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PASSAGE THROUGH INTERNATIONAL STRAITS: FREE OR INNOCENT? THE INTERESTS AT STAKE

INTRODUCTION

One of the subjects scheduled for discussion by the Convention on the Law of the Sea is passage through straits used for international navigation.¹ The law that will cover international straits is important because of the expected extension of the breadth of the territorial sea to twelve miles; if this extension is agreed upon, it will have the effect of enclosing as territorial water, straits of a width of twenty-four miles or less.² By extending the sovereignty of the states bordering international straits, straits which previously contained a corridor for high seas traffic will assume the characteristics of sovereign owned property.

In anticipation of this extension of the breadth of the territorial sea, the United States has stated that it will vote in favor of a twelve mile limit, with one crucial condition—that a *right of free transit* through international straits be adopted.³

The United States proposal on international straits has received opposition in the United Nations Seabeds Committee from nations taking the position that uncontrolled transit is not acceptable, arguing that the concept of *innocent passage* is sufficient to protect both the interests of the international community and the coastal states. The controversy over the two views raises basic questions on the use of the sea in an area where the clash of international and local interests is very real.

1. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 GAOR Supp. 21 at 5, U.N. Doc. A/8721 (1972).

2. U.S. DEP'T STATE, GEOGRAPHIC BULL. No. 3, SOVEREIGNTY OF THE SEA, 22-27 (rev. 1969) lists 106 straits of a width of 24 n.m. or less. I Preparatory Documents, United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF. 13/6 and Add. 1 (1958) contains a description of the major straits used by international traffic.

3. See statement of U.S. representative before Subcommittee II of the Seabeds Committee, 65 DEP'T STATE BULL. 261 (1971).

The purpose of this paper is to examine interests involved in the straits question, with emphasis on the interests of the coastal states, and to propose a solution to the conflict. A proposal will be made regarding the question of submerged passage by submarines through international straits. Two assumptions are made. First, the Conference will settle on a territorial sea breadth of twelve miles, and second, that neither group will consider its position on the straits issue so important that it will allow the Conference to fail without making a serious attempt at a compromise.⁴

THE STATUS OF INTERNATIONAL STRAITS

The question of passage through international straits was considered by the International Court of Justice in the *Corfu Channel* case.⁵ There, the Court was confronted with a claim for damages by the United Kingdom against Albania for damage done to warships which struck mines while transiting the Corfu Channel, in Albanian territorial waters. The Court first held that innocent passage through international straits did exist for warships:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention there is no right for a coastal state to prohibit such passage through straits in time of peace.⁶

The Court found that although the trip through the channel had been to "test" the reaction of the Albanian government, and the crews of the ships were at battle stations, the passage was innocent.⁷

The Albanian government argued that the Corfu Channel was not an international strait because it was of secondary importance, used mainly by local traffic. The Court held that the strait was of an international character.

[T]he decisive criterion is . . . its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.⁸

4. This assumption is by no means certain. Outside events such as the Arab oil embargo play an important part in the willingness of nations to reach a compromise solution.

5. [1949] I.C.J. 4, 43 AM. J. INT'L L. 558 (1949).

6. *Id.* at 28, 43 AM. J. INT'L L. at 576.

7. *Id.* at 31, 43 AM. J. INT'L L. at 577. The Court attached some importance to the facts that the warships were steaming in peacetime formation and had their guns in trail and unloaded. *Id.* at 31, 43 AM. J. INT'L L. at 578.

8. *Id.* at 28, 43 AM. J. INT'L L. at 576.

Innocent passage for warships through international straits existed in 1919; the straits covered by this rule were all those connecting high seas.

THE 1958 CONVENTION ON THE LAW OF THE SEA

The 1958 Convention on the Territorial Sea⁹ makes allowance for international navigation by establishing the *right of innocent passage* through the territorial sea of a coastal state by ships of foreign states. Passage is defined as navigation through the territorial sea for the purpose of traversing the sea without entering internal waters¹⁰ and innocent passage as that which “. . . is not prejudicial to the peace, good order or security of the coastal State.”¹¹

Two specific instances of non-innocent passage are cited. First, a fishing vessel might not be in innocent passage if it fished in the territorial sea,¹² and second, submarines must transit territorial waters on the surface and display their flag.¹³

The coastal state has no authority to prevent innocent passage through international straits:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.¹⁴

The Convention articles make only one provision for warships; that which permits the coastal state to require that the warship leave the territorial waters if it does not comply with the regulations of the coastal state.¹⁵ All other sections pertain to “all ships.”

