

Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea

Karin M. Burke*
Deborah A. DeLeo**

The seas have always proved an extraordinary resource for the limited number of communities having access to them.¹ Although in modern times the seas have been considered a resource available for the use of all nations and the exclusive property of none,² the recent history of the law of the sea continues to reflect conflicts between states seeking unhampered navigation and utilization of resources and other states seeking exclusive control over adjacent seas.³ The international law of the sea seeks to moderate these competing interests by “establishing and maintaining a public order in the shared use of, and shared competence over, the oceans.”⁴

A major event in the history of the international law of the sea occurred on April 30, 1982, with the adoption of the United Nations Convention on the Law of the Sea⁵ during the eleventh and final session of the Third Conference at United Nations headquarters in New York.⁶ The Convention, which represents the culmination of nine years of intensive effort,⁷ is particularly significant for its comprehensiveness.⁸ Virtually every human use of the oceans—navigation and overflight, resource

* Member, New York Bar.

** Member, New York and New Jersey Bars.

1. McNees, *Freedom of Transit Through International Straits*, 6 J. MAR. L. & COM. 175, 176 (1975).

2. *Id.* at 177, quoting the following enunciation of the rule by Lord Stowell in 1817: “All nations have an equal right to the unappropriated parts of the ocean for their navigation.” (citing J. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 64 (6th ed. 1967)).

3. Shelton & Rose, *Freedom of Navigation: The Emerging International Regime*, 17 SANTA CLARA L. REV. 523 (1977).

4. McDougal & Burke, *The Community Interest in a Narrow Territorial Sea: Inclusive Versus Exclusive Competence Over the Oceans*, 45 CORNELL L.Q. 171 (1960) [hereinafter cited as *Community Interest*].

5. United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1982) [hereinafter cited as LOS Convention].

6. United Nations Press Release, U.N. Doc. SEA/494 (Apr. 30, 1982) at 1 [hereinafter cited as U.N. Press Release]. See Allott, *Power Sharing in the Law of the Sea*, 77 AM. J. INT’L L. 1, 4 (1983).

7. U.N. Press Release, *supra* note 6.

8. Allott, *supra* note 6, at 8.

exploration and exploitation, conservation and pollution, fishing and shipping—is addressed in the Convention's 320 articles and nine annexes.⁹ Whether the new Convention becomes a formally ratified treaty,¹⁰ its very existence “modifies political, economic and legal relationships in countless ways whose direction and intensity we can predict only in a most speculative way.”¹¹

This Comment examines the United Nations Convention on the Law of the Sea (LOS Convention) as it affects two basic issues: (1) the right of passage in the territorial sea¹² or “innocent passage,” and (2) the right of passage through straits used for international navigation, or “transit passage.”

The primary conflict relevant to analysis of ocean passage involves the security interests of coastal states and the navigational interests of maritime states.¹³ The most exclusive¹⁴ claims advanced by coastal states are those that seek to protect or limit access to “internal” or “territorial” waters immediately adjacent to the state,¹⁵ and those that seek to extend the reach of state sovereignty over these waters.¹⁶ These nations justify their demands in terms of economic necessity in order to preserve petroleum and mineral resources, to protect fishing interests, and to prevent

9. U.N. Press Release, *supra* note 6.

10. The Convention shall enter into force of law 12 months after the date of deposit of the sixtieth instrument of ratification or accession with the Secretary General of the United Nations. LOS Convention, *supra* note 5, arts. 306 & 308(1).

11. Allott, *supra* note 6.

12. The sea is generally divided into three zones—high seas, internal waters, and territorial sea. These zones and the concomitant rights of vessels passing through them have been described as follows:

The ‘high seas’ are beyond the coastal State’s jurisdiction and there all States enjoy the ‘freedom of the seas’ . . . including the freedom of navigation and overflight. At the other extreme are the ‘internal waters’ of the State, consisting of its harbours, ports and roadsteads, and of its interior gulfs and bays, straits, lakes and rivers. In general, they include all waters to landward of the low waterline or the established baseline. On these waters, apart from where special treaties apply and where waters were formerly territorial prior to the application of the principle of straight baselines, foreign States cannot demand any rights for their ships and aircraft. Between these two extremes lies the ‘territorial sea’ acknowledged to be the territory of the State whose coasts it washes. Here no foreign State may overfly but its ships may pass ‘upon their lawful occasions’ or in ‘innocent passage.’ This right to access by ships of other States may be looked upon as a servitude over the territorial waters.

McNees, *supra* note 1, at 180-81.

13. *Id.* at 187. The term “maritime states” signifies those nations “whose merchant and naval ships make more than localized use of the seas.” *Id.*

14. Exclusive interests are interests in those activities “which predominantly affect only one territorial community.” McDougal, *The Law of the High Seas in Time of Peace*, 3 DEN. J. INT’L L. & POL’Y 45, 49 (1973).

15. See McNees, *supra* note 1, at 180-81.

16. *Id.* at 187-88.

pollution in their adjacent waters.¹⁷

The most inclusive¹⁸ claims, by contrast, are those often advanced by maritime nations, whose interests are best served by maximum freedom of access to the oceans for transportation, communication, military purposes, and the production and exchange of raw materials and goods.¹⁹ Maritime nations view these policies as advantageous to their own interests as well as to those of the larger world community.²⁰ The LOS Convention represents the latest attempt to strike a balance between the interests of coastal states and maritime states through the regimes of innocent passage and transit passage.

