THE SILK

A JOURNAL OF LEGAL ISSUES FOR CONTEMPORARY JUSTICE IN NIGERIA

In Honour of:

His Lordship
Hon. Justice Bode Rhodes-Vivour, JSC

By

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His Lordship
Hon. Justice Bode Rhodes -Vivour, JSC

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THE WIDTH AND LEGAL REGIME OF THE TERRITORIAL SEA

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"Whoever commands the sea commands the trade; whoever commands the trade of the world commands the reaches of the world, and consequently the world itself"...Sir Walter Raleigh[1]

INTRODUCTION

The Oceans of the world have been in the dominion of few nations. As a result of continuous protest from the then emerging powers, greater part of the oceans were ultimately released for the use of all. Hence, the emergence of the Concept of the Freedom of the Seas. Therefore, the historic function of the international law of the sea has long been recognized as that of achieving an appropriate balance between the special exclusive demands of coastal states, other special claimants, and the general inclusive demands of all other states in the world arena[2].

The exclusive claims of coastal states include the right to exercise sovereignty over the adjacent water of their territories and the right to the exclusive exploitation of the resources beneath such waters. On the other hand, others nations do assert some inclusive rights as against the claims of the coastal states. These inclusive claims have led to the emergence and acceptance among the nations of the world of concepts now known today as right of innocent passage, 'freedom of flight', 'freedom of navigation and fishing', 'hot pursuit' and so on[3].

The trend continued until 1958 when the United Nations was able to bring state parties together to harmonise existing states practices in respect of the territorial sea. The failure to agree on a very significant point- the width of the territorial sea led to the call for another conference in 1960 with no success at the end of the day. The matter was finally laid to rest in the 1982 Convention which has been stimulated by Arvid Pardo suggestion of 1967.

This paper shall examine the legal regime and width of the territorial sea as evidenced by customary international law, the codification attempt made by the League of Nation in 1930 and the subsequent United Nations Conferences which produced the 1958 Convention on the Territorial Sea and Contiguous Zone, the 1960 Conference and the 1982 Convention. Other concepts like transit and innocent passage, bays, archipelagos and straits shall be briefly considered as enshrined in the 1982 Convention.

HISTORICAL PERSPECTIVE OF THE TERRITORIAL SEA

The term "territorial waters" was first used by the International Law Commission. What we now called 'Territorial Sea' was adopted in 1954 as suggested by Mr J. P. A. Francois of The Netherlands who was the rapporteur to the Commission at that time. The choice is supported by the argument interalia, that the term "territorial waters" may include "internal (inland) waters," which causes confusion[4].

[1] Quoted by A. Nweze: 'The Impact of Cabotage Act on Entrepreneurial Opportunities and Nigeria's Economic Growth' (2006), p.325. A PhD thesis submitted to The St. Clements University

[2] M.S McDougal and W.T Burke: 'Crisis in the Law of the Sea: Community Perspectives versus National Egoism', The Yale Law Journal, Vol. 67, No. 4 (Feb., 1958), p. 539

[3] Ibid, p.545

[4] See: P.C., Jessup: 'The International Law Commission's 1954 Report on the Regime of the Territorial Sea', The American Journal of International Law, Vol. 49, No. 2 (Apr., 1955), pp. 222

It is on record that the whole of the world oceans were once held between Spain and Portugal as evidenced by the ***Treat of Tordesillas in 1494***[5]. This treaty divided the oceans between these two maritime powers of the time. However, this move was challenged by other emerging maritime powers of this period particularly Netherland, France and Britain. This resulted in the proposition of Hugo Grotius in 1609 of the concept of mare liberum- freedom of the seas[6]. It was the contention of Grotius that the world ocean cannot be owned by any nation since it is not capable of being seized or enclosed. Hence, the ocean belongs to every nations of the world[7].

Grotius was countered by John Selden who propounded the concept of mare clausum- the closed sea, in 1618. Selden while accepting Grotius claim that the world ocean cannot be owned believed that some part of the ocean particularly those adjacent to the territory of a state could be owned[8].