No mention is made of a right of innocent passage for warships in the Convention, but from its articles and the *Corfu Channel* case, such a right in international straits seems clearly established. The definition of an international strait in the Convention covers

9. Convention on the Territorial Sea and the Contiguous Zone, *done at Geneva*, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205. (hereinafter cited as Territorial Sea Convention).

10. Territorial Sea Convention, Art. 14(2).

11. *Id.*, Art. 14(4).

12. *Id.*, Art. 14(5).

13. *Id.*, Art. 14(6).

14. *Id.*, Art. 16(4).

15. *Id.*, Art. 23.

not only straits that connect high seas, but also those which connect high seas with the territorial waters of another state as, for example, the strait of Tiran.¹⁶

Some states do not recognize the right of innocent passage for warships through their territorial sea.¹⁷ The Soviet Union entered a reservation to the Convention stating its position that innocent passage does not exist as a right for foreign warships. This view was adopted by the People's Republic of China, which prohibits foreign warships from passing through the Chiungchow strait, and requires prior notice and authorization for the passage of merchant ships, and then only under restricted conditions.¹⁸

THE 1971 UNITED STATES DRAFT ARTICLES

On August 3, 1971, the United States submitted its proposed draft articles on the breadth of the territorial sea and passage through international straits to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.¹⁹ (Seabeds Committee). Article I(1) recognizes a maximum breadth of the territorial sea of twelve nautical miles. This article proposes a change from the traditional United States position,²⁰ but is conditional on the adoption of Article II.

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 pur-

16. This definition was adopted with the Arab-Israeli dispute over the Gulf of Aqaba in mind. Gross, *The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba*, 53 AM. J. INT'L L. 564 (1959).

17. The accepted definition of a warship is:

[A] ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

Convention on the High Seas, done at Geneva, Apr. 29, 1958, Art. 8(2), 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 182. (hereinafter cited as High Seas Convention).

18. Order of the State Council of the Chinese People's Republic, 145th Plenary Session, Jun. 5, 1964. Reprinted in 3 INT'L LEGAL MATERIALS 926 (1964). China maintains the position that each state can determine unilaterally its jurisdiction over the territorial sea, as well as its breadth. See U.N. Doc. A/AC.138/SR.72 at 11 (1972) (statement of Chinese representative). It has been pointed out that China regards the Chiungchow strait as her inland waters, and by allowing merchant passage is recognizing innocent passage. Tao Cheng, *Communist China and the Law of the Sea*, 63 AM. J. INT'L L. 47, 61 (1969).

19. U.N. Doc. A/AC.138/SC.II/L.4 (1971).

20. S. SWARTZTRAUER, *THE THREE MILE LIMIT OF TERRITORIAL SEAS* (1972).

pose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.

2. The provisions of this article shall not affect conventions or other international agreements already in force specifically relating to particular straits.

While Article II has been termed by the United States as an "inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves,"²¹ it does present new ideas. The United States' concern touches on the basic nature of the high seas and international straits, for should passage through the major straits of the world be impeded, the concept of freedom of the seas would be crippled.

A. *Passage by Surface Vessels*

In international straits more than six miles wide there presently exists a strip of high seas. Vessels passing through this strip are not subject to the control of the littoral states. A coastal state however does have the authority to prevent passage through its territorial sea which is not innocent.²² The coastal state may not suspend innocent passage through international straits lying within its territorial waters, but this implies that it can suspend *non-innocent* passage.

The United States proposal retains the high seas freedom of unrestricted transit through international straits. Its effect is this: in straits of twenty-four miles in width or less, (assuming a twelve mile limit) ships would retain a *right* to pass without having their passage judged by the coastal state. Under innocent passage, the coastal state could determine that the passage is not innocent, and theoretically suspend such passage. A coastal state could argue that the presence of a United States warship threatened its security interest so as to make the warship's passage non-innocent, justifying forbidding the warship passage. Under the United States proposal the coastal state does not have this argument, having

21. Statement of U.S. representative before Subcommittee II, *supra* note 3, 65 DEP'T STATE BULL. at 262.

22. Territorial Sea Convention, Art. 16(1), 16(3).

only the authority to establish the route shipping must take, and then following established navigational channels.

Outside these designated lanes of "free transit" innocent passage apparently would apply. The criteria of innocence would be applied to all shipping, and submarines would have to transit on the surface, showing their flag, something they would *not* have to do while transiting the designated corridors under the United States proposal.

