adopted instead the following definition:

> "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[199]

The resulting shift in emphasis has been away from reasonably objective criteria capable of ascertainment by an impartial decision-maker. The effect of this formulation appears to be that the determination of innocence is within the discretion of the coastal state, and in making the determination,

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[199] The substitution resulted from an amendment submitted by the United States (in itself, some evidence that no broadening of coastal state discretion was intended). U.N. DOC. A/CONF. 13/C.1/L.28/REV.1, III OFFICIAL RECORDS (1958) 216. The passage is now article 14 §4 of the Territorial Sea Convention. The comments of Mr. Yingling of the U.S. delegation in reporting the efforts of a working group tasked with reconciling various proposed definitions of innocence are less than clear.

> "The working group felt that (this proposal) gave the greatest measure of freedom of passage without in any way endangering the security of the coastal State. The group had realized that the term security had no...precise meaning but considered that it should be regarded as implying that there should be no military or other threats to the sovereignty of the coastal State. It did not regard the word security as relating to economic or ideological security." Id., at 82-83.

consideration may be given to a broader range of effects than merely those which emanate from the actions of the vessel while in the territorial sea. Who bears the burden of establishing innocence or proving non-innocence is likewise unclear.[200]

The coastal state's discretion is not absolute, of course, since the determination of innocence, like the delimitation of territorial sea breadth, has an international aspect. But apparently, as the focus has shifted from "acts of ships" to "passage", the increase in subjectivity has broadened the permissible scope of coastal state discretion. This interpretation of the work of the Conference leads to the conclusion that coastal states may properly consider vessel configuration, cargo, destination, and perhaps even the general condition of political relations among coastal, flag, and consignee states. Assuming warships have a right of innocent passage in the first instance, any protection they would secure under this view of innocence-determination is ephemeral.

There are several reasons, however, for arguing that this view of innocence-determination does not accurately reflect contemporary community expectations. The record of the Conference reveals no consensus for such pervasive

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[200] McDougal and Burke, at 263.

coastal state competence, and only occasional recognition of the possibility of such an interpretation.[201] Acceptance of pervasive coastal state competence would also hinder the

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204 Id., at article 3.

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in McDougal and Burke at 228-233.

gue Conference draft, note 195, supra.

non-innocent passage, i.e. to bar or expel any vessel committing acts prejudicial to its security.[205] The draft went further, however, and accorded the coastal state a limited competence to suspend all passage rights.

> The coastal State may suspend temporarily in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of (its security or other interests protected by international law).[206]

The thrust of this provision seems to be that under certain unspecified but extreme exigencies, the coastal state is relieved of the burden of making individual innocence determinations, and may in the alternative suspend temporarily all passage of whatever nature.

Since the draft also provided for a relatively circumscribed coastal state competence in determining innocence, this provision represented, in many respects, a quite reasonable accommodation of the conflicting interests involved. The accompanying Commentary considers it a salutory limitation on coastal state prerogatives and then blandly advances the

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[205] Article 17 §1 of the ILC draft provided:

> "The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law."

II Y'BK. OF INT'L. L. COMM. (1956) at 273.

[206] Id. at Article 17 §3.

opinion that "the article states the international law in force."[207]

The choice of the words "if it should deem such suspension essential" proved to be unfortunate, however. In a clear move to abridge the unfettered coastal state discretion implied therein, the 1958 Conference amended the clause with the following result:

> "...The coastal State may, without discrimination among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security..."[208]

The result was certainly the introduction of more objective standards for the invocation of the suspension clause, and hence, a diminution of coastal state discretion. Unfortunately, the tautology of the 1930 draft has surreptiticiously reappeared.[209]

The difficulty is this. How can it ever be essential for the protection of state security to suspend passage, if that passage is innocent, i.e., not prejudicial to the

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[207] Ibid.

[208] Article 16 §3, Territorial Sea Convention.

[209] The ILC draft referred to suspension of "passage". At the same time the discretionary "if it should deem..." language was removed, the Conference re-introduced, perhaps inadvertently, the present Convention reference to suspension of innocent passage.

peace, good order, or security of the state? The answer seems to consist in recognizing that what is actually being suspended is not an innocent passage, identified and adjudicated as such, but all rights of transit for all foreign vessels through a given area. A necessary corollary to this proposition is that in determining whether suspension of passage rights is essential to its security, a coastal state may take into consideration a broader range of interests and circumstances than is permissible in assessing the innocence of a particular passage. In other words, innocence vel non is still to be determined primarily with reference to a vessel's conduct while in the territorial sea.

