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Jurisdiction

of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea

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Foreword

Dr *Yang's* book deals with the port and coastal State's jurisdiction over foreign merchant ships as well as with the rights and duties of these ships in the internal waters and in the territorial sea. The international law is rather different in both situations. Despite the fact that it faces a number of issues such as, for example, a contested right of access to ports or conditions for port access requirements, the law of foreign merchant ships in internal waters has never been codified. On the other hand, already the League of Nations considered the law of the territorial sea as appropriate for codification in the 1930s. And the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 was indeed a codification of most rules of international law on the territorial sea known at that time. The remaining issue of the breadth of the territorial sea was finally solved during the Third United Nations Conference on the Law of the Sea: art. 3 of the UN Convention on the Law of the Sea of 1982 set it at a limit not exceeding 12 nautical miles. In addition, the right of innocent passage of foreign ships through the territorial sea is regulated in the 1982 Convention in greater detail than ever before, whilst the new regime on the prevention of marine pollution provided in Part XII of the Convention has also considerable impact on this right. Notwithstanding this development of the law, potential conflicts concerning foreign merchant ships on innocent passage through the territorial sea may still arise. Due to the extension of their territorial seas to 12 miles by most States during the 1970s and 1980s, the possibilities of such conflicts have even increased. In his comprehensive book Dr *Yang* has painstakingly analysed the relevant legal issues arising both in the internal waters and the territorial sea with regard to foreign merchant ships. Thereby he has cautiously strived for reasonable and generally acceptable solutions. His professional experience of several years in the State Oceanic Administration of China before he came to Hamburg for further studies has helped him to take a realistic approach with respect to the relevant States practice. This, no doubt, gives the book a particular value.

Hamburg, November 2005

Rainer Lagoni

Preface

This book was a Ph.D. thesis submitted to the Faculty of Law, Hamburg University, Germany, in 2004. It was accepted by the Faculty with the grade of *magna cum laude* in the same year. My first thanks go to my academic supervisor and the first examiner of the thesis, Professor Dr. *Rainer Lagoni*, Director of the Law of the Sea and Maritime Law Institute (LOSMLI), Hamburg University. He went beyond his supervisory role and I always enjoyed encouraging discussions with him and his constructive comments. I was especially impressed by his sharp perception and far-sighted ideas when addressing difficult topics. Professor Dr. Dr. h.c. *Rüdiger Wolfrum*, Director of the Max Planck Institute for Comparative Public Law and International Law and Judge of the International Tribunal for the Law of the Sea, acted as the second examiner of my thesis. I express my deep appreciation for his discerning evaluation. I wish also to acknowledge the kind help extended to me by Mrs. *Ney-Schönig* and Mrs. *Pabusch* at the LOSMLI.

My sincere gratitude goes to KAAD (*Katholischer Akademischer Ausländer-Dienst*), a German foundation, for granting me a scholarship that enabled me to complete my studies successfully. I am personally indebted to Dr. *Heinrich Geiger* and Mrs. *Karin Bialas* for their kind advice and assistance. The International Max Planck Research School for Maritime Affairs, Hamburg, has admitted me as an associate and accepted this work for its Hamburg Studies on Maritime Affairs. The discussions at the Research School were inspiring and encouraging, I am most grateful to Professor Dr. Dr. h.c. *Jürgen Basedow* and his co-directors. Further I would like to thank Dr. *Wolfgang Wurmnest*, *Ingeborg Stahl* and *Grete Erma* for editing the final version of this manuscript before it went to print.

The enduring friendship with the family of Professor Dr. *Hans Bienlein* accompanied my family throughout our stay in Germany. It constituted a major source of strength and inspiration that were indispensable for me to continue with my work. Their smiles, humor, help and especially heartfelt love for my two children will always stay in my memory.

The final words of appreciation are reserved for my family. My wife, *Jinhui*, deserves the deepest thanks for her constant encouragement and immeasurable support. I also appreciate the presence of my little daughter, *Lucy*, in my life. Her smiles – even screams – gave me new strength and helped get over all hardships during writing. I especially present this book to my newly born son, *Mike*, as a welcome gift on his birth.