B. Overflight by Aircraft

Presently the right of overflight of the territorial sea of a state by civil aircraft exists, limited to aircraft not engaged in scheduled air transport, and not including military aircraft.²³ Overflight is a right for aircraft over the high seas,²⁴ so under a three mile limit an international strait wider than six miles contains a strip of high seas over which all aircraft could fly without restriction. The United States proposal allows overflight as a right even over the territorial waters of the coastal state, and limits its authority to designating air traffic corridors. The United States proposal also does not distinguish between civil and military aircraft, in effect creating a new right for military aircraft to overfly the territorial waters of a foreign nation.

C. Passage by Submarines

By retaining the high seas freedoms of passage for submarines, the United States proposal avoids the requirement of the Territorial Sea Convention that when passing through the territorial sea of a state, a foreign submarine must navigate on the surface and show its flag.²⁵ The United States submarine does not now have to surface when it passes through straits over six miles (twenty-four miles under the proposed extension of the territorial sea) wide, and the United States proposal would retain that right to pass submerged.

The United States regards the adoption of Article II as most important.²⁶ Its public statements give the impression that this posi-

23. Convention on International Civil Aviation, Arts. 2, 3, 5, 7, Dec. 8, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295. See also 1 Preparatory Documents, United Nations Conference on the Law of the Sea, at 336, U.N. Doc. A/Conf. 13/31 (1958).

24. High Seas Convention, Art. 2(4).

25. Territorial Sea Convention, Art. 14(6).

26. Our security, and that of our friends, depends upon freedom of navigation and overflight of the high seas, and on free movement through and over international straits. A significant portion of

tion is more than a bargaining maneuver. For example, Mr. Stevenson in his statement before Sub-Committee II of the Seabeds Committee (Subcommittee II) referred to mobility on the sea and in the air as "fundamental security interests" of our country and expressed the view that the Conference itself would be in jeopardy if these special interests of the United States were not accommodated.²⁷ As a major maritime nation, the United States shares the concern of the international community in preserving freedom of commerce.²⁸ A nation's security may be threatened when the flow of trade goods and materials necessary for its economy is threatened.²⁹ For example, the flow of oil from the Mideast is affected by the status of not only Arab-Israeli relations, but also by the status of the straits of Gibraltar and Bab-el-Mandeb.³⁰ The shipments of large quantities of goods, including oil, depends primarily on ocean transportation.³¹ The security interest advanced by the United States is not its strategic dependence on a free flow of goods but the military flexibility of its Navy. The United States position is that the doctrine of innocent passage is too subjective a device to

our strategic deterrent is seaborne. The trend to more extensive territorial sea claims by other nations thus threatens very directly our national security.

President Nixon's Third Annual Report to the Congress, Feb. 9, 1972, 66 DEP'T STATE BULL. 409 (1972). See also statement of U.S. representative to the Seabeds Committee, Aug. 10, 1972, U.N. Doc. A/AC.138/SR.83, 67 DEP'T STATE BULL. 383 (1972).

27. [M]y Government would be *unable to conceive* of a successful law-of-the-sea conference that did not accommodate the objectives of these articles.

Statement of U.S. representative, *supra* note 3, 65 DEP'T STATE BULL. at 263-64. (emphasis added).

28. Imports of developing countries have increased from \$35,700,000 (U.S.) to \$63,100,000 in the period from 1964 to 1971, while exports increased from \$34,600,000 to \$61,400,000. U.N. MONTHLY BULL. STAT., vol. XXVI, no. 12, Dec., 1972 at 110-11.

29. In 1970, the U.S. loaded 218,256,000 metric tons of international trade at its ports, while unloading 292,786,000 metric tons. During 1970, the total unloaded and loaded by Chile, Peru, Spain, Indonesia, and Malaysia in international trade was 157,378,000 metric tons. Japan depends heavily on imports, loading only 41,937,000 metric tons and unloading 435,875,000 metric tons. *Id.* at xxxiii-xxxv.

30. The strait of Bab-el-Mandeb connects the Red Sea with the Gulf of Aden.

31. The tanker *Torrey Canyon* was "jumboized" to carry 850,000 barrels of oil, weighing 117,000 tons. E. COWAN, OIL AND WATER, THE TORREY CANYON DISASTER 10 (1968).

allow³² to the coastal state in judging passage through international straits.

The problem with subjective discretion lying in the coastal state is made clear by the application of innocent passage to nonmilitary shipping. There is a general acceptance of the right of innocent passage for merchant ships.³³ The Territorial Sea Convention calls for passage itself to be innocent, and does not take the approach that a coastal state can act only if the actions of the passing vessel are detrimental to its interests. While an unarmed merchant ship probably would not be capable of threatening the coastal state by its actions, the Convention allows the coastal state to "use" less direct effects, such as the nature of the cargo or its destination, to constitute the necessary prejudice to its interests, providing support for interfering with passage.