The controversy as to whether States could own the seas or it is 'a common heritage of mankind' to use the words of Arvid Pardo last for a very long time. By the 19th Century, it was a generally accepted notion that States could own and infact exercise sovereignty over the belt of water adjacent to their territory. As it has been observed by prof. Oyebode, this is unconnected to the desire of the riparian States to satisfy both their security and economic interest[9]. While ownership of the adjacent sea was settled, the extent of the sea remains a gray area.

There have been suggestions of fixing the limit of the territorial sea by a distance of two days navigation or a limit determined by the range of visual horizon[10]. However, by the 19th Century, there was a dominant view among nations that a country could claim sovereignty over the belt of water of her coast to three nautical miles seaward. This has also been referred to as the cannon-shot rule[11] which was developed by a Dutch jurist, Cornelius Bynkershoek[12]. This is to say that the extent of the territorial sea is the distance a canon placed at shore would fire. This dominant view had represented customary international law prior to era of codification[13].

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[5] A. Oyebode 'History of the Law of the sea (1500-1960)', in International Law and Politics: An African Perspective, (Lagos, Bolabay Publications, 2003) p.37

[6] Before Grotius, the idea of has been earlier propounded by Justinian, in 529 A.D., that "the sea is common to all, both as to ownership and as to use. It is owned by no one as incapable of appropriation, just as is the air. And its use is open freely to all men. It was on record that no opposition view was heard in history until the ancient Greeks considered the Mediterranean their own, while Alexander the Great relied on sea power to conquer nations great and small. See I. Bezpalko, infra

[7] A. Oyebode: 'History of the Law of the Sea' supra

[8] K. Agyebeng, 'Theory in Search of Practice: 'The Right of Innocent Passage in the Territorial Sea' (2005), Cornell Law School Graduate Student Papers, paper 9. It must be added that the concept of territorial sea may be argued to have emanated from the idea of John selden as submitted in his mare clasum

[9] Such interests have been identified to include the need of coastal States to protect its coast or its vessels from the attacks of pirates, privateers, foreign attacks or invasion, its status of neutrality in times of war, collection of tolls, exclusion of foreign fishermen from the maritime coastal area and so on

[10] A. Oyebode, 'History of the Law of the Sea' supra, p.35

[11] ibid. However, it has been seriously contended that the canon shot rule and three miles rules developed independently of each other. While canon shot holds its origin to the practice of United Kingdom, Spain, France and other maritime nations, the three mile rule is of Denmark and Norway. For a detail discussion of this, see: H. S.K. Kent 'The Historical Origins of the Three-Mile Limit', The American Journal of International Law, Vol. 48, No. 4 (Oct., 1954), pp. 537-553

[12] See: A. H., Charteris: 'Claims of Territorial Jurisdiction in Wide Bays', The Yale Law Journal, Vol. 16, No. 7 (May, 1907), p. 475 ; National open University of Nigeria Course Material on OIL AND GAS LAW I (2011)

[13] See: A.V., Lowe: 'The development of the Concept of Contiguous zone', in British Year Book on International Law, Vol. 52, (1981), pp. 109-169

CODIFICATION OF THE LEGAL REGIME OF THE TERRITORIAL SEA

The attempt to codify the legal regime of the territorial sea started about 1929 when the Hague Conference of that year was convened. At The Hague in 1930, the conferees had before them a report by the League of Nations' Committee of Experts for the Progressive Codification of International Law, which in the maritime field dealt only with the problem of territorial waters[14]. It was largely a lawyers' conference[15]. The principal issue before the delegates was the width of the territorial sea. The delegates were not able to agree at a particular width. Hence, the conference failed to achieve any meaningful significance in the area of law of the sea.

The decade after this period witnessed the occurrence of significant events in the international arena. These include the Second World War and the discovery of valuable resources beneath the world ocean. Nations see more importance in the exploitation of the sea and subsequent to the Truman declaration of 1945 wherein United States extended her control over all the natural resources of its continental shelf, other nations too then laid claim to territorial limit between 3 nautical miles to 200 nautical miles[16]

I UNCLOS I

In 1956, the United Nations which succeeded the League of Nations convened a conference purposely to address issues bordering on the Law of the Sea. Hence, we had the United Nations Conference on the Law of the Sea (UNCLOS) I at Geneva in Switzerland. This conference came out with a significant progress in the area of codification of the law of the sea. Four treaties were negotiated and concluded on 29 April 1958among which is the convention on the Territorial Sea and Contiguous Zone. The Convention came into force on 10 September 1964[17].