I. Innocent Passage in the Territorial Sea

Innocent passage signifies a right of free passage through territorial waters which exists only as long as the foreign vessel respects coastal state regulations and does not interfere with or threaten the tranquility of the coastal state.²¹

All claims by coastal states with regard to the territorial sea involve two conflicting policies. One is the interest of the general community in maintaining the oceans as a common resource for transportation and communication, free from undue coastal restraint.²² The competing policy is the recognition of the competence of the coastal state to promote and protect its interests by exercising authority over passage through its territorial sea.²³

The purpose of the doctrine of innocent passage is to reach a compromise between these conflicting policies. The common, inclusive interest in assuring full and efficient use of the oceans is represented by the guarantee of freedom of passage, while the exclusive interest in protecting coastal state values is protected by the qualification that passage must be "innocent," that is, not offensive to certain coastal interests.²⁴ In appraising claims and counterclaims relating to passage in the territorial

17. *Id.* at 188.

18. Inclusive interests are interests in those activities which "have significant transnational effects, that is, which importantly affect more than one territorial community." McDougal, *supra* note 14.

19. See Burke, *Contemporary Law of the Sea: Transportation, Communication and Flight*, 2 YALE STUD. WORLD PUB. ORD. 183, 189-90 (1976) [hereinafter cited as *Contemporary Law*].

20. See McNees, *supra* note 1, at 188-89.

21. Smith, *The Politics of Lawmaking: Problems in International Maritime Regulation—Innocent Passage v. Free Transit*, 37 U. PITT. L. REV. 487, 503-04 (1976).

22. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 184-85 (1962) [hereinafter cited as *PUBLIC ORDER*].

23. *Id.* at 185.

24. *Id.*

sea, the major problem has been to determine what is a reasonable intrusion.²⁵ Reconciling these competing interests involves the complex question of the extent of the territorial sea. Nations have not yet agreed upon a common limit for territorial waters.²⁶

During the nineteenth century, the right of the coastal state to exert jurisdiction over a three-mile territorial sea gained widespread acceptance through the customary practices of nations and subsequent codification in statutes and treaties.²⁷ This recognition initially stemmed from demands by coastal states for authority to protect their boundaries up to a distance measured by a cannon shot.²⁸

Since about 1960, a substantial majority of coastal nations has abandoned this traditional boundary and has claimed a territorial sea of twelve miles.²⁹ Even the United States, which had supported a three-mile rule since 1793, more recently has accepted a jurisdiction of twelve miles for certain limited purposes.³⁰

In the past several decades, a small group of Latin American nations has asserted what is, in effect, exclusive sovereignty over coastal seas to a distance of 200 miles.³¹ These nations desire to maintain control over the living resources of the sea upon which their economies depend for commodities in international trade and as a means of livelihood and nourishment for their citizens.³²

Despite these extreme claims, which favor special interests and jeopardize the full sharing of ocean resources,³³ the most recognizable modern trend has been the acceptance of a twelve-mile territorial sea.³⁴ The practical effect of this policy, however, is to place considerably greater expanses of waters, formerly governed by unrestricted high seas freedoms, under the more intrusive regime of innocent passage.

The balance struck by the LOS Convention among the competing in-

25. *Id.*

26. Comment, *Territorial Waters—Ownership and Control*, 8 CASE W. RES. J. INT'L L. 240, 242 (1976).

27. *Community Interest*, *supra* note 4, at 229; Comment, *supra* note 26, at 242.

28. *Community Interest*, *supra* note 4, at 229; Comment, *supra* note 26, at 241.

29. Martinez, *The Third United Nations Conference on the Law of the Sea: Prospects, Expectations, and Realities*, 7 J. MAR. L. & COM. 253, 255 & n.7 (1975).

30. Comment, *supra* note 26, at 243. This shift was manifested in the proclamation of an exclusive fishing zone in 1965, Martinez, *supra* note 29, at 256; and in the establishment of a coastal zone for the testing of nuclear weapons by treaty in 1971, Comment, *supra* note 26, at 243.

31. Martinez, *supra* note 29, at 260. See also Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 195 n.10 (1977) [hereinafter cited as *Submerged Passage*].

32. McNees, *supra* note 1, at 188.

33. See *Community Interest*, *supra* note 4, at 175.

34. See Martinez, *supra* note 29, at 255.

Law Of The Sea

terests varies with the nature of the ship in question. The LOS Convention contains provisions applicable to all ships as well as provisions applicable only to commercial vessels. A final set of provisions covers warships and other government ships operated for non-commercial purposes.

A. *Prescriptions Applicable to All Ships*

As in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (1958 Geneva Convention),³⁵ the provisions of the LOS Convention relating to innocent passage through the territorial sea appear under Part II, Section 3.³⁶ Subsection A, "Rules Applicable to All Ships," refers to "ships" without distinction as to their character.³⁷ Article 19 of the new agreement, in language identical to that of the 1958 Geneva Convention, defines innocent passage as that which is "not prejudicial to the peace, good order or security of the coastal State."³⁸ The article enumerates a dozen acts of the transiting vessel which would be considered "prejudicial" to the coastal state. This is a significant departure from the 1958 Geneva Convention, which was essentially subjective and made no specific reference to activities that were prejudicial.³⁹ The broadest category is phrased as "any other activity not having a *direct bearing* on passage."⁴⁰ The purpose of the revision was to specify those activities that are prejudicial to coastal interests, while retaining the flexible notions of peace, good order, and security.⁴¹ Debate at the LOS Conference primarily concerned whether such specifications should be exhaustive (as espoused by maritime nations such as the Soviet Union and the United Kingdom) or open-ended and merely illustrative (as urged by "strait states" such as Fiji).⁴²

Article 20 provides that "submarines and other underwater vehicles" must navigate on the surface and show their flags in the territorial sea, a position which represents no significant change from the 1958 Geneva Convention.⁴³

35. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as 1958 Geneva Convention].