The real contest on both sides of the question is based on military grounds.³⁴ The United States publicly stresses its national security,³⁵ and the opposing nations resist on much the same grounds. A subjective decision by a coastal state that passage by a United States fleet threatens its interests could hamper the flexible military response of the United States and could create the possibility of conflict with the coastal state.

The effect of allowing the innocent passage doctrine to apply in international straits is felt most strongly by the ballistic missile submarine. The United States relies upon the ballistic missile submarine as an integral part of its nuclear deterrent.³⁶ The advantage of the *Polaris-Poseidon* submarine is in its secrecy. Surfaced, it is merely another ship, capable of detection; submerged, it is all but undetectable. The secrecy of the ballistic missile submarine is allegedly vital to its use as a weapon, and a requirement that it surface when in transit through international straits

32. [T]he ambiguous doctrine of "innocent passage" would otherwise apply, and States bordering straits would be required to decide which ships and planes should, and which should not, pass. Domestic and international pressures could be brought to bear on every decision.

President Nixon's Third Annual Report to the Congress, Feb. 9, 1972, 66 DEP'T STATE BULL. 440 (1972).

33. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 169-99 (1962).

34. The Department of Defense has exercised a great deal of influence over policy in the area of the law of the sea. See Hollick, *United States Ocean Politics*, 10 *SAN DIEGO L. REV.* 467, 492 (1973).

35. See note 26 *supra*.

36. Approximately 20 *Polaris-Poseidon* submarines are on patrol at any one time carrying 16 missiles each, and some carry the Multiple Independently Targeted Re-entry Vehicles (MIRV) which add 10 warheads per *Poseidon* missile. *JANE'S FIGHTING SHIPS* 409 (Blackman ed. 1972-73).

such as Gibraltar, reduces its secrecy and thus its effectiveness. Only two other countries have ballistic missile submarines,³⁷ and their use (essentially one of providing a military stalemate between the United States and the Soviet Union) is not particularly persuasive to other nations.³⁸

Support for the United States proposal on free transit came in 1972. The Soviet Union submitted to Subcommittee II its draft articles on straits used for international navigation, bearing striking similarity to the United States articles.³⁹

1. In straits used for international navigation between one part of the high seas and another part of the high seas, all ships in transit shall enjoy the same freedom of navigation, for the purpose of transit through such straits, as they have on the high seas. Coastal States may, in the case of narrow straits, designate corridors suitable for transit by all ships through such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors shall include such channels.⁴⁰

While almost identical to the United States Article II, the Soviet articles limit the definition of an international strait to those connecting two parts of the high seas, thus leaving innocent passage to apply to straits connecting high seas with the territorial sea of another state.⁴¹ The Soviet articles also provide for the freedom of overflight through international straits in identical terms as the United States Article II.⁴²

The Soviet articles go further than the United States proposal and specify rules to be observed by aircraft and ships while in transit. Of particular interest is the separation of ships into "all ships" and "warships." Ships in general must, *inter alia*, avoid threatening the security of the coastal state, comply with interna-

37. *Id.* at 341, 581, 582. The U.S.S.R. has 39 FBM submarines and the U.K. has 4.

38. Remarks by the representative of Spain before Subcommittee II, U.N. Doc. A/AC.138/SC.II/SR.42 at 53 (1972).

39. U.N. Doc. A/AC.138/SC.II/L.7 (1972). The Soviet articles are in two unnumbered articles, the first dealing with passage of ships and the second with overflight of aircraft.

40. *Id.*

41. Remarks by the Soviet Representative before Seabeds Committee, U.N. Doc. A/AC.138/SR.83 at 72 (1972).

42. U.N. Doc. A/AC.138/SC.II/L.7 (1972). The Soviet representative indicated that IMCO would be the appropriate body to set up navigational rules for international straits. *Supra* note 41.

tional rules concerning prevention of accidents at sea, and avoid causing pollution or damage to the coastal state.⁴³

The rules on warships are more specific as to actions considered a threat to a coastal state's security. Warships shall not conduct exercises or gunfire, launch any weapons or aircraft, undertake hydrographical work or engage in acts "unrelated to transit."⁴⁴

The second article of the Soviet proposal covers overflight by aircraft. Overflights are restricted to designated altitudes and air corridors, and threats to the security of the coastal state are once again to be avoided. Military aircraft shall not use any weapons, take aerial photographs, circle or dive toward ships, take on fuel, or engage in acts "unrelated to overflight."⁴⁵

These articles admit the security interest of the coastal state, and provide restrictions on passing vessels, but they also severely restrict the authority of the coastal state to a greater extent than the Territorial Sea Convention.⁴⁶ Not only can the coastal state not suspend traffic through a strait, but it cannot, under the Soviet articles, even interfere with shipping or even require communication from vessels in transit.