Further support for this proposition is found in the Convention provision addressed specifically to international straits:

> There shall be no suspension of the innocent passage of foreign vessels 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.[210]

If the determination of innocence is limited to an examination of the vessel's conduct, the coastal state retains,

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210 Article 16 §4, Territorial Sea Convention.

under this formulation, the competence to prohibit passage through straits to ships which commit acts prejudicial to its security. But within international straits, this is the limit of competence. Here states may not "suspend innocent passage" in the sense of suspending all passage rights because of security threats resulting from circumstances other than the vessel's conduct within the territorial sea.

Both results appear to be both reasonable and in accord with the general trend of community expectations. In ordinary territorial seas the coastal state may be temporarily relieved of the burden of making individual innocence determinations for serious cause shown; within international straits the concession is withheld as too onerous a burden on shared access to the oceans.

In summary, the argument that coastal states should be accorded a broad discretion to consider a wide range of factors in determining innocence leads to illogical results within the framework of the Convention itself. The general suspension article would become superfluous, since an even more pervasive protection of coastal state interests could be achieved by the simple expedient of determining passage in or through a given area to be non-innocent. The same expedient would serve to avoid the prohibition of the straits suspension article and strip the international

community of any reasonable enforceable protection in international straits.[211] On balance, the more logical view, and the view more in harmony with community expectations, is that coastal state discretion in determining innocence is narrowly circumscribed and is to be exercised with primary reference to the conduct of the vessel in the territorial sea.

3. The Permissible Scope of Unilateral Regulation

Throughout the Conference, the major maritime powers sought to impose more or less precise limits on the scope of unilateral coastal state regulation. The interplay between coastal and international interests has already been described in reference to the most extreme form of coastal state regulation, i.e., the suspension of the right of innocent passage altogether. Efforts to limit coastal state regulatory competence in other areas were a mixture of success and failure, as the following examples illustrate.

In the International Law Commission's draft no specific mention was made of fishing vessels, although the accompanying Commentary pointed out that such vessels had

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[211] In view of the rather specific modification of article 16 §4, with a view to regulating the Arab-Israeli conflict in the Gulf of Aqaba, this seems a totally unintended result. See II OFFICIAL RECORDS (1958) at 65.

a right of innocent passage.[212] At the Conference itself, the United Kingdom proposed the addition of a new paragraph to article 14 to read: "In the exercise of innocent passage ...foreign fishing vessels shall observe such laws and regulations as may be published by the coastal State..."[213] The United States attacked this proposal as a grant of unlimited regulatory competence to the coastal state.[214] Thereupon, the United Kingdom amended its proposal so as to require that the laws and regulations of the coastal state be "in conformity with the present rules and other rules of international law."[215] The United Kingdom amended proposal was rejected in favor of a clause (heavily supported by the Latin American countries)[216] which made no mention of any requirement that coastal state regulations comply with international law.[217]

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[212] II Y'BK. OF INT'L. L. COMM. (1956) at 272.

[213] III OFFICIAL RECORDS (1958) at 247.

[214] Id., at 113. The U.S. would vote against the amendment because...

> "it placed no limitation whatsoever on the kind of laws and regulations which fishing vessels would have to observe...it failed to require the coastal State to comply with the present rules and other rules of international law."

[215] Ibid.

[216] Id., at 114.

[217] "Passage of foreign fishing vessels shall not be considered innocent if they do not observe such

The specific article dealing with the coastal state regulation of warships[218] makes no explicit reference to subordinating coastal state regulatory competence to an international standard. It was adopted by both the First Committee and the Plenary Session in the form recommended by the International Law Commission[219] and occasioned no discussion regarding the permissible scope of coastal state regulatory competence.

Some positive evidence of a trend toward limitation of coastal state regulatory competence is found in the sections dealing with the duties of vessels in innocent passage. The International Law Commission draft had provided:

> Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the

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laws and regulations as the coastal state may make...to prevent these vessels from fishing in the territorial sea."