36. LOS Convention, *supra* note 5, arts. 17-26.

37. See Maduro, *Passage Through International Straits: The Prospects Emerging From the Third United Nations Conference on the Law of the Sea*, 12 J. MAR. L. & COM. 65, 85 (1980).

38. LOS Convention, *supra* note 5, art. 19(1).

39. See Maduro, *supra* note 37, at 77 n.43.

40. LOS Convention, *supra* note 5, art. 19(2)(1) (emphasis added).

41. *Contemporary Law*, *supra* note 19, at 226.

42. *Id.* at 226-27.

43. Article 14, para. 6 of the 1958 Geneva Convention refers only to "submarines," whereas the LOS Convention adds "and other underwater vehicles," no doubt in response to technological and scientific developments during the last two decades. See Robertson, *Passage*

Article 21 establishes the coastal state's authority to "adopt laws and regulations" in the following areas: safety of navigation; regulation of marine traffic; protection of navigational aids and facilities, cables, and pipelines; conservation of the living resources of the sea; prevention of infringement of fisheries regulations; preservation of the coastal state's environment; prevention, reduction, and control of pollution; marine scientific research and hydrographic surveys; and the prevention of infringement of the state's customs, fiscal, immigration, or sanitary regulations.⁴⁴ This represents a significant expansion over the 1958 treaty, which contained specific mention of coastal state authority only regarding transport, navigation, and the prohibition of fishing.⁴⁵ However, the LOS Convention specifies that such regulations "shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally-accepted international rules or standards."⁴⁶ Foreign ships exercising the right of innocent passage are directed to comply with all such regulations as well as with accepted international law on the prevention of collisions.⁴⁷

In response to coastal state concerns regarding accidents and pollution in adjacent seas,⁴⁸ Article 22 provides that the coastal state may prescribe, "where necessary and having regard to the safety of navigation," sea lanes and traffic separation schemes for the passage of ships. The negotiations concerning Article 22 reveal that the grant of authority to coastal states to create sea lanes was preferable to the more intrusive grant of competence to regulate the design, construction, manning, or equipment of ships, which, it was believed, would inhibit the shipbuilding industry and commerce in general,⁴⁹ and which is therefore essentially forbidden.⁵⁰

Article 25 grants to the coastal state the right temporarily to suspend innocent passage in its territorial waters, provided such suspension is without discrimination among foreign ships and is essential for the protection of security.

Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, 20 VA. J. INT'L L. 801, 802 n.5 (1980).

44. LOS Convention, *supra* note 5, art. 21(1).

45. Maduro, *supra* note 37, at 78.

46. LOS Convention, *supra* note 5, art. 21(2).

47. *Id.* art. 21(4).

48. For a detailed discussion of marine pollution problems, see generally Fleischer, *Pollution from Seaborne Sources*, 3 NEW DIRECTIONS IN THE LAW OF THE SEA 78 (1973); Hardy, *Definition and Forms of Marine Pollution*, 3 NEW DIRECTIONS IN THE LAW OF THE SEA 73 (1973).

49. Smith, *supra* note 21, at 542.

50. LOS Convention, *supra* note 5, art. 21.

Article 19's comprehensive enumeration apparently encompasses nearly every situation which might present a threat of harm to the coastal state.⁵¹ In the area of environmental protection, however, the LOS Convention provides that where pollution occurs, only an act of "wilful and serious pollution" will be considered prejudicial per se.⁵² Presumably, pollution caused by accident, negligence, poor standards of construction or seamanship, or by any other unintentional cause would be regarded as "innocent" under the LOS Convention.⁵³ This result is surely undesirable.

Some commentators have argued that, despite the detailed enumeration, the new definition of innocent passage gives the coastal states entirely too much latitude to determine "prejudice" subjectively.⁵⁴ For instance, almost any passage by a military vehicle may be regarded as threatening to the coastal state, and thus prejudicial under Article 19(2)(a), due to the "symbolic" or "flag-showing" message communicated.⁵⁵ Moreover, the broad language holding prejudicial "any other activity not having a direct bearing on passage" provides even greater discretion for coastal states to characterize passage as "non-innocent."⁵⁶ Finally, the provision in Article 19(2)(a) permitting the coastal state to consider violations of "principles of international law embodied in the Charter of the United Nations" when assessing prejudice arguably grants undue discretion to the coastal states.⁵⁷ Many of the Charter principles were framed at high levels of generality and discretion, with the expectation that they would be applied by United Nations organs according to Charter procedures.⁵⁸

51. These prejudicial activities are as follows: any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; any exercise or practice with weapons of any kind; any act aimed at collecting information to the prejudice of the defense or security of the coastal state; any act of propaganda aimed at affecting the defense or security of the coastal state; the launching, landing, or taking on board of any aircraft; the launching, landing, or taking on board of any military device; the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary regulations of the coastal state; any act of wilful and serious pollution, contrary to this Convention; any fishing activities; the carrying out of research or survey activities; any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state; and any other activity not having a direct bearing on passage. LOS Convention, *supra* note 5, art. 19(2).

52. LOS Convention, *supra* note 5, art. 19(2)(h).

53. Maduro, *supra* note 37, at 79.

54. Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 60-65 (1980).

55. *Id.* at 63-65.

56. LOS Convention, *supra* note 5, art. 19(2)(1).

57. Reisman, *supra* note 54, at 63-65.

58. *Id.* at 65.