Beijing, May 2005

Haijiang Yang

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Abbreviations

AiIL	<i>American Institute of International Law</i>
AJIL	<i>American Journal of International Law</i>
APCIS	Asia-Pacific Computerized Information System
Arrest Convention 1999	International Convention on Arrest of Ships 1999
AVR	<i>Archiv des Völkerrechts</i>
AYIL	Australian Yearbook of International Law
Basel Convention 1989	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
BGBI. I	Bundesgesetzblatt, Teil I
BGBI. II	Bundesgesetzblatt, Teil II
BYIL	<i>British Yearbook of International Law</i>
CHS 1958	Convention on the High Seas
CLC 1969	International Convention on Civil Liability for Oil Pollution Damage 1969
COLREG 1972	Convention on the International Regulations for Preventing Collisions at Sea 1972
CS	Continental Shelf
CTS 1958	Convention on the Territorial Sea and the Contiguous Zone
CWA 1972	Clean Water Act 1972 of the US
CYIL	Canadian Yearbook of International Law
CZ	Contiguous Zone
DCME	design, construction, manning or equipment
DGVR	Deutsche Gesellschaft für Völkerrecht
DVIS	Deutscher Verein für Internationales Seerecht
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EPIL	<i>Encyclopedia of Public International Law</i>
EU	European Union
EUROS	European Community Ship Register
FAL 1965	Convention for Facilitation of International Maritime Transport
FoC	Flag of Convenience
FRG	Federal Republic of Germany
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GDR	(former) German Democratic Republic
GRT	Gross Registered Tonnage
GYIL	<i>German Yearbook of International Law</i>
HambGVBl.	Hamburger Gesetz- und Verordnungsblatt
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICNT	Informal Composite Negotiating Text
ICS	International Chamber of Shipping
IJMC	<i>International Journal of Marine and Coastal Law</i>
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO 147	Convention Concerning Minimum Standards in Merchant Ships
IMCO	Inter-governmental Maritime Consultative Organization
IMDG Code	International Maritime Dangerous Goods Code
IMO	International Maritime Organization
INMARSAT 1976	Convention on International Maritime Satellite Organization 1976
ISM Code	International Safety Management Code
ISNT	Informal Single Negotiating Text
ITLOS	International Tribunal for the Law of the Sea
LDC 1972	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972
LL 1966	International Convention on Load Lines 1966
LOS	<i>Law of the Sea Bulletin</i>
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships
MFNT	most-favored-nation treatment
MSR	Mandatory Ship Reporting
nm	nautical mile
OECD	Organization for Economic Co-operation and Development
O.J.	Official Journal of the European Communities
ODIL	Ocean Development and International Law
OPA 1990	Oil Pollution Act 1990 (USA)
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic 1992
Paris MOU 1982	Paris Memorandum of Understanding on Port State Control
PCIJ	Permanent Court of International Justice
PWSA 1972	Port and Waterways Safety Act 1972 of the US
RIAA	Reports of International Arbitral Awards

RSNT	Revised Single Negotiating Text
SBC	Sea-Bed Committee
SeeSchStrO	Seeschiffahrtsstraßenordnung
SOLAS 1974	International Convention for the Safety of Life at Sea 1974
SPF	South Pacific Forum
STCW 1978	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978
StGB	Strafgesetzbuch (German Criminal Code)
StPO	Strafprozessordnung (German Criminal Procedural Law)
TEC	Treaty establishing the European Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on the European Union
Tokyo MOU 1993	Memorandum of Understanding on Port State Control In the Asia-Pacific Region
TONNAGE 1969	International Convention on Tonnage Measurement of Ships 1969
TSS	Traffic Separation Schemes
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCCORS	United Nations Convention on Conditions for Registration of Ships
UNCLOS I	First United Nations Conference on the Law of the Sea (1958)
UNCLOS II	Second United Nations Conference on the Law of the Sea (1960)
UNCLOS III	Third United Nations Conference on the Law of the Sea (1973-1982)
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
US	United States of America
VDR	Voyage Data Recorder
VTs	Vessel Traffic Services
WLR	Weekly Law Reports
WTO	World Trade Organization
YBILC	<i>Yearbook of the International Law Commission</i>
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

Introduction

The interface between coastal State jurisdiction over foreign shipping in coastal waters on the one hand and the rights of a third party to navigate therein on the other has long constituted a basic subject in the law of the sea. Under the sway mainly of the United Nations Convention on the Law of the Sea (UNCLOS), most coastal States have chosen to extend their internal waters by introducing straight baselines. They have also expanded their territorial seas by increasing the breadth thereof up to twelve nautical miles. Meanwhile, coastal State jurisdiction in the territorial sea has been unprecedentedly corroborated under the Convention. In exchange, the universally recognized regime of innocent passage in the territorial sea and in some parts of internal waters is also delicately preserved in the Convention. However, the intricate stipulations of the Convention appear, in many aspects, to be aimed more at striking a balance acceptable to all than at setting operable legal parameters.