The convention provides that the sovereignty of a State extends, beyond its land territory and its qinternal waters, to a belt of sea adjacent to its coast, described as the territorial sea[18]. It further provides that the sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil[19]. It provides for other aspect of the law of territorial sea like, the measurement of the baseline[20], right of innocent passage[21], the regime of island and bays[22]. While the convention is a success in the area of the codification of the legal regime of territorial sea, it failed to provide for the breath of the territorial sea.

ii. UNCLOS II

While the confusion over what the breadth of the territorial sea last, the United Nation felt it could resolve this tussle by agreement among states. This time around, the interests were more complicated as most third world countries just got their independence from the colonialists[23]. Precisely in 1960, the United Nations second conference on the law of the sea popularly referred to as UNCLOS II was held at Geneva.

[14] P.C., Jessup: 'The United Nations Conference on the Law of the Sea', Columbia Law Review, Vol. 59, No. 2 (Feb., 1959), pp. 234-268
[15] Ibid
[16] S.J, Shackelford: 'The Tragedy of the Common Heritage of Mankind', Stanford Environmental Law Journal, Vol. 27, (2008), p.115
[17] United Nations, Treaty Series, vol. 516, p. 205.
[18] Article 1
[19] Article 2
[20] Articles 3 & 4
[21] Articles 14-18
[22] Article 10 and 7 respectively
[23] W.C., Lynch: 'The Law of the sea and The Developing Countries' in The Law of the Sea: Issues in Ocean Resources Management, D. Walsh ed., (New York, Praeger Publishers, 1977), p.119
[24] Ibid
[25] R., Stevenson: 'Who is to Control the oceans: US Policy and the 1973 Law of the sea Conference', International Lawyer, Vol. 6 No. 3, (1972)

This time around, the debate was more serious than ever. State practices around this period reveal that while some states still held on to the three mile rules, others maintained a limit far beyond that[24]. So, expectedly, agreeing to a particular limit was a serious task for the conference. Overwhelming was the population of the third world countries which some of them had particularly resolved to oppose the three mile rule at least to assert their newly found sovereignty and independence of thought[25]. So, they were not ready to accept any rule that had been in practice before their independence. The united States-Canada proposal for a 6 mile territorial sea and additional 6 mile exclusive for fishery zone, failed by one vote to achieve the necessary two –third majority[26]. The conference could not achieve any success as the principal aim had failed.

iii. UNCLOS III

Seven years after the failure of the second Geneva Conference, it was suggested by Arvid Pardo, the Ambassador of Malta that there was need to call for another conference to address the issue of deep seabed which in his opinion ought to be declared a res communis[27]. As a result of the foregoing, a third Conference on the law of the sea was convened in 1973. This time around, the conference which lasted for nine years was able to reach some consensus particularly on the limit of the territorial sea. The consensus was not reached on a platter of gold.

In the words of Borgese, 'revolution in international relation began in the ocean and its seat is the third United Nations Conference on the Law of the Sea[28].The resulting convention adopted virtually all the provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone.

This convention was notable for its establishment and regulation of various maritime zones like the Continental Shelf, Exclusive Economic Zone among others. The resulting document of the conference which was finalised at Montego Bay is now called United Nations Convention on the Law of the Sea (UNCLOS) III, 1982

IV CONTEMPORARY TERRITORIAL SEA IN STATE PRACTICE

The UNCLOS III has been regarded as the most comprehensive treaty ever produced after the UN charter. Notwithstanding this, it is not all states that are party to the convention[29]. The question now is, whether the convention is binding on non- state parties[30]? And what is the status of states that still maintain a territorial sea limit beyond what is provided in the convention[31].