The LOS Convention also limits the rights of the coastal states. The prejudicial activity must occur in the territorial sea before the coastal state can invoke its rights under the Convention.⁵⁹ This provision, coupled with the adoption of a twelve-mile territorial sea, helps to avoid the dangers inherent in more expansive interpretations of coastal state authority.⁶⁰ Article 24 of the LOS Convention imposes the additional requirement that the coastal state shall not discriminate in form or in fact against foreign ships based upon their nationality or destination. Furthermore, they may not impose requirements on transiting ships which have the "practical effect" of denying or impairing innocent passage.⁶¹ It has been suggested that if passage is in fact innocent, states with transiting ships may be expected to assert their right of passage against coastal state claims of non-innocence.⁶² In a major improvement over the 1958 Geneva Convention, compulsory adjudication is available to determine non-innocence, at least where commercial vessels are involved.⁶³

A final consideration concerns Article 26, which states that charges may not be levied upon foreign ships by reason of their passage through the territorial sea alone, but that payment for specific services actually rendered to the ship may be exacted. The implication that the costs of maintenance and regulation of navigational aids and facilities will be borne by coastal states may cast an inequitable burden on coastal states, particularly the developing nations.⁶⁴

B. *Prescriptions Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes*

Subsection B of the LOS Convention contains rules that apply only to commercial vessels. The rules delineate the extent of the coastal state's civil and criminal jurisdiction over these ships. Article 27 provides that criminal jurisdiction generally should not be exercised on board a foreign ship during its passage through the territorial sea. Among the few exceptions are situations when the consequences of the crime extend to the coastal state, when the assistance of the coastal state has been requested, or when illicit traffic in narcotic drugs is involved. With only two exceptions, the Article provides that criminal jurisdiction should not be exercised in connection with crimes committed before the ship's entry into

59. LOS Convention, *supra* note 5, art. 19(2); see Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 118 (1980).

60. Moore, *supra* note 59, at 118.

61. LOS Convention, *supra* note 5, art 24; see Moore, *supra* note 59, at 118.

62. Moore, *supra* note 59, at 119.

63. *Id.*

64. Smith, *supra* note 21, at 503-04; see Burke, *supra* note 19, at 189-90.

the territorial waters of the coastal state.⁶⁵

Article 28 provides that the coastal state may not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction over a person on board. However, both Articles 27 and 28 specify that the coastal state *may* exert its criminal or civil jurisdiction over a ship passing through territorial waters after the ship has left the internal waters of the state.⁶⁶

The provisions of Subsection B attempt to accommodate the interests of the coastal state in regulating those activities of vessels sailing within its territorial waters that bear directly on its community values. Under this formulation, the jurisdiction of the coastal state over criminal matters, which threaten greater deprivation to the coastal community, is more expansive than its jurisdiction over civil wrongs. This competence to prescribe and apply either criminal or civil sanctions is limited to events having the most direct impact, that is, criminal events occurring within territorial waters, and civil and criminal wrongs resulting from a ship's passage through internal waters.⁶⁷ Special concern for enforcement in areas of narcotics traffic, pollution, and environmental problems is evident,⁶⁸ in conformity with increasing demands for regulation over these areas in recent years.

C. *Prescriptions Applicable to Warships and Other Government Ships Operated for Non-Commercial Purposes*

Subsection C contains special prescriptions applicable to warships⁶⁹ and other government ships operated for non-commercial purposes. Article 30 provides that warships, in exercising the right of innocent passage, must "comply with the laws and regulations of the coastal state" and may be required to leave the territorial sea immediately upon disregard of a request for compliance.⁷⁰ Article 31 places liability on the flag state for any loss or damage to the coastal state arising from the non-compliance of a warship or other government ship operated for non-commercial purposes while in the territorial sea. Finally, the principle of immunity is reaffirmed in Article 32.

Western powers, including the United States, France, and Great Britain, traditionally have favored the unimpeded passage of warships, with

65. LOS Convention, *supra* note 5, art. 27(5).

66. *Id.* arts. 27(2) & 28(3).

67. *Id.* arts. 27(1)(a) & (b), 27(2), 28(3).

68. *Id.* arts. 27(1)(d) (narcotics traffic) & 27(5) (preservation of marine environment).

69. Defined in *id.* art. 29.

70. This formula resembles that of the 1958 Geneva Convention. See Shelton & Rose, *supra* note 3, at 556.

no requirement of notice on the part of the foreign vessel.⁷¹ The Soviet Union and other Eastern Bloc nations, however, have argued that innocent passage is not a right, but merely a matter of privilege or tolerance. These nations claim that requirements of notice and authorization may be imposed on transiting warships.⁷² Such a requirement may preclude the effective use of innocent passage.⁷³ Furthermore, where, as in the U.S.S.R., all state-owned vessels are classified as warships, the state presumably could invoke the defenses and immunities attributable to warships for all state-owned vessels, their crew, and passengers.⁷⁴

In recent years, however, the U.S.S.R. has gradually moved toward unrestricted innocent passage, perhaps due to its emergence as a major naval power.⁷⁵ Nevertheless, though a majority of nations follow the "Western" position regarding prior notice and authorization,⁷⁶ many coastal states continue to demand compliance with notice and authorization requirements.⁷⁷ Other states, which do not themselves require prior notice, strongly endorse the practice.⁷⁸ These demands generally have been met through informal notification at low levels of authority.⁷⁹ However, it is possible that military confrontation could occur because of adamant positions held by some of the more powerful states.⁸⁰

At the final session of the Third Law of the Sea Conference, two amendments to the proposed Convention were introduced, both of which would have enabled a coastal state to require prior authorization or notification for passage by warships in the territorial sea.⁸¹ Although these

71. The United States, for example, recognizes a right of innocent passage for military vessels. The U.S. requires no notice from foreign ships in its territorial waters, and gives no notice when transiting the territorial waters of other states. Smith, *supra* note 21, at 513.

72. Comment, *The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom*, 15 SAN DIEGO L. REV. 573, 578-80 (1978) [hereinafter cited as *Innocent Passage*].

73. Smith, *supra* note 21, at 515. The Soviet Union, for instance, requires that thirty days' notice be given prior to passage by warships. *Id.*

74. *Id.* at 518.