At any rate, under the new legal framework, the interaction between coastal State jurisdiction and the right of innocent passage takes on a new meaning that is not clear at first sight. Therefore, it is of both theoretical and empirical significance to carry out a systematic analysis of this matter. The purpose of the dissertation is to try to find out which measures to what extent coastal States may take in exercise of their territorial jurisdiction *vis-à-vis* foreign merchant ships within internal waters and the territorial sea, and, particularly, to ascertain how far coastal States may proceed with their various kinds of powers against foreign ships without unduly frustrating the right of innocent passage of the ships.

The analysis will be based primarily on the provisions of UNCLOS, which entered into force on 16 November 1994 and at the moment boasts 145 parties,¹ while other relevant international legal instruments, some bilateral treaties, certain customary international law rules and State practice are also taken into account where necessary. In the meantime, the references are to the latest publications available.

The dissertation begins with an examination of some basic concepts that shall frequently emerge in the ensuing discussions, including ship, nationality of ship and jurisdiction over foreign ships. It should serve as the crucial basis for our further elaborations in the parts that follow.

¹ See the website of the Division for Ocean Affairs and the Law of the Sea, the UN available at: <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> (last visited: March 30, 2004).

Part 2 of the thesis will focus on the jurisdiction of coastal States over foreign merchant ships in internal waters. A review will first be made of the scope and legal status of internal waters. Then efforts will be made to find out whether there is a general right of access to foreign ports and a right of passage in internal waters in international law, while some particular constellations, such as distress situations, the freedom of transit, passage in canals and historic waters are also brought into consideration. The Part continues with discussions on the legal status and treatment of foreign ships in ports and other parts of internal waters, criminal and civil jurisdiction over foreign ships, and port and coastal state jurisdiction in respect of foreign ships in ports as outlined by UNCLOS. Port State control will be looked into as a special feature of coastal State jurisdiction in internal waters. In this Part no space is reserved for jurisdiction over foreign ships on innocent passage in internal waters. In our opinion, there is in principle no difference from that in the territorial sea, which will duly be addressed in Part Four of the thesis.

Part 3 of the dissertation revolves around the right of innocent passage in the territorial sea. This will start with an evolutionary recapitulation of some basics of the territorial sea where the right of innocent passage basically exists, namely, the juridical nature and the breadth of the territorial sea in the light of international codification efforts and State practice. Following that, a detailed analysis, as the main subject in this Part, will be provided on the background and the developments of the right of innocent passage. This will take into consideration relevant conventional prescriptions and international judicial practice, as well as State practice, in order to ascertain the general contours of the innocent passage regime and try to establish the least common denominator in spite of the possible divergence on the interpretation of the regime. Later on, the duties of foreign ships during innocent passage and that of coastal States shall be examined.

Like Parts 2 and 3, Part 4 also constitutes a pillar of the dissertation. The aim is to systematically scrutinize the powers and competence *vis-à-vis* foreign merchant ships, either of a regulatory or enforcement nature, which coastal States may have under existing international law of the sea, with a desire to obtain a general picture of what coastal State jurisdiction over foreign ships in the territorial sea presently looks like. In the course of the investigation, we will try to highlight the relevance of the jurisdictional measures to the right of innocent passage, although it might not always be as easy as expected. In this Part, the legislative jurisdiction of coastal States will be examined first. Then ensues a close look into administrative jurisdiction that is again broken down into further categories. Enforcement jurisdiction concerning the marine environment will be elaborated separately, given its increasing prominence in the whole matter of coastal State jurisdiction. Criminal and civil jurisdiction over foreign ships in the territorial sea will be dealt with at the end of the Part.

Finally, based on the previous elaborations, the dissertation will seek to draw some general observations as conclusion and outlook in the concluding Part.

However, it is not going to touch on the special issues with respect to archipelagic waters and straits used for international navigation in order to concentrate on the interaction between coastal State jurisdiction and international shipping activities in internal waters and the territorial sea proper.

Part 1: Basic Concepts

A. Ship

I. Definition: ship or vessel

There is no generally accepted definition of ship either in customary or conventional international law. It appears also hopeless to find a uniform description of ship in domestic legal systems. The concrete meaning of ship varies with different contexts, application scopes and different purposes reflected in the given legal instrument.² It is to be noted that, in some cases, the term “vessel” is preferred as an alternative for “ship”.