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[24] A. D., Couper: 'The Marine Boundaries of the United Kingdom and the Law of the Sea', The Geographical Journal, Vol. 151, No. 2 (Jul., 1985), p. 230; I., Bezpalko: 'The Deep Seabed: Customary Law Codified', NATURAL RESOURCES JOURNA, Vol. 44, (2004)

[25] E.M., Borgese: The New International Economic Order and the Law of the Sea' in The Law of the Sea: Issues in Ocean Resources Management, supra, p.82

[26] There are 162 state parties to the convention as at date. See: United Nations Division for Oceans and law of the Sea: 'chronological list of ratifications of, accessions and successions to the Convention and Agreements as at June 2011' www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (Accessed 11/02/12)

[27] The following are some of the non-state parties: Ecuador, Eritrea, Isreal, Kazakhstan, Peru, South Sudan, Somalia, Syria, Turkey, Venezuela among others

[28] D., Anderson: 'Legal Implication of the Entry into Force of the UN Convention on the Law of the Sea', International and Comparative Law Quarterly, vol. 44, (1995), p.313

Pursuant to the 1982 Convention, most state parties have adjusted their legislations in line with the 12 miles agreed under the convention. There are states that maintained territorial sea limit of less than 12 mile (basically 3 miles). In majority of these states, it is usually as a result of overlapping with the territorial waters of other state(s). Most worrisome is the fact that some states, despite being parties to the UNCLOS III continued to maintain a territorial sea limit beyond 12 nm. Togo claims 30 nm and states like Peru, Ecuador, Benin, Democratic Republic of Congo and Somalia all claim 200 nautical miles[32].

These claims are doubtful under international law. Firstly, for states that are parties to the convention, they can no longer maintain a claim beyond 12 nm. Treaty law is binding on every state party by virtue of the principle of pacta sunt servanda. Hence, such claims are contrary to international law[33].

For states that are not party to the convention, the International Court of Justice has held that such states are bound by the provisions of the convention[34]. The reason is simply because the agreements reached under the convention represent the current state practice and has become apart from being a treaty law a rule of customary international law which no state would be allowed to derogate from[35]. This will be applicable to states like Ecuador and Peru that have not signed the convention.

V THE WIDTH OF THE TERRITORIAL SEA

One issue that has divided the nations of the world from ages is the width of the territorial sea. As it has been observed earlier in this paper, the various actors in the international maritime domain had a consensus that a State could own or exercise some degree of control or sovereignty over the belt of waters adjacent to its territory. What they could not agree upon at least before UNCLOS III was the extent of the area of the sea that every state could exercise such powers.

By the 17th century, the canon shot rule was widely accepted as the limit of the territorial sea of a state. This is the range a shore-based canon fired there from would reach. This is generally agreed to be three mile. Although, some states extended their authorities beyond this three miles for special purposes like fishing, custom[36] etc.

This disagreement persisted till 1958 when the first Geneva conference on the law of the sea this time around under the auspices of the United Nations was convened. It is not surprising that the 1958 Convention on Territorial Sea and Contiguous Zone which codified the prevalent customary international law on the law of the sea did not say anything on the width of the territorial sea. What the convention provides for is the point of measurement of the territorial sea. It reads thus:

> *Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State*[37]

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[32] CIA World Fact Book: 'Maritime Claims' www.cia.gov/library/publications/the-world-factbook/fields/2106.html (Accessed 11/02/12)

[33] Ibid

[34] See Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain) 16 March 2001; see also: Y. Tanaka: 'Reflections on Maritime Delimitation in the Qatar/Bahrain Case', The International and Comparative Law Quarterly, Vol. 52, No. 1 (Jan., 2003), pp. 53-80

[35] Ibid

[36] A. A. Archer and P. B. Beazley: 'The Geographical Implications of the Law of the Sea Conference', The Geographical Journal, Vol. 141, No. 1 (Mar., 1975), p. 2

[37] Article 3 of the 1958 Convention, supra

Two years later when the second Geneva conference was held, the United States and Canada proposed a limit of 6-mile territorial sea coupled with an exclusive fisheries zone of 6 miles. Unfortunately, this proposal could not see the light of the day as it fell by a single vote[38].

At last, state parties to the 1982 UNCLOS after serious negotiations and compromise agreed to a 12-mile territorial sea limit. Hence, it can be authoritatively said now that the width of the territorial sea of any state cannot extend beyond 12 nautical miles. Any claim outside this limit will be clearly against international law[39].