75. *Innocent Passage*, *supra* note 72, at 600.

76. Smith, *supra* note 21, at 515.

77. *Innocent Passage*, *supra* note 72, at 582-83.

78. *Id.* at 584.

79. *Id.* at 582-83.

80. *Id.* at 583. One such confrontation did occur in August 1981, involving the United States and Libya. During weapons exercises conducted in the south Mediterranean Sea by the United States, two Libyan jets fired upon U.S. F-14 fighter planes; they were themselves shot down sixty miles off the Libyan coast in the Gulf of Sidra. Libya claims a territorial sea of twelve miles and, since 1973, has claimed the waters of the Gulf of Sidra where the military exercises took place. Although no other nation, including the Soviet Union, recognizes Libya's claim to the Gulf of Sidra, this incident illustrates the potential for military conflict arising from unilateral claims and demands by coastal states. *Shootout Over the Med*, Time, Aug. 31, 1981, at 24-25.

81. U.N. Press Release, *supra* note 6, at 37.

proposals ultimately were not pressed to a vote by their sponsors,⁸² the lack of explicit codification probably will not alter the customary practices of these nations. Certain coastal states, opposed to the unimpeded passage of warships, have adopted regulations such as demands for prior notice of passage or "pollution" or "weight" controls,⁸³ whose practical effect is to restrict or deny passage. These types of regulations, which would be cognizable under Article 21, coupled with the provision that warships not in compliance with coastal state laws and regulations may be required to leave the territorial sea,⁸⁴ suggest that innocent passage, as prescribed in the LOS Convention, could be undermined substantially by the exclusive interests of coastal states.

Although Article 24 of the new treaty provides that the coastal state "shall not hamper the innocent passage of foreign ships" and, in particular, shall not "impose requirements . . . which have the practical effect of denying or impairing the right of innocent passage,"⁸⁵ the actual scope of coastal state authority to prescribe and apply policy with respect to warships remains unclear in light of customary practice. The failure of the LOS Convention to address the issues of prior notice and authorization requirements⁸⁶ magnifies this uncertainty. Such ambiguities are no doubt particularly disturbing to those maritime nations whose bases of power depend on effective military use of the seas, and whose interests are best served by a treaty securing the freest possible access to these waters.⁸⁷

II. Transit Passage

Transit passage refers to navigation through straits which connect the high seas. Since the 1958 Geneva Convention, navigation through such straits has been regulated by the general provisions applicable to inno-

82. *Id.*

83. For example, Canada in 1970 attempted through internal legislation to subject 100 miles of coastal sea to "pollution control." Similarly, Malaysia and Indonesia have restricted shipping in their territorial waters on the grounds of "pollution control." Under these restrictions, warships, due to their excessive weight, are to be excluded completely. *Innocent Passage*, *supra* note 72, at 586; see Smith, *supra* note 21, at 514-15. *But see Contemporary Law*, *supra* note 19, at 222, stating that during the preparations for the Third Conference, "only two proposals of over a dozen provided expressly that the coastal state could require authorization and notification of the passage of warships" (citations omitted). The two proposals were made by "straits states." *Id.*

84. LOS Convention, *supra* note 5, art. 30.

85. *Id.* art. 24(1)(a).

86. In commenting on the 1958 Geneva Convention, Smith has stated that "[a]lthough the Convention does not authorize the coastal state to make passage of warships subject to previous authorization, neither does it forbid actions of this nature." Smith, *supra* note 21, at 515. The statement is equally true with respect to the LOS Convention.

87. See, e.g., PUBLIC ORDER, *supra* note 22, at 131.

cent passage.⁸⁸ The subsequent recognition of a twelve-mile territorial sea brought traditional territorial sea rights into conflict with free passage rights in more than 100 straits around the globe.⁸⁹

The maritime nations regard any restriction on the right of navigation as gravely affecting their economic, political, and military interests.⁹⁰ With the recognition of a twelve-mile territorial sea, the maritime states became concerned that the straits states may be permitted to "close off" straits used for international navigation by applying the doctrine of innocent passage to supersede the existing navigation rights currently exercised under the doctrine of freedom of the high seas.⁹¹

As a result of these developments, the United States formulated a new policy with respect to ocean passage and presented its proposal at the 1971 summer session of the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.⁹² The proposal declared that the United States would accept the extension of territorial waters to twelve miles only if a treaty could be negotiated which would provide for freedom of navigation through and over international straits, as defined in the 1958 Geneva Convention.⁹³ Although the proposal provided that ships and aircraft should enjoy the same freedom of navigation and overflight as they have on the high seas, some limitations were envisaged, such as the right of a coastal state to prescribe and enforce certain regulations and establish

88. 1958 Geneva Convention, *supra* note 35, art. 16(4). "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."

89. Cundick, *International Straits: The Right of Access*, 5 GA. J. INT'L & COMP. L. 107 (1975). An unpublished survey conducted by the United States Navy Department, *quoted in* McNees, *supra* note 1, at 185, revealed that if a twelve-mile territorial sea were adopted, "the waters of over 116 major straits . . . would become part of the territorial waters of the coastal states and there would no longer be the high seas corridor which currently gives an absolutely unrestricted right of passage through them." The study further revealed that recognition of a two hundred-mile limit would place virtually every passage between two free seas within the territorial sea of some nation. *Id.* A similar study by the Department of State, *reported in* Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited*, 5 OCEAN DEV. & INT'L L.J. 477, 488 & n.29 (1978), identified 121 international straits which would be brought under national jurisdiction by the adoption of a twelve-mile territorial sea. Of these, 16 are designated as "straits of major importance": West Korean, Malacca, Sunda, Lombok, Ombai, West Bering, Juan De Fuca, Old Bahamas Channel, Dominica Channel, Martinique Channel, St. Lucia Channel, St. Vincent Passage, Dover, Gibraltar, Bab Al Mandeb, and Hormuz.