THE STRAIT STATES DRAFT ARTICLES

Another set of draft articles for the territorial sea and straits used for international navigation were presented in 1973 by Greece, Cyprus, Indonesia, Malaysia, Morocco, the Philippines, Spain and Yemen.⁴⁷ These articles are interesting because they present the views of a group of states that actually border on important international straits, including Gibraltar and Malacca.⁴⁸ These articles are supported by China,⁴⁹ while the United States disapproves of their contents.⁵⁰

The articles submitted by the strait states rest on what are termed five "basic considerations." First, navigation through

43. U.N. Doc. A/AC.138/SC.II/L.7 (1972).

44. *Id.*

45. *Id.*

46. *Id.* The Territorial Sea Convention, Art. 16(4) only forbids suspension of the right of innocent passage.

47. U.N. Doc. A/AC.138/SC.II/L.18 (1973).

48. Spain and Morocco border the Strait of Gibraltar, Yemen the Strait of Bab-el-Mandeb, and Indonesia and Malaysia the Strait of Malacca.

49. U.N. Doc. A/AC.138/SC.II/SR.62 at 238 (1973).

50. U.N. Doc. A/AC.138/SC.II/SR.58 at 130 (1973). The U.S. objected that the articles were vague on the right of the coastal state to be compensated. The U.K. and France saw the questions of international straits and the territorial sea as separate problems. *Id.* at 162-64.

the territorial sea and international straits is to be treated as a single subject. Second, innocent passage is the best principle to balance the interests of the international community with those of coastal states. Third, any regulation of navigation should promote the safety of maritime commerce and the security of the coastal state. Fourth, technological changes require regulation of ships with "special characteristics." Fifth, regulation should solve the "deficiencies" of the 1958 Convention with respect to warships.⁵¹

The strait states' articles on the territorial sea are identical with the Territorial Sea Convention on the question of passage, adopting that definition of innocent passage and the requirement of surface transit by submarines. Where the articles deal with international straits they present difficulties. In accord with the Territorial Sea Convention, the strait states' articles forbid a charge on passage, but Article 11 provides that "[t]he coastal state shall have the right to be compensated for works undertaken to facilitate passage."⁵² No suggestion is provided as to how this "compensation" will be paid, by whom, or what the effect of non-payment will be.

The strait states' proposal, in Article 14, singles out "ships with special characteristics:"

The coastal State may regulate the passage through its territorial sea of the following:

- (a) Nuclear-powered ships or ships carrying nuclear weapons;
- (b) Ships carrying nuclear substances or any other material which may endanger the coastal State or pollute seriously the marine environment;
- (c) Ships engaged in research of the marine environment.⁵³

In Article 15 the coastal state is allowed to require prior notification or authorization before nuclear-powered ships or ships carrying nuclear weapons will be allowed passage.⁵⁴ For these ships, Article 16 makes their passage conditional upon prior notification, the carrying of insurance, and the use of designated sea lanes during transit.⁵⁵

Article 21 of the proposal refers to passage by warships. The concept of innocent passage is applied to warships, but the coastal

51. U.N. Doc. A/AC.138/SC.II.18 at 1-2 (1973).

52. *Id.* at 5.

53. *Id.* at 6.

54. *Id.* at 6-7.

55. *Id.* at 7.

state may also require notification or authorization before giving permission for passage.⁵⁶ If passage is granted, the warship passes through the strait under the innocent passage but is restricted from certain activities:

Foreign warships exercising the right of innocent passage shall not perform any activity which does not have a direct bearing with the passage, such as:

- (a) Carrying out any exercise or practice with weapons of any kind;
- (b) Assuming combat position by the crew;
- (c) Flying their aircraft;
- (d) Intimidation of displaying of force;
- (e) Carrying out research operations of any kind.⁵⁷

The strait states' proposal effectively allows each coastal state to adopt its own rule as to whether innocent passage through international straits exists for warships. The power to demand authorization before passage turns a right of innocent passage into a privilege dependent on the discretion of the coastal state. Even if a right of passage without prior approval is adopted, under the proposal the coastal state will have wide discretion over ships powered by and carrying nuclear materials. If the strait states' proposed articles are viewed as the interests of the coastal states, and the United States articles are viewed as representing the international community, the two are irreconcilable.

INTERESTS⁵⁸ AT STAKE IN INTERNATIONAL STRAITS

Fish

Fishing resources are a major reason for demands to extend the breadth of the territorial sea.⁵⁹ Most fish are available near land masses, so an extension of the exclusive rights of a state through its sovereignty over its territorial sea guarantees it the opportunity to exploit stocks off its shores without competition from foreign fishermen. The coastal state should have as much interest in the preservation and use of its fishing grounds as international shipping concerns have in the passage through international straits

56. *Id.* at 8.