HOW IS THE WIDTH OF THE TERRITORIA SEA DETERMINED

It is one thing to agree that the limit of the territorial sea is 12 nautical miles from the coast of a state, yet states still find it difficult to determine or agree to the point from which the 12 miles would be measured on the coast[40].

Traditionally, the baseline from which to measure the width of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. This position was retained by the 1958 convention and UNCLOS III[41]. This is the normal baseline. However, it is not unusual for some coasts to have an irregular shape or sinuosity. In this instance, the law has recommended a straight baseline.

The law provides as follows:

> *In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured*[42]

The implication of this is that where the coast is fairly straight and smooth, then the baseline is the low water mark of the coast. However, in situations where the coast is highly indented or is fringed with a number of islands or where bays cut into the coast line, then a straight line may be drawn along the sinuosity of the coast. In a case where the coast is paralleled with islands, a straight line is drawn across the islands.

This special circumstance first arose in the Anglo-Norwegian Fisheries case[43]. In this case, Norway sought to delimit its territorial sea by drawing a series of straight lines linking the outer most part of a number of islands and rock[44] parallel to her coast instead of the usual low-water line across the coast. The implication of this method is that part of the waters that would ordinary had fallen under the high sea have been 'cornered' by Norway. United Kingdom challenged this method employed by Norway as contrary to international law. The International court of Justice found for Norway and held interalia that the method used by Norway is part of international law. The court opined that apart from the fact that the practice has been acquiesced by UK, the condition of the coast and the proximity of the islands to the coast must necessarily warrant that the waters between them be treated as internal waters[45].

[38] See note 28

[39] See D. Anderson, supra

[40] There have been several disputes between states over failure to agree to territorial delimitation between them. For a discussion of the problems of delimitation of boundaries, see N. Dundua: 'Delimitation of Maritime Boundaries between Adjacent States' (2007), www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf (Accessed 11/02/12)

[41] See Article 3 and Article 5 of 1958 and 1982 Conventions respectively

[42] Article 4 and Article 7 of 1958 and 1982 Conventions respectively

[43] ICJ reports, 1951 p.116

[44] These islands and rocks are referred to as skjaergaard

[45] I.C.J Reports 1951, p. 139

Again, the straight baseline adopted by Norway has not materially deviated from the direction of the coast.

The decision in Anglo-Norwegian case was accepted by the international community and no wonder the method was adopted in the 1958 Convention on territorial sea and Contiguous Zone. It was also retained in the UNCLOS III. It must be noted that straight baseline has some conditions it must satisfy. Before a state can successfully apply a straight baseline, it must be shown that the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.

VI DELIMITATION OF TERRITORIAL SEA

Since the legal rights of the coastal state and of foreign states within the territorial sea differ greatly from the rights of all states on the high sea, it should be made possible for a navigator, or a fisherman, or the coastal state, to determine with certainty whether or not a vessel is in territorial waters or on the high sea[47].

The 1982 convention has provided that delimitation of maritime zone between two opposite or adjacent littoral states should be resolved by agreement between the states. Where no agreement is reached, Article 15 of the convention provides that neither state can extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baseline from which the breadth of the territorial sea of each of the two states is measured[48]. This is what is usually referred to as the equidistance rule.

VII SOVEREIGNTY AND JURISDICTION IN THE TERRITORIAL SEA

It is generally accepted that the sovereignty of a State extends, beyond its land territory and its Internal waters, to a belt of sea adjacent to its coast, described as the territorial sea[49]. This is because; the territorial sea is seen as part of the coastal state's territorial domain and such a state could enforce all her laws in the territorial sea as she would do on land. In essence, a coastal state has right to punish anyone that violates her laws in this zone[50].

In this respect, one must distinguish the category of persons and or entities that are subject to the coastal state's jurisdiction. Every individual is subject to the laws of a coastal state in her territorial seas whether a citizen or foreigner and as such he or she is subject to the jurisdiction of the courts of the coastal state[51].