90. Grandison & Meyer, *International Straits, Global Communications, and the Evolving Law of the Sea*, 8 VAND. J. TRANS. L. 393, 416-17 (1975).

91. Cundick, *supra* note 89, at 110; *See* McNees, *supra* note 1, at 184.

92. Robertson, *supra* note 43, at 806-07.

93. *Id.* at 808.

suitable sea lanes.⁹⁴ Nevertheless, the United States proposal was considerably broader than the innocent passage codification of the 1958 Geneva Convention.⁹⁵

In contrast to the concerns of the maritime states, the straits states are concerned about the proximity and density of traffic in the straits on which they border, and the possible effects of this traffic on their interests. They fear that pollution caused by accidents in adjacent straits will endanger the lives of their citizens and damage property and resources. Moreover, dense traffic in a strait may make it difficult or impossible for coastal states to utilize fully their fisheries and seabed resources.⁹⁶ Coastal states are also concerned that traffic in straits adjacent to their shores may jeopardize their security interests. Such concerns stem from fears of attack, infiltration, or military intelligence activities conducted by vessels and aircraft passing through the straits.⁹⁷ As a final consideration, coastal states recognize the potential strategic value of straits, and some may attempt to manipulate the right to navigate international straits as a source of wealth or a means of achieving particular political objectives.⁹⁸

Although certain straits states have adopted more extreme positions which attempt to justify their competence to limit access based upon notions of "national sovereignty,"⁹⁹ most straits states have recognized that the maritime states have legitimate interests in transit passage. In response to the United States proposal, Fiji, together with a group of straits states, proposed the continuation of the non-suspendable innocent passage principle of the 1958 Convention, modified to some extent to meet the objections of the maritime states. Neither proposal, however, proved satisfactory.¹⁰⁰

In the ongoing dialogue in the Seabed Committee and the Third Law of the Sea Conference, the United Kingdom introduced the concept of "transit passage" through straits that are used for international navigation and that join two parts of the high seas.¹⁰¹ This was an attempt to find a middle ground between the freedom of navigation proposals favored by the maritime nations and the proposals of the straits nations which would have been mere extensions of the concept of innocent pas-

94. *Id.* at 809.

95. *Id.* at 812; *see also supra* note 83.

96. Grandison & Meyer, *supra* note 90, at 420.

97. *Id.* at 421.

98. *Id.* at 422.

99. Cundick, *supra* note 89, at 109-10.

100. Robertson, *supra* note 43, at 817-18.

101. *Id.* at 819.

sage.¹⁰² The "transit passage" concept became the basis of Part III of the LOS Convention.¹⁰³

The definition of straits is set forth in Article 37. Straits are defined as waterways "used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." This definition is qualified by Article 38.¹⁰⁴ Like its predecessor in the 1958 Geneva Convention, Article 38 mandates that in order for a body of water to be characterized as a strait subject to the regime of transit passage, it must be a bridge between high seas and/or exclusive economic zones and must in fact be used for international navigation.¹⁰⁵ Article 36 provides that if there is a strip of high seas or exclusive economic zone through a strait, and if navigation within that strip is as convenient as navigation through the territorial sea portions of the strait, then the ship or aircraft must avoid the territorial sea and remain in the high seas or exclusive economic zone portion. This provision has a restrictive effect because, depending upon the interpretation of the word "convenience," vessels might be forced to extend their voyages or to operate without coastal navigational aids.¹⁰⁶

Another significant aspect of this definition is its omission of straits joining a part of the high seas or exclusive economic zone to a nation's territorial sea. Instead, the regime of non-suspendable innocent passage in Article 45 applies to such straits.¹⁰⁷

Articles 38 through 40 establish the rights and correlative duties of ships and aircraft under the transit passage provisions. Article 38 sets forth the substantive content of the right of transit passage; it is explicit in providing that transit passage "shall not be impeded." This provision apparently supplies the basic guarantee of freedom of navigation sought by maritime nations. Article 38 does not say that the coastal state may not "interrupt" passage, but the usual construction of the word "impede" suggests that any action that interrupts passage also impedes it.¹⁰⁸ Moreover, the LOS Convention ensures non-discrimination against ships and aircraft based on destination, flag, type of vessel, or cargo. The Arti-

102. *Id.*

103. *Id.* at 826.

104. LOS Convention, *supra* note 5, art. 38.

105. Reisman, *supra* note 54, at 66.

106. Robertson, *supra* note 43, at 828.

107. *Id.* at 830. The economic zone is "an area of the high seas subject to the exercise of certain coastal State rights, including sovereign rights to the living and non-living resources of the area and the necessary ancillary exclusive jurisdiction to protect those rights." *Id.* at 829. The criterion that the straits be "used for international navigation" has also been criticized for its ambiguity. See Reisman, *supra* note 54, at 66.

108. Robertson, *supra* note 43, at 837.

cle 38(1) grant of transit passage to “all” ships and aircraft appears to be so inclusive as to embrace vessels of any type or nationality.¹⁰⁹

Not all scholars, however, are satisfied that Article 38 adequately provides for unhampered passage through international straits. One writer questions the efficacy of the provision because it is not specific in granting rights which would make the regime acceptable from a security standpoint, and so must be construed as permitting the coastal states to exercise broad discretion.¹¹⁰

Article 39 sets forth the duties of ships and aircraft exercising the right of transit passage. It provides that a vessel must proceed without delay, must not threaten or use force against the sovereignty, territorial integrity, or political independence of states bordering straits, and must not violate any of the principles of international law embodied in the Charter of the United Nations.