1. Ordinary meaning and definition efforts by scholars

Under international law, the ordinary meaning of a term is of practical significance for the interpretation and application of the treaties concerned, where the definition thereof is absent.³ To this end, “ship” refers to “any large floating vessel capable of crossing open waters, as opposed to a boat”,⁴ while “vessel” means “a hollow structure designed to travel on water and carry people or goods, a ship or boat”.⁵

From these elucidations, both terms can be taken as quasi-synonymous with the slight suggestion that “vessel” bears a slightly broader connotation. Anyhow, “ship” can largely be seen as the generic name for sea-going vessels.⁶ The point is

² Meyers, *Nationality of Ships* (1967), 16; O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 748.

³ See art. 31(1) of the Convention on the Law of Treaties which reads: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” [1969] 8 *ILM* 690; A/CONF.39/27.

⁴ *The New Encyclopaedia Britannica* (1988), vol. 10, 746.

⁵ Hawkins (ed.), *The Oxford Reference Dictionary* (1986), 911.

⁶ *Ibid.*, at 764; “A vessel that sails the ocean is called a ship”, *Encyclopedia American* (1884), vol. 24, 719.

also to be deduced from an English judicial statement⁷ and Yankov's explanation during the Third UN Conference on the Law of the Sea (UNCLOS III).⁸ Etymologically, "ship" was originally applied to sailing vessels with three or more masts;⁹ the term "vessel" was developed on a metaphorical basis from the root meaning of a tube-like structure in the body of living creatures.¹⁰

Attempts have been made by countless jurists to circumscribe the concept of ship. *Gidel's* definition underscored the importance of the capacity to move in water and excludes floating structures and vessels which are not capable of self-propulsion.¹¹ *Meyers*, however, included all seaworthy objects which can traverse the sea with the aid of towage or as hovercraft (air-cushioned vessels) under the category of ships in his "very broad definition".¹² According to a definition by *Lagoni*, a ship "can be described as a vessel used or capable of being used as a means of transportation on water" and it comprises lightships, floating cranes, dredgers, amphibious vessels, hydrofoils, hovercraft and submersibles. However, self-propelled boats, floating docks, floating islands and seaplanes are normally not counted as ships.¹³ Some authors attach more importance either to the existence of a community on board¹⁴ or the suitability of ordinary speech¹⁵ leading to the inclusion in or exclusion from the "ship" family. *Hasselmann* basically refused the inclusion of seaplanes and amphibious vessels in "ship", whereas he tended to prefer to refer the issue of definition to the individual States in question.¹⁶ It is believed, however, that the ILC intended the expression "ship" to cover all types of sea-going vessels, whatever their nomenclature and even if they are engaged only partially in sea-going traffic.¹⁷

⁷ The statement read: "... the definition 'ship' includes or embraces every description of vessel, which includes in turn, if one refers back to the definition of 'vessel', 'any ship or boat', but, by the definition of 'ship' any vessel of any description is only included if it is not propelled by oars. In other words, no vessel which is propelled by oars is within the definition of 'vessel'." *Edwards v. Quickenden and Forester* (1939), 261; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 748.

⁸ See *infra* note 35.

⁹ See Mason (ed.), *Encyclopaedia of Ships and Shipping* (1980), 583; 746.

¹⁰ See *The New Encyclopaedia Britannica* (1988), vol. 12, 336; *Encyclopedia Americana* (1984), vol. 28, 56; no reference is made to 'vessel' in *Encyclopaedia of Ships and Shipping and The New Columbia Encyclopedia*.

¹¹ *Gidel, Le Droit International Public de la Mer*, li.1, 1932, 70; cited as per Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 12.

¹² *Meyers, Nationality of Ships* (1967), 22.

¹³ *Lagoni, 'Merchant Ships' in Bernhardt (ed.), EPIL* (1989), 228.

¹⁴ *Florio* (1957), 36; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 748.

¹⁵ *Lazaratos in 22 Rev. hellén. de droit int. (pts. 3-4)*, 1969, 73; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 748.

¹⁶ *Hasselmann, Die Freiheit der Handelsschiffahrt* (1987), 60 ff.

¹⁷ Report of the ILC on the Work of its 43rd Session, 46 GAOR, Supp. No.10 (A/46/10), 1991, 119; *Nandan/Rosenne, The United Nation's Convention on the Law of the Sea 1982 - A Commentary* (1993), vol. II, 46.