Foreign Merchant Ships within the territorial seas are subject to the jurisdiction of the coastal states as well. They are to abide by all the laws and regulations of the coastal state. Although before now, the law has been shrouded in some controversy as to whether a coastal state can exercise jurisdiction over crimes committed on a vessel within the territorial waters.

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[47] See Qatars Bahrain, ICJ reports 2001 para 212

[48] S. W., Boggs: 'Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law', The American Journal of International Law; Vol. 24, No. 3 (Jul., 1930), pp. 541-555

[49] The following works have discussed the delimitation of maritime zones and all the controversies involved: N., Dundua, supra; S. W., Boggs: 'Problems of Water-Boundary Definition: Median Lines and International Boundaries through Territorial Waters, Geographical Review, Vol. 27, No. 3 (Jul., 1937), pp. 445-456; J. I., Charney: 'Progress in International Maritime Boundary Delimitation', The American Journal of International Law; Vol. 88, No. 2 (Apr., 1994), pp. 227-256; L. D. M., Nelson: 'The Roles of Equity in the Delimitation of Maritime Boundaries', The American Journal of International Law; Vol. 84, No. 4 (Oct., 1990), pp. 837-858; D. A., Colson: 'The Delimitation of the Outer Continental Shelf between Neighbouring States', The American Journal of International Law; Vol. 97, No. 1 (Jan., 2003), pp. 91-107; M. D., Evans: 'Maritime Delimitation and Expanding Categories of Relevant Circumstances', The International and Comparative Law Quarterly, Vol. 40, No. 1 (Jan., 1991), pp. 1-33

[50] Article 1, 1958 convention

[51] A., Oyebode: 'Nigeria's Maritime Boundaries: Law of the Sea and Diplomatic Relations' in African Integration: Images and Perspectives, (Lagos, University of Lagos Press, 2000), p. 178; P.D. Clark: 'Criminal Jurisdiction over Merchant Vessel engaged in International trade', Journal of Maritime Law and Commerce, vol. 11, No.2, 1989 p.220

P.D., Clark, ibid

By the 19th century, it is generally believed that any crime committed on board a ship which does not involve a breach of the peace of the coastal state, such a crime ought to be punished by the flag state[52]. This issue is now comprehensively dealt with by convention. Both the 1958 and 1982 conventions have provided that:

> *The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:*
>
> (a) If the consequences of the crime extend to the coastal State; or
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
> © If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs[53].

It now means that a coastal state would not exercise criminal jurisdiction over a foreign ship passing through her territorial sea for offences which consequences do not extend to the coastal state and crimes that do not disturb the peace of the country or the good order of the sea. These provisions however, are not applicable to war ships or non-commercial ships owned by foreign governments. These ships are immune from national jurisdiction other than the flag state in international law[54].

VIII INNOCENT AND TRANSIT PASSAGE

Part of the inclusive claims of foreign states whether coastal or land-lock is the right to navigate in the territorial sea of a state unhindered. It is a concept that is rooted in customary international law and has now been codified in the 1958 and 1982 conventions. According to Selak, right of innocent passage 'is a principle firmly established in international law that certain foreign vessels have a right of navigation through the territorial sea (but not the inland waters) of a coastal state, thereby creating a servitude which qualifies the bundle of powers, collectively referred to as sovereignty, which the coastal state exercises in its maritime belt[55]'.

A passage has been defined by the convention to mean navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters[56]. It includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress[57] When will a passage be said to be innocent? It is stated that a passage shall be innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law[58].

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[52] C.N., Gregory 'Jurisdiction over Foreign Ships in Territorial Waters', Michigan Law Review, Vol. 2, No. 5 (Feb., 1904), pp. 333-357; P.D., Clark, supra, p.222
[53] Article 19, 1958 Convention and Article 27, 1982 Convention
[54] M.N., Shaw, supra, p.512
[55] C.B., Selak, Jr 'Fishing Vessels and the Principle of Innocent Passage', The American Journal of International Law; Vol. 48, No. 4 (Oct., 1954), pp. 627-635
[56] Article 14(2), 1958 and Article 18(1), 1982
[57] Article 14(3), 1958 and Article 18(2), 1982
[58] Article 14(4), 1958 and Article 19(1), 1982. The conducts that are prejudicial to the peace, good order and the security of the coastal state are enumerated under Article 19(2) of the 1982 convention

Every foreign vessel in the territorial sea must also observe the laws and regulations of the coastal state before their passage could be regarded as innocent[59]. The 1982 convention has built upon this provision by expressly stating the kind of regulations a coastal state may make[60]. It must be mentioned that the aforesaid provisions are also applicable to foreign war ships. Although, this has been subject of controversy between the western and eastern maritime powers as the Russians have traditionally maintained that foreign war ships have no right of innocent passage and must first obtain the permission of the coastal state before navigating in her territorial sea[61].