This provision has been criticized because the legal duties provide criteria that are subject to the coastal states’ evaluation and approval. Thus, transit passage is made to appear more as “a species of innocent passage than a high seas freedom.”¹¹¹

Even if transit passage affords users significantly greater surface navigation rights than does innocent passage, an important issue, apparently left open by the LOS Convention, is whether transit rights permit submerged submarines to traverse straits.¹¹² No explicit textual provision recognizes a right of submerged transit for submarines. Article 39(1)(c) merely states that ships in transit shall refrain from any activities other than those incident to their normal mode of continuous and expeditious passage. Whatever is normal to the mode of passage for a particular vehicle, presumably, is permitted.¹¹³

Scholars are divided as to whether Article 39 secures the right of submarines to navigate below the surface. Those who affirm a right of submerged passage point to the explicit requirement imposed by Article 20 that submarines exercising the right of innocent passage operate on the surface, and they suggest that the omission of a similar provision from the articles dealing with transit passage is not the result of mere inadver-

109. *Id.* at 838.

110. Reisman, *supra* note 54, at 69. *But see* Pirtle, *supra* note 89, at 486 (favoring the current transit passage provisions and believing that they “constitute a treaty weighted in favor of the navigation and security interests of the United States”).

111. Reisman, *supra* note 54, at 70.

112. *Id.* at 71. As noted previously, under the regime of innocent passage, no right of submerged transit is accorded submarines. *See* Robertson *supra* note 43.

113. Robertson, *supra* note 43, at 843.

tence.¹¹⁴ One such writer notes that with regard to the high seas portion of the Convention:

It has never been contended that the "freedom of navigation" confirmed by article 87 . . . does not include the right of submerged navigation for submarines. Yet there is no provision in part VII which explicitly confers that right on submarines.¹¹⁵

Other writers have rejected this view, arguing that, despite the reasonableness of inferring a right of submerged passage from the absence of its prohibition in Article 39, the opposite inference is also possible, especially because such a right would be a "derogation from sovereignty" of the coastal state and thus should have been granted explicitly.¹¹⁶

An interpretation of Article 39 permitting submerged transit through straits gives rise to internal contradictions. For example, Article 39(1)(b) recognizes the coastal state's competence to appraise the contemplated passage for its conformity with the principles of international law set forth in the United Nations Charter. If submerged passage is secret passage, it is unclear how the coastal state can perform that function under subsection (b). It can be argued that the section appears to be more coherent "if no right of submerged passage is hypothesized."¹¹⁷

Article 40 of the LOS Convention prohibits ships, including marine research and hydrographic survey ships, from carrying out any research or survey activities during transit passage without the prior permission of bordering states. The propriety of its inclusion and the language of its provisions appear largely uncontested.¹¹⁸

Articles 41, 42, and 44 establish the rights and duties of coastal states with regard to transit passage through international straits. Article 41 limits that right to the designation of sea lanes and traffic separation schemes. Article 42 empowers coastal states to prevent, reduce, and control pollution, prohibit fishing, and regulate the loading and unloading of commodities, currency, or persons in contravention of customs, fiscal, immigration, or sanitary regulations.

Although the two articles are relatively narrow in scope, they seem to grant coastal states sufficient latitude to interfere substantially with transiting ships.¹¹⁹ One safeguard which attempts to prevent such interference is the requirement that coastal state regulations be consistent

114. *Id.* at 844.

115. *Id.* See also *Submerged Passage*, *supra* note 31, at 200-20.

116. Reisman, *supra* note 54, at 71.

117. *Id.* at 73.

118. See Robertson, *supra* note 43, at 832.

119. *Id.* at 849.

Law Of The Sea

with international standards. Article 41 permits nations bordering straits to prescribe sea lanes or traffic separation schemes only after they have received the approval of the "competent international organization."¹²⁰ Article 42 similarly restricts the power of the coastal state regarding the discharge of "oil, oily wastes and other noxious substances in the strait"¹²¹ by permitting it to give effect only to applicable international regulations. In cases of fishing, customs, fiscal, immigration, and sanitary regulations, where the discretion of the coastal state is not limited by an international standard, Article 42(2) requires that laws and regulations not discriminate among foreign ships or "in their application have the practical effect of denying, hampering or impairing the right of transit passage."

As previously noted, straits linking the high seas or an exclusive economic zone with the territorial sea of a foreign state are not covered by the transit passage provisions.¹²² Similarly, straits between an island and the mainland are excluded if a high seas or exclusive economic zone route of similar convenience exists.¹²³ Article 45 fills the gap in coverage for these two types of straits by providing that the doctrine of non-suspendable innocent passage will apply.

Conclusion

Although the rights of innocent passage and transit passage, as codified in the LOS Convention, generally appear to accommodate maritime and coastal interests and the needs of the larger community,¹²⁴ some provisions of the articles do present problems. Most of these problems arise from ambiguities in the language or application of the provisions, which could be exploited in favor of the more exclusive interests of coastal states.¹²⁵

For example, the new definition of "innocent passage" in Article 19 gives the coastal states broad latitude to characterize passage as non-innocent through the use of subjective criteria. Moreover, although the new provisions in Article 21 contain grants of authority to the coastal state to regulate innocent passage in areas that would appear to fall well

120. LOS Convention, *supra* note 5, art. 41(4).

121. *Id.* art. 42(1)(b).

122. *See supra* note 107 and accompanying text.

123. *Id.*

124. Shelton & Rose, *supra* note 3, at 557. President Reagan has declared that the navigation and overflight provisions, along with most other provisions of the LOS Convention, were acceptable to the United States and "served well the interests of all nations." Oxman, *The New Law of the Sea*, 69 A.B.A. J. 156, 157 (1983).