Article 14 §5, Territorial Sea Convention.

218 "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea, and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea."

Article 23, Territorial Sea Convention.

219 See II OFFICIAL RECORDS (1958) at 68, and III OFFICIAL RECORDS (1958) at 128, 134 and 203.

> coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.[220]

Phrased in this fashion, the clause obligates ships to obey only those coastal state regulations which are "in conformity with international law." Through a series of amendments and counter-amendments in the First Committee, the major maritime powers achieved a rough stand-off with advocates of an unlimited regulatory power for coastal states. The Committee first accepted an amendment, supported by the Latin American states,[221] which would have removed any limitation on scope of unilateral coastal state regulation. Then, in a totally contradictory move, an amendment was accepted which would have placed even more explicit limitations on coastal state competence.[222] The resulting clause was a hopeless jumble and was rejected.[223] Finally the First Committee returned to the International Law Commission's draft, approving it by a vote of 59 to 0.[224] The parlimentary maneuvers demonstrated that

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[220] Supra, note 212, at 273-274.

[221] III OFFICIAL RECORDS (1958) 101. For amendment text see Id., at 222.

[222] Ibid. For amendment text, see Id., at 217.

[223] Id., at 102.

[224] Id., at 109.

the forces in favor of a broad unilateral coastal state regulatory competence and those opposed were almost evenly matched.

The article dealing with the duties of the coastal state within its territorial sea is further illustration of compromise. The 1930 Hague draft had provided: "A coastal State may put no obstacles in the way of innocent passage of foreign vessels in the territorial sea."[225] On the other hand, the International Court, in the Corfu Channel Decision, had recognized "every State's obligation not to allow knowingly its territorial sea to be used for acts contrary to the rights of other States."[226] The article adopted by the Conference represents a middle position between these two extremes.[227] It has been suggested, however, that the major maritime powers actually supported the move to water down any positive duty of the coastal state to insure innocent passage out of a fear of creating correlative rights of inspection and supervision in the coastal state.[228]

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[225] 24 AM. J. INT'L. L. 185 (SUPP. 1930).

[226] [1949] I.C.J. REP. 22.

[227] "The coastal State must not hamper innocent passage through its territorial sea." Article 15, §1, Territorial Sea Convention. The I.L.C. draft had sought to impose on the coastal state a duty to use its best efforts to secure innocent passage to foreign vessels. II Y'BK. OF INT'L. L. COMM. (1956) at 273.

[228] Slonim, supra, note 125, at 111.

The underlying logical difficulty, however, is the rigid insistence that problems of innocence determination be compartmentalized under one set of prescriptions, and problems involving the permissible scope of coastal state regulation be treated independently. Plainly these two facets of the exercise of coastal state prescriptive competence are functional equivalents. Passage may be barred as effectively by the promulgation of onerous regulations as by determinations of non-innocence or by suspension of rights of innocent passage. The only real solution may well consist in a much more comprehensive and detailed examination of particular coastal state regulations than any international Conference has heretofore been willing to undertake.

D. The Second Law of the Sea Conference

In March 1960, a second United Nations Law of the Sea Conference met to resolve the two major problem areas upon which no agreement had been reached at the 1958 Conference, to wit: coastal states' fishing rights and territorial sea breadth. No accord was reached on either matter, and hence the debates do not rise even to the questionable dignity of <u>traveaux preparatoires</u>. Nonetheless, an examination of the record within the context of a study of transit and passage problems is profitable on several counts.

This study has posited the new factual context of an internationally-sanctioned 12-mile limit for the territorial sea. The Second Conference was often a debate over the acceptability of such a limit, so it is possible to discern how various states perceived their vital interests to be affected thereby. More significantly the various rationale advanced in support of proposals at the 1960 Conference persist in current discussions of international and coastal state claims in straits. The record thus helps to reveal the trend of community expectations with respect to such claims

In 1960, a variety of proposals presented the conferring states essentially with a choice between a 6-mile and a 12-mile territorial sea.[229] The United States and Canada led the bloc of states advocating a 6-mile limit. Neither any of the initial proposals, nor the ultimate compromise position offered by the United States and Canada[230] made any mention of rights of passage through waters which would be recognized as territorial sea thereunder, whether in

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[229] The draft treaty articles present for the consideration of the Conference are reproduced in OFFICIAL RECORDS (1960) at 164-169.