The current state practice suggests that the general rules of innocent passage as provided under the 1982 convention is applicable to war ships as well. Hence, a foreign war ship has right of innocent passage through the territorial sea of another state without prior authorization in so far as it complies with the provisions of Article 19(2) and 21(1) of the 1982 convention[62].

Where any of the above provisions is breached, a coastal state may take necessary steps to prevent passage or steps to prevent the breach of any of the provisions. Where it involves a foreign war ship, the costal state may require it to leave immediately.

Another important aspect of passage through the territorial sea is what is called transit passage. Prior to 1982, the status of international straits was embroiled in controversy. There are some straits that fall within the territorial seas of some coastal states. Straits are passages that connect one part of the sea to another. A very good example is the Strait of Hormuz which connects the Persian Gulf to the high sea[63].

It has been the practice for littoral straits states to assert control over straits in the manner they control the territorial sea if such straits fall within their territorial sea. As one author has observed, this has been a big concern for maritime powers as they fear that littoral strait states might try to limit tonnage through the straits, stop traffic or impose tolls for passage, or even close straits in extreme cases[64]. By implication, if straits' states could regulate passage through international straits in the same manner as they regulate their territorial waters, submarines could be required to travel on the surface and civil and military aircraft could be denied overflight passage through straits[65].
The matter was finally settled under the 1982 convention as the right of transit passage was finally agreed upon by state parties. This did not go for a platter of gold. It was the result of a trade off between the major maritime states and other littoral states as this was the reason for the acceptance of the 12 mile limit by the major maritime states[66]. This is what Judge Vukas reffered to as 'a package deal'[67].

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[59] Article 14.5, 1958

[60] See Article 21.1, 1982 Convention

[61] E. Butler 'Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy', The American Journal of International Law, Vol. 81, No. 2 (Apr., 1987), 332

[62] See USA/USSR joint statement on Uniform Interpretation of Rules on international law governing Innocent Passage, 23 September 1989, 28 ILM 444 (1989)

[63] The Strait is now a subject of impending confrontation between the United State and Iran over the latter's threat to close down the Strait from navigation should the West carry out their threat of larger embargo on Iran oil.

[64] J. Kraska 'The Law of The Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law', The Geo. Wash. Int'l L. Rev. (Vol. 39[], 2007), p.551

[65] ibid

[66] B. H. KAS: The Law of the Sea: Selected Writings, (Leiden, Martinus Nijhoff Publishers, 2004), p.20

[67] ibid

IX SUMMARY/CONCLUSION

It would be observed that the legal regime of the territorial sea is of historical importance to the whole of the subject of law of the sea. It has been shown that at one time, it was believed that the world oceans belong to all mankind and no one could appropriate it. The Greek brought the idea of ownership of the Mediterranean Sea and subsequently, the view was that the seas could be owned.

It took the intervention of theorists like Grotius to sensitise other nations that the ocean belong to all. Selden nurtured the idea of territorial sea through his mare clasum. Hence, from the onset, there was a generally agreed notion that the ocean comprises the high sea and the territorial sea.
The Second World War, advancement in technologies and the discovery of essential mineral resources gave a new dimension to the regime of the territorial sea as nations then sea the need to exercise maximum control over the belt of waters adjacent to their territory far beyond what was prevalent then.
As it stands today, the legal regime of the territorial sea seems to have been relatively settled by virtue of that all encompassing conference convened to discuss all the issues bordering the regime of the territorial sea. After series of politicking, the conference was able to come out with a very rich convention which has been described as the most comprehensive and well negotiated convention after the UN Charter.