125. *See Smith, supra* note 21, at 542.

within the jurisdiction of that coastal state, such as pollution and weight control, these provisions, in practice, have the potential to result in exclusive claims and prescriptions by the coastal state to suspend, deny, or impede the innocent passage of certain types of vessels, particularly warships. Furthermore, the issue of coastal state claims requiring prior notice and authorization for the passage of warships through territorial waters is not clarified in the Convention. As has been observed, “[m]ilitary and commercial activities may be as effectively discouraged when rights are uncertain and ambiguous as when there are no legal rights.”¹²⁶

Similarly, with respect to transit passage, some prescriptions, particularly those dealing with the right of submerged transit, were never codified and are completely missing from the LOS Convention. Even where prescriptions have been set forth expressly in the articles, the application of those prescriptions frequently is made to depend upon the interpretation given those articles by the coastal nations. Coastal states, for example, are granted by Article 39 the competence to determine whether a purported transit through straits constitutes a “threat or use of force” against their “sovereignty, territorial integrity or political independence.”¹²⁷ Such a grant of competence is broad indeed, and it may work to the detriment of the interests of the maritime nations. A more satisfactory provision might set forth some objective criteria for use by coastal states in evaluating the prejudicial nature of a particular transit.

Thus, although the LOS Convention provisions regarding innocent passage and transit passage do promote, in some measure, unimpeded access to the territorial seas and straits, certain ambiguities remain and ultimately may undermine a policy of inclusive oceans usage.

The new Law of the Sea Convention was approved by a recorded vote of 130 in favor to 4 against, with 17 abstentions.¹²⁸ The ratification of sixty states will be required within a two-year period for the agreement to enter into force.¹²⁹ No reservations or exceptions to the Convention are permitted,¹³⁰ thus precluding states from selective ratification. Nations

126. Moore, *supra* note 59, at 82.

127. LOS Convention, *supra* note 5, art. 39(1)(b).

128. U.N. Press Release, *supra* note 6, at 9-10. The recorded vote was requested by the United States. *Id.* at 9.

129. LOS Convention, *supra* note 5, arts. 305(2) & 308(1). The Convention will remain open for signature until December 9, 1984. *Id.* art. 305(2). To be more precise, however, all states and “other entities referred to in article 305, paragraph 1(b), (c), (d) and (e)” are allowed to ratify the Convention. *Id.* art. 306. Such “entities” include various national liberation movements, governments that are not fully independent, and Namibia. *Id.* art. 305. See U.N. Press Release, *supra* note 6, at 44-48.

130. LOS Convention, *supra* note 5, art. 309.

not assenting to the treaty nevertheless remain subject to existing international law,¹³¹ including customary law.

At present, nine states, primarily from the Third World, have ratified the LOS Convention.¹³² However, the United States, which was among those voting against its approval, thus far has refused to sign the Law of the Sea treaty. This decision stems from United States objection to the deep seabed mining provisions in Part XI of the Convention, which were perceived as "unacceptable and damaging to the United States and other countries' interests."¹³³

The process by which international law is made and applied incorporates global community expectations of authority and control.¹³⁴ A United States refusal to accept the obligations of a new Convention undoubtedly would affect perceptions regarding its acceptability among other nations.¹³⁵ The United States stance may "give rise to political restraints on ratification by major allies, as well as misgivings of principle regarding the entry into force of a treaty that, without the world's major power, cannot purport to establish a global regime."¹³⁶

Nevertheless, there is a substantial likelihood that the necessary sixty states will ratify the Convention, thus bringing it into force.¹³⁷ The widespread support for the Convention evident in the recorded vote is particularly strong among coastal and straits states and less developed nations. The Soviet Union is said to be a "strong proponent" of the Law of the Sea pact, although it abstained from voting for approval.¹³⁸ There remains, however, some concern for the controlling effect that will be given to the provisions on oceans passage if the treaty is ratified over the objections of several important maritime nations, including the United States.

Even in the absence of formal ratification, the Law of the Sea Convention is an important source of authoritative communication with respect to current maritime law.¹³⁹ With the exception of certain controversial areas such as deep seabed mining and settlement of disputes, the provisions of the Convention already are regarded by some as definitive state-

131. *Id.* art. 317(3).

132. They are the Bahamas, Belize, Egypt, Fiji, Ghana, Jamaica, Mexico, the United Nations Council for Namibia, and Zambia 14 OCEAN DEV. & INT'L L.J. 144, 144-147 (1984).

133. United States Mission to the United Nations, Press Release U/SUN 1-(83) (Jan. 3, 1983) at 2.

134. See McDougal, *supra* note 14, at 46.

135. Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)*, 76 AM. J. INT'L L. 1, 22 (1982).

136. *Id.*

137. Oxman, *supra* note 124, at 156.

138. Bus. Wk., Mar. 14, 1983, at 159.

139. Shelton & Rose, *supra* note 3, at 557.

ments of existing customary law, applicable to all states irrespective of their ratification of the document.¹⁴⁰ Claims to a territorial sea of twelve miles, for example, invariably would be recognized under present customary international law, and states claiming less than twelve miles may be expected to extend their jurisdictional limits accordingly.¹⁴¹

The provisions regarding innocent passage and transit passage are the product of years of negotiation and compromise between inclusive and exclusive interests of global participants.¹⁴² The absence of a formal treaty is unlikely to alter the pattern of expectations and preferences which gave effect to this compromise. The advantage lost, however, would be the certainty of a detailed and binding agreement to which parties may resort to settle their disputes.¹⁴³

140. Oxman, *supra* note 124, at 156.

141. H. KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD U.N. LAW OF THE SEA CONFERENCE 17, 48 (1976).

142. Shelton & Rose, *supra* note 3, at 557.

143. H. KNIGHT, *supra* note 141, at 6.