57. *Id.*, Art. 22(2).

58. Professors McDougal and Burke argue that a community interest exists, expressed in inclusive claims to the high seas freedoms, and opposed by the exclusive claims of authority of the coastal state. McDougal & Burke, *Crisis in the Law of the Sea: Community Perspectives versus National Egoism*, 67 *YALE L.J.* 539, 546 (1958). For an argument that a definite community interest does not exist see Sorensen, *Law of the Sea*, 520 *INT'L CONC.* 195, 199 (1958).

59. M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 183 (1962).

which contain fishing areas. Fishing is affected by free transit. The basic danger to fish (excluding for the moment the question of pollution) is the foreign fishing fleet. The Territorial Sea Convention expressly allowed the coastal state to forbid fishing by foreign vessels during passage. The United States proposal would not change the status of foreign fishermen since it is limited to preservation of a right of transit.

Oil Pollution

The coastal states involved in the straits proposal have indicated their concern over pollution of their shores by oil.⁶⁰ The advent of the supertanker and the *Torrey Canyon* grounding⁶¹ are factors behind the strait states' proposal. This concern is not limited to the straits states, but has received attention in Conventions regarding pollution of the sea by oil,⁶² liability for such pollution⁶³ and the right of a state to intervene on the high seas in the event of a casualty.⁶⁴ The coastal state has an interest in seeing that the passage through straits in its territorial waters by supertankers is made safely. No control over tankers is provided by the United States or Soviet proposals except to the extent that the coastal state may designate traffic corridors. Both proposals rely on international regulations that would be established apart from any document coming out of the Law of the Sea Convention to meet the problem of safety of navigation through straits.

As the effect of a massive oil spill or casualty is primarily felt by the coastal state near the spill, its interest in safe transit cannot be denied. However, the problem is enormous, and enormous on an international scale, and probably beyond the expertise of any single coastal state. For one state to claim the expertise and

60. U.N. Doc. A/AC.138/SC.II/L.18 art. 16 (1973) refers to any other material which may endanger the coastal state or pollute.

61. For an account of the *Torrey Canyon* grounding and its effect on the shores of Britian and Normandy, see E. COWAN, *OIL AND WATER, THE TORREY CANYON DISASTER* (1968).

62. International Convention for the Pollution of the Sea by Oil, *done at London* May 12, 1954, (1961), 12 U.S.T. 2989, T.I.A.S. 4900, 327 U.N.T.S. 3.

63. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *done at Brussels* Nov., 1969, *reproduced in* 9 INT'L LEGAL MATERIALS 25 (1970).

64. International Convention on Civil Liability for Oil Pollution Damage, *done at Brussels* Nov. 1969, *reproduced in* 9 INT'L LEGAL MATERIALS 45 (1970).

capability, and resulting authority, to control traffic through its straits may be another way of imposing a unilateral claim over those straits. As the nature of the traffic is international, the best source of regulation and control for safety purposes is through international bodies.⁶⁵

Military Security

The most controversial interest of the coastal state is its security. The term may mean different things to each state, but is here used in its military sense, excluding the passage of commercial ships even though the cargo and destination may have a bearing on the ability of the coastal state to maintain its military effectiveness.

Under innocent passage, the coastal state is limited in its action against a warship to ordering it to leave the territorial sea, and in straits themselves cannot suspend their innocent passage. To protect its security, the coastal state applies the criteria of innocent passage, and if the presence of the warship is found to be offensive, may order it to depart. The Soviet view requires previous authorization before passage can be accomplished. This approach turns what is a right of passage into at best a privilege.⁶⁶

The security interest of the coastal state is the key issue in the controversy. The coastal states want some control over foreign warships transiting their waters,⁶⁷ and feel innocent passage will give them sufficient protection of their interest. They view their security interest as unchanged in international straits and possibly even more critical due to the numbers of warships that would be transiting their straits.