[230] U.N. DOC A/CONF. 19/C.1/L.3 (U.S. proposal); U.N. DOC. A/CONF. 19/C 1/L.4 (Canadian proposal); U.N. DOC. A/CONF. 19/C.1/L.10 (joint Canadian-U.S. proposal) [reprinted in OFFICIAL RECORDS (1960) at 166, 167, 169].

international straits or otherwise. Nor did the advocates of a 6-mile limit see fit to confront in general debate the problem of transit through the new international straits to be created thereby.

The Soviet Union was one of the foremost proponents of a 12-mile limit, and immediately set out to bell the cat by equating opposition to the 12-mile limit proposals with military colonialist ambitions.[231] Implicit in the Soviet position was the rejection of any right of innocent passage for warships.[232] Other states echoed the view that the problem of territorial sea breadth was almost exclusively a clash between the naval mobility interests and perceived threats to coastal state security. Support for a restriction

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231 "The debates on the breadth of the territorial sea at the first Conference proved that military and strategic considerations which had nothing to do with the preservation of world peace...underlay objections to...a 12-mile limit..." Statement of Mr. Tunkin, Chairman of the U.S.S.R. delegation to the Committee of the Whole, March 22, 1960, OFFICIAL RECORDS (1960) at 39.

232 "Opponents of a 12-mile limit...seemed willing to admit that a State might exercise a wide range of rights in the 12-mile zone, but under the express condition that the exercise of those rights should not interfere with the freedom of warships...navigating near foreign coasts. As Scuh activities had not infrequently contributed to an increase in international tension, the acceptance of a 12-mile limit could not fail to further the interests of world peace." Ibid.

on naval mobility, in the form of a 12-mile limit with no transit rights for warships, was solicited from:

> "...especially those States which after having been the subjects of colonialism based mainly on naval power, had recently gained their independence, the tragic memory of the appearance of warships in the coastal sea, threatening any liberation movement in those countries was still unforgetable, and a breadth of six miles, insufficient as it was to keep warships out of sight, would not give such countries an adequate safeguard."[233]

respect to the problems of commercial navigation

advanced what was to become the standard "12-

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passage was perfectly adequate to protect com-

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It is not clear in many such statements
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IAL RECORDS (1960), at 29.

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attempted to raise the specter of a sort of "legal obsolescence" of navigational aids throughout the world, and suggested that heavy financial burdens in the form of increased hazards to navigation, costs of navigational aid replacement and modernization, and increased transportation costs, would result from the extension of the territorial sea to 12 miles.[235]

Advocates of a 6-mile limit ignored any discussion of the extent to which the same consequences would attend the adoption of their proposals. It was clearly a matter of degree, especially with regard to the problems of international straits, and the weakness of the Canadian-U.S. position did not escape critical comment. When Pakistan criticized a 12-mile limit because thereunder "the English Channel would cease to be high seas for a distance of 30 miles and the navigable channel in the Malacca Strait would be severely restricted,"[236] Ethiopia replied that even under a 6-mile limit, "the straits of Surigao, Bab el Mandeb, and Gibraltar cease to be high seas, yet major maritime powers were prepared to support such a limit without any special transit guarantees."[237]

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[235] Id., at 45.

[236] Id., at 86.

[237] Id., at 108.

The Conference was unable to muster a two-thirds majority for any of the various proposals before it, and thus adjourned without concrete result. In two ways, however, it has critical significance for an appraisal of passage rights through straits under a 12-mile limit. For better or for worse, the major maritime powers have already announced before the world that they could accept, without critical damage to their vital interests, a 6-mile limit and the existing innocent passage regime for all resulting international straits. Any retreat from this position will be enormously difficult to accomplish. Secondly, the Soviet Union was successful in persuading developing nations that the major clash of interests involves first and foremost, the military interests of the major naval powers. Arguments that a 12-mile limit without transit guarantees through international straits would cripple maritime commerce had a hollow ring in 1960, and would require persuasive evidence to be accepted today.

V. APPRAISAL AND RECOMMENDATION

The problems which arise from the clash between coastal state interests and those of the commercial maritime community are quite different from those occasioned by the perceived conflicts between coastal state and naval mobility interests. In attempting to discern criteria for a viable international accommodation of the straits passage issue, it is convenient to discuss these two types of conflicts separately. This is not to suggest, however, that the two problems are independent to a degree which would permit their severance for purposes of resolution.