2. The use of "ship" and "vessel" in international conventions

International law witnesses the different and functional definitions of "ship" or "vessel" in about 25 multilateral conventions related to maritime navigation.¹⁸

An extremely broad definition of "ship" has been given in MARPOL 73/78, whereby ship means:

a vessel of any type whatsoever operating in a marine environment and includes hydrofoil boats, air-cushioned vehicles, submersibles, floating craft and fixed or floating platforms.¹⁹

INMARSAT 1976 embraces a similar definition, which, however, differentiates itself from that in MARPOL 73/78 by keeping out fixed platforms.²⁰ An obviously functional usage of "ship" is contained in CLC 1969 when it prescribes that ship "means any sea-going vessel and any sea-borne craft of any type whatsoever, actually carrying oil in bulk as cargo".²¹

It is worth pointing out here that the concept of "ship", in many conventions, is expressly limited to sea-going vessel,²² excluding river craft, and that from the application scope commonly excluded are warships, government ships operated for non-commercial purpose, fishing vessels, pleasure yachts and small ships or some of them.²³

In some other conventions, the use of "ship" gives way to that of "vessel". For instance, COLREG 1972 comes out with a broad definition of "vessel" by providing that:

The word 'vessel' includes every description of water craft, including non-displacement craft and seaplanes, used or being capable of being used as a means of transportation on water.²⁴

There is a similar description in LDC 1972 that regards waterborne craft of any type as vessels, irrespective of whether self-propelled or not.²⁵ Many conventions using the term "vessel" are likewise not applicable to warships and certain particular types, just like the conventions which prefer the term "ship".

While the definition of "ship" or "vessel" in a convention can surely help us find out the specific connotation of the terms in the convention, some influential

¹⁸ Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 61.

¹⁹ Art. 2(4) MARPOL 73/78; the description of ship in the preceding convention is, nonetheless, very restrictive by stating "ship means any seagoing vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage...", see art. I(1) 1954 OILPOL Convention.

²⁰ Art. 1(f) INMARSAT 1976.

²¹ Art. 1(1) CLC 1969.

²² *Ibid.* art. 4(2) LL 1966; art. II(2)(a) of the Intervention Convention 1969; art. 1(1) ILO 147; art. II(9) STCW 1978; art. 2 UNCCORS 1986.

²³ E.g. arts. 5(c) and (d) LL 1966; art. 3(3) MARPOL 73/78; art. 1(4) ILO 147; art. III STCW 1978; art. 8(2) of the Convention on Arrest of Ships 1999.

²⁴ Rule 3(a) COLREG 1972.

²⁵ Art. III(2) LDC 1972.

conventions, including the Convention on Arrest of Ships 1999, the Basel Convention 1989 and even UNCLOS, contain no definition of “ship” or “vessel”. It contributes further to the obscurity of the legal instruments and could spark vigorous discussions on the use of the terms.

3. The use of “ship” and “vessel” in UNCLOS

Compared with UNCLOS, the discrepancy in using different terms is negligible in earlier instruments of the law of the sea. In the Final Act of the 1930 Hague Conference for the Codification of International Law, only the term “vessel” was used,²⁶ except for the appearance of “warships” as a fixed expression.²⁷ CTS and CHS 1958 showed their preference, on the contrary, for “ship” save in art. 14 (5) CTS 1958, whereby fishing vessels were dealt with.²⁸

In UNCLOS, the words “ship” and “vessel” are used interchangeably. While the term “ship” finds its prevalence in Parts II, III (except in art. 42(1)(c)), IV, VII and X,²⁹ the term “vessel” is preferred in Parts I, V, XII (except in art. 233), XIII and XV.³⁰ The dichotomous usage of terms can, basically, be ascribed to the different leanings to “ship” or “vessel” of the two Committees which were entrusted to deal respectively with traditional or new questions of the law of the sea.³¹ Readers are justified in feeling some confusion as to the variety of different terms used, for different words might, at first sight, indicate different meanings, however slight the difference could be. A close look at the issue will, nonetheless, give us some new ideas.

In the first place, the problem of different terms concerns mainly the English and Russian texts,³² given that only one term is used, i.e. *buque* or *navire*, in Spanish and French texts. On the other hand, English, French, Russian and Spanish versions of the Convention are, pursuant to art. 320, equally authentic.

²⁶ See arts. 3-11, Annex to Part B “Territorial Sea” of the Final Act. LON C. 228.M. 115.V.1930.

²⁷ *Ibid.*, arts. 12, 13.

²⁸ Cf. arts. 14-20 CTS 1958; arts. 4-7, 9-13, 15-24, 27 and 29 CHS 1958. The other two Geneva Conventions, namely, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf, appear to have refrained from using either “ship” or “vessel”.

²⁹ Arts. 17 *seq.*, 38 *seq.*, 52 *seq.*, 90 *seq.*, 131.

³⁰ Arts. 1(5), 62, 73, 211, 