The delegate from Spain to the Seabeds Committee has expressed his concern over the United States proposal on the following grounds: that a spy plane could conduct overhead observation of neighboring coastal states while in transit; that a danger of confrontation between military powers exists in the straits; that nuclear arms and other materials endanger the coastal state by their proximity; and that a coastal state that allows free passage to all vessels during times of crisis may suffer from adverse political

65. See International Regulations for the Prevention of Collisions at Sea (1960), 16 U.S.T. 794, T.I.A.S. 5813.

66. Butler, *The Legal Regime of Russian Territorial Waters*, 162 AM. J. INT'L L. 51, 69 (1968).

67. The United States has established a series of Air Defense Identification Zones (ADIZ) including zones around the Panama Canal and Guam, extending over high seas. 14 C.F.R. §§ 99.43, 99.45 (1973). These zones are established for the identification and control of civil aircraft. *Id.* at § 99.3.

reaction.⁶⁸ The Spanish delegate's concern has been adopted in the strait states' proposal which lists as a ship of "special characteristics" the nuclear powered vessel. The major problem is the nuclear warship, primarily the ballistic missile submarine. This vessel represents a mixture of military and environmental interests on both sides. For example, the problem presented by the requirement for surface passage under the Territorial Sea Convention, as applied to the ballistic missile submarine, involves the balance of power between the United States and the Soviet Union as well as free navigation, and nuclear pollution from an uncontrollable source operating near the country most affected by any major pollution—the coastal state.

Self-Image

Many of the nations now considering the law of the sea were not in existence during the 1958 Conference.⁶⁹ National pride can of itself lead to desires to resist the proposals of countries primarily motivated by military interests.⁷⁰ It may also create the intention to use the issue of international straits as a method of restricting the use of military power and force a neutralization of military strength, effecting a de facto disarmament.⁷¹ The nationalism of a state is not of itself an interest, but coupled with any legitimate interest of a coastal state, it accentuates the need to provide adequate assurances to the coastal state that its interests have been protected in any forthcoming international agreement on the straits question.

68. Oil can take on more importance than usual during certain times of the year.

Saudi Arabia and Algeria, the biggest Arab suppliers of oil and liquified gas to the United States, yesterday announced they have stopped all exports to the United States. . . . [T]he countries were taking the step because of 'continuing American aid to Israel' in the Middle East War.

San Diego Union, Oct. 21, 1973, A-1, col. 3.

69. Remarks of the delegate of Ecuador before Subcommittee II, U.N. Doc. A/AC.138/SC.II/SR.54 at 75 (1973).

70. The delegate of Egypt phrased the issue as not the passage of merchant ships, but whether the coastal state should allow free passage through its straits by warships and submarines of foreign powers without exercising its right to safeguard its security. U.N. Doc. A/AC.138/SC.II/SR.59 at 154-55 (1973) (emphasis added).

71. Knauss, *The Military Role in the Ocean and its Relation to the Law of the Sea*, PROCEEDING OF THE SIXTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE 77, 85 (1971).

COMPROMISE

Innocent passage criteria do not provide a clear enough basis for handling conflicts over passage through straits, and also do not assure protection of the interests of either side of the conflict. Either side may take its own position on what is "prejudicial" to the peace or security of the coastal state. A flag state could conduct activities which it maintains are "innocent" and the coastal state may be unable to force a confrontation over its opposing view.⁷² The subjective nature of the criteria, and the definite possibility of biased arguments on either side, not just the coastal state's, is the weakness of innocent passage, and should be avoided in any new regime for international straits.

One possible solution would be to create corridors of high seas,⁷³ or an international zone running through the major international straits.⁷⁴ The width of the territorial sea could be limited in straits to a percentage of the width of the strait, allowing the opposing coastal states a certain portion of the strait as territorial sea, with the remaining part a strip of high seas.⁷⁵ The difficulty with these proposals is that they retain *complete* high seas freedoms through the straits, and not the limited freedom of transit advocated by the United States.

The Soviet proposal presents a middle ground between the United States' and strait states' proposals by establishing the right of unimpeded transit, while at the same time restricting the manner in which that right is to be exercised. The restrictions placed on transiting traffic are *specific* while at the same time including an amount of subjectivity in the "unrelated to transit" restriction. Admittedly, states will be reluctant to commit themselves to restrictions that may prove unattractive in later years, but without some compromise, the positions taken by the two camps are completely opposed. If the direction of the Law of the Sea Convention is toward reaching a result, compromise over the straits issue is necessary, and the Soviet view should provide the best middle ground.

72. Indonesia, for example, has only 15 destroyers and frigates with 18 patrol and subchaser craft. JANE'S FIGHTING SHIPS, 161 (Blackman ed. 1972-73).

73. Remarks by the Soviet delegate to the Seabeds Committee, U.N. Doc. A/AC.138/SR.83 at 70 (1972).

74. A discussion of alternate proposals to re-define the extent of territorial seas in the straits is found in Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 ORE. L. REV. 754 (1972).

75. Knauss, *supra* note 71, at 86.

The international community is interested in unimpeded transit through international straits. This interest is protected by not allowing the coastal state to stop or unnecessarily impede direct transit through the straits.