A. Straits and Commercial Maritime Interests

Any coastal state has within its territorial sea a variety of interests which it might deem threatened by present or prospective practices of the maritime shipping industry. The interests vary in importance and, if consideration is restricted to commercial traffic through international straits, the threats also vary in intensity. Thus, while some attention will properly continue to focus on threats to coastal state economic and fiscal interests in the form of fishing in prohibited areas or smuggling

operations, neither threat seems likely to be very intense within international straits.

In contrast, the paramount coastal state concern threatened by the commercial maritime community's desire for expeditious ocean transportation is the coastal state's equally legitimate desire to be secure from resulting adverse impact on its environment, the threat of which is greater, rather than less, intense within international straits.

The fundamental fact emerging from an analysis of the claims advanced by the competing interests and the trends in community expectation is that the concept of innocence is still a vital element of any reasonable settlement of the passage issue. The commercial maritime community has no legitimate requirement for a franchise so broad as to sanction direct physical damage to the coastal state or its adjacent marine environment. Likewise, coastal states advance no overt claims to manipulate innocence determination so as to prohibit truly harmless carriage of goods. Within the penumbra of these manifest views are the elements of compromise, the essence of which is the particularization of the doctrine of innocent passage. Such particularization will result in new restrictions on both commercial shippers and coastal states

A first step toward an optimum solution of the straits

passage issue requires the international community to demonstrate some real concern for the danger to coastal states caused by the present lack of effective concern for maritime safety. If coastal states are to be persuaded that they can prudently forego their inclination to impose unilateral regulations to reduce the threat of marine disasters in straits, some effective multilateral regulation in the form of an international shipping convention is necessary.

Such a convention should govern such matters as standards of vessel construction and maintenance, requirements for modern safety devices including radar and bridge-to-bridge telecommunications, minimum standards of crew competence, installation of modern navigational aids in restricted waters, mandatory observance of traffic separation lanes, and finally, mandatory disciplinary measures to be imposed by the flag state for violations of convention provisions. A coastal state might then reasonably require that a flag state adhere to the convention in order for its vessels to be accorded the right of innocent passage. Such a procedure would effectively bring to bear the prescriptive competence of the international community as a whole (albeit indirectly) without the complexities of establishing elaborate international enforcement machinery. Correspondingly, such an agreement eliminates any basis for

coastal states prescribing and enforcing their own regulations in straits.

Such a convention, while necessary, is not a sufficient condition for the optimum solution to the straits passage issue as it relates to commercial maritime interests. There still remain unique geographic problems associated with certain international straits. The community of nations must examine the possibility that some international straits are simply unsuited for utilization by mammoth supertankers regardless of the greater security from marine disaster which an operative Shipping Convention would provide.

Previous proposals to subdivide international straits into categories have suggested as a basis their criticality to international transportation interests.[238] Such proposals still seem heir to the oversimplifications inherent in the Corfu Channel opinion.[239] What is required is a classification which takes into account not only the criticality of an individual strait to maritime transportation, but also the relative danger posed by the geography of the particular strait and the volume of traffic through it, and which further gives some consideration to the magnitude of the

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[238] E.g., "Draft Ocean Space Treaty," working paper submitted by Malta, U.N. DOC. A/AC.138/53 (23 August 1971).

[239] See text following not 152, supra.

potential impact on coastal state value processes should disaster strike. Admittedly, the volume of data required makes informed judgments on this question exceedingly complex. But the prospects that a stable legal regime for international straits will emerge from a posture which pretends either that the problem does not exist or that an acceptable solution will in due time emerge from the councils of the commercial maritime industry are scarcely more encouraging.

At the same time, any viable accommodation on the straits passage issue demands that coastal states renounce, formally and explicitly, any ambitions they may harbor of constructing either monetary or ideological toll gates across international straits. The legitimate interest at stake is purely one of the physical integrity of the coastal state. The regime must incorporate language sufficiently specific to exclude attempts to discriminate against commercial maritime traffic on economic, political or diplomatic grounds. Accordingly, the present language of article 14 §4 of the Territorial Sea Convention is inadequate and must be revised.

Revision of the definition of innocent passage should make clear that with respect to commercial traffic only two considerations are relevant. First, within the territorial sea activities prejudicial to recognized legitimate coastal

state interests (economic, fiscal, immigration, and the like) may be prohibited. Secondly, commercial passage is innocent so long as it does not unreasonably threaten the physical environment of the coastal state. Such a revision, which seems completely in accord with community expectations, would ensure that international straits do not become pawns in a struggle for political influence within the community of nations. For commercial purposes then, the critical elements of innocence become adherence to a multilateral Shipping Convention, to upgrade maritime safety generally, and adherence to multilaterally-determined routings for vessels presenting special environmental hazards.

There is nothing novel in suggesting this sort of an internationalized solution to the problems of ocean pollution occasioned by maritime commerce. What may be somewhat novel is the assertion that such a solution is indispensable to any really satisfactory solution to the straits passage issue.

Some have argued that the two problems are, if not unrelated, at least severable.[240] Thus it has been suggested that a proper legal regime for straits ought merely to exclude

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[240] This appears to be the current United States position on the matter. See the statement of Mr. Jared Carter, Deputy Director, Office of Ocean Affairs, U.S. Department of Defense, quoted in Marine Technology Society, Law of the Sea Reports (1972) at 137.

the possibility of any exercise of coastal state regulatory competence in pollution matters and leave to some group such as the International Maritime Consultive Organization (IMCO) the task of developing a regulatory scheme satisfactory to all.

Even were IMCO sufficiently representative to perform the task effectively, nothing to date suggests results could be expected soon. And as the Canadian experience demonstrates, coastal states will not wait indefinitely for multilateral solutions. The hard fact is that an optimum solution to the straits passage issue requires that the international community undertake the arduous and complex job of implementing an International Shipping Convention now. The only reasonably forseeable alternative is not free transit but the certain prospect of a multiplicity of unilateral coastal state regulations within all segments of the newly-expanded territorial sea, particularly in international straits.

B. Straits and Naval Mobility

Whatever the nature of the practical hurdles barring the way to an optimum solution of the straits passage issue for commercial shipping interests, the conflict between international naval mobility interests and coastal states presents still more vexing problems. Perhaps even the form

of the dilemma is inaccurately articulated. It has been estimated that less than 20 states possess navies capable of more than a limited coastal defense mission and, ignoring alliances, only the United States and the Soviet Union are capable of full military use of the oceans.[241] The conflict may therefore be between differing perceptions of individual or exclusive national interests rather than between such interests, on the one hand, and the interests of the international community on the other.

The first step in assessing the prospects for an accommodation in this area would appear to be an evaluation of the importance to the competing interests of the claims involved. But, however one classfies the protagonists, it is extraordinarily difficult to evaluate the actual competing interests.

The argument that maximized naval mobility is the guarantor of international peace and stability, and hence advances the ultimate best interests of the international community, is well known. It is likewise far from universally accepted. Weaker states (whether they be coastal with respect to an international strait or not) may perceive their best interests to lie in a resolution of the

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241 Knauss, "The Military Role in the Ocean and its Relation to the Law of the Sea," SIXTH RHODE ISLAND CONFERENCE (1972) 77 at 85.

straits passage issue which significantly impedes the operation of naval forces.

Naval mobility as a guarantor of international peace and security means primarily mobility for the strategic nuclear deterrence system component of naval forces. Unfortunately, the nature and complexity of the data bearing on the importance of passage through international straits to this component of naval mobility is such that no informed analysis is possible for the majority of participants in the international decisional process. This fact alone bodes ill for the wide acceptance of any absolutist solutions in favor of unrestricted naval mobility.

At the same time, preceeding sections of this study have revealed two important factors not widely acknowledged in contemporary discussions of the straits passage issue. Assuming that the closure of international straits to submerged missile-launching systems does in fact have some detrimental effect on their efficacy, by far the major portion of such effect occurs with an expansion of territorial sea limits from three to six miles. Secondly, there are strong indications that such closure would affect unequally the two major operators of strategic nuclear deterrence systems, and hence would have a destabilizing influence on world public order. These two factors, combined

with the intensity with which the major naval powers feel their need for conventional naval mobility (the benefits to international stability accruing from the exercise of which are even more difficult to demonstrate) sharply reduce the area available for compromise.

It is tempting to argue that claims to exclude military vessels from international straits (or to regulate their passage through requirements for prior authorization) have little objective importance to coastal states. Thus it has been argued that with the increasing range of military weapons over the last three decades, a coastal state really achieves little enhancement of its security by banning warships from a narrow strip of water along its coast. (Even twelve miles would be considered narrow in this context.)

The argument founders for two reasons. First, it takes insufficient account of the contemporary trend in world community expectations. The Corfu Channel Decision was perhaps the high water mark of unrestricted naval mobility. The inadequacies of its arguments may have contributed to the erosion of its conclusions. Or the law as enunciated therein may merely have been overtaken by events - principally the emerging nationalism which has literally transformed the world community since 1949.

Whatever the reasons, the clear thrust of events since that time is that a growing number of states perceive some new restrictions on naval mobility as desirable policy. Whether the basis of such perceptions is objective and demonstrable or subjective and even irrational, a stable solution to the straits passage issue cannot be achieved by dismissing such coastal state concerns as unworthy of serious consideration.

Secondly, to argue that with modern weaponry a warship thirteen miles off a foreign coast represents a potential threat indistinguishable from that of one three miles or less away, misconceives the issue.[242] For if restrictions on warships passage through international straits can actually be made effective, then the result might be a world-wide diminution in naval power generally. To States which believe world peace is better preserved by international organization than by the military preparedness of the major powers the attractions of such a result are obvious.

The best hope of persuading states thus inclined of the necessity of compromise may well lie not in arguments that the desired result is utopian, but in the clear threat to peace should it prove unattainable. Despite protestations

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[242] McDougal and Burke, at 194.

to the contrary, naval mobility is actuated primarily by perceived self-interest. This interest and the power to dispatch warships in response thereto will persist regardless of the outcome of the forthcoming Conference. At best, assuming the major naval powers possess sufficient economic and diplomatic influence to force bilateral solutions, restrictions on naval mobility through straits would be merely ineffective. At worst they would rip asunder the entire delicate fabric of international law, with the resultant threat to world public order most gravely felt by the small, the weak and the non-aligned states.

Traditionally the major powers have managed to circumvent any serious negotiation of disarmament matters by large multilateral Conferences. The mood of the Seabeds

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straits as "major" or "critical", with the aim of securing unrestricted naval mobility therein, while accepting whatever legal regime the whim of the majority may dictate for the remainder of international straits throughout the world. First, while there may be some theoretical prospect of such identification with respect to the operation of strategic nuclear deterrence systems, the list of "critical" straits becomes impractically long if attention is shifted to requirements for conventional naval mobility. Secondly, the divergent needs, naval strategies and policy objectives of the two major naval powers would probably preclude joint agreement on a list of straits brief enough to constitute any meaningful inducement for compromise, whatever the basis of classification. Likewise there is little prospect for solution in the form of some sort of special military passage right in the outer portions of 12-mile territorial sea, since the real problem arises in the first three miles of expansion.

The sole prospect of reasonable compromise in the emotion-charged area of naval mobility may lie in the recognition that here too the concept of innocence still has a measure of vitality. The major naval powers have neither need nor desire to conduct "non-innocent" activities (at least under a reasonably circumscribed interpretation of

the term) within the territorial seas of foreign states. If the forthcoming Conference were to recognize what appears to be the prevailing expectations of the world community as revealed by the 1958 Geneva experience, and define innocence in terms of the acts of vessels while within the territorial sea to the exclusion of more remote political and ideological considerations, while recognizing the right of submerged passage through international straits, it would appear that the legal regime of innocent passage so defined should be minimally acceptable to the major naval powers.

Difficult questions of definition would certainly remain. The most obvious consists in identifying when a permitted passage repeated becomes a naval maneuver prohibited. But such a regime repre

sents a significant retreat from the present laissez-faire
attitude toward passage of warships through some 120-odd
straits of the world's oceans. Whether the concession proves
sufficient to induce devel- oping states to abandon their
commitment to direct or indir- ect demilitarization of ocean
space remains to be seen. From the perspective of the pr
esent study, however, it seems to offer the only hope of a st
able resolution of the straits passage issue.

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