The coastal state is interested in guarding against the harmful effects of passing traffic. This would be assured by the restrictions on the conduct of passing vessels and aircraft. The restrictions should be aimed at military activities only, which either directly threaten or reasonably appear to threaten the coastal state. The Soviet provisions covering use of weapons, and military exercises illustrate and provide a starting place for negotiation.

Will specific restrictions on passage satisfy the interests of the coastal state? Fishing interests are satisfied by the prohibition of fishing by foreign vessels while in transit. Threats to military security can be accommodated in part by restricting the activities of passing warships. This places the emphasis on the actions of the warship, and not on the fact of passage itself, reducing to some extent the subjective application of criteria by the coastal state. The problem is that the presence of a warship itself can be a threat and to find complete security the coastal state must forbid such presence (passage). The purpose of a convention is to establish law for times of peace. If no hostilities exist between the coastal state and warships in transit, the "threat" is problematical and insufficient to justify wide discretion in the coastal state over traffic through the straits. If the coastal state cannot be allowed to suspend passage of warships, then a reasonable alternative is to restrict the activities of the warship while they are transiting through straits in territorial waters.

The fleet ballistic missile submarine complicates this approach. The United States patrols about twenty ballistic missile submarines at one time.⁷⁶ The Soviet Union has about thirty-nine ballistic missile submarines.⁷⁷ The balance of power in this area, due to the small numbers of submarines involved, is effected by a break in their secrecy. The mission of the submarine, however, is not necessarily to penetrate the territorial sea of a coastal state; for with missiles capable of long range attacks, the logical place to make

76. JANE'S FIGHTING SHIPS, *supra* note 36.

77. *Id.* at 577.

use of that capability would be some distance from the intended target. The presence of a FBM submarine in an international strait running submerged probably means that it is *not* intending to launch its missiles against the coastal states bordering the strait.

The presence of the submarine does present the strait state with a problem of identity. Not all submarines carry ballistic missiles; some retain their more traditional attack mission. The coastal state, assuming it detects the submarine, does not know what type it has discovered. A ship or aircraft is more easily detected than a submarine, and its basic nature more readily determined. While a coastal state may agree that the presence of a FBM submarine does not mean an attack is necessarily intended, it wishes to know whether it is an FBM submarine, or one designed to attack shipping. While restrictions on the military operations of transiting vessels might be adopted, it is futile to expect that adoption when there is no way for the coastal state to know if the FBM submarine is following those restrictions.

How vital is submerged transit to the effectiveness of the ballistic missile submarine? If the submarine passes a strait surfaced it may easily be detected, but after passing the strait it can re-submerge and regain its secrecy for the most part. However, if the submarine *cannot* maintain its secrecy even when passing through a strait submerged, then the importance of submerged transit dwindles as there is no real impact on its effectiveness. Regardless of this, there may be some influence on the overall effectiveness of the ballistic missile submarine by requiring surface transit, but the purpose of an international body of laws is not to guarantee to one or two countries unlimited freedom to deploy their weapons according to their desires.

CONCLUSION

The maritime powers proposing a right of free transit through international straits must recognize the interests of the coastal state. The United States proposal is directed at more than assuring transit through international straits, for under present law, the coastal state cannot suspend passage through those straits. The United States proposal would also assure the manner of transit for its submarines. The proposal is aimed at protection of the military weapons of the United States and should be unpersuasive in an attempt to establish new international law. The concept of retention of the high seas freedom of navigation through the straits is, however, a necessary and important doctrine. The difficulty lies in its collateral effect on submarines.

The approach taken by the Soviet Union is the best solution to the problem of transit through international straits. Applying the concept of free transit through international straits with restrictions on the conduct of vessels and aircraft while in transit provides the middle ground for opposing interests. The key to this form of compromise lies in the manner of application and the restrictions adopted. The coastal state should have its control of the route of traffic, but should not have the authority to close the strait.

The United States should be liberal in accepting restrictions on the conduct of vessels in transit. The first concern of the United States is in unimpeded transit and the United States could seriously consider accepting the restrictions in the strait states' proposed articles.⁷⁸

The key restriction the United States must consider is that requiring surface transit by submarines. The dependence of the international community on a free flow of trade makes the concept of free transit vital. This is especially so in view of the use of oil control by Arab nations as a means to achieve political and military ends. Agreement on a solution retaining high seas freedom of transit through international straits is too important to be jeopardized by insistence on a right to transit submerged. If agreement can be reached on the United States proposal in the form of the Soviet proposal, by the United States agreeing to surface transit for its submarines, then it should agree to such a restriction.

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78. See note 57 *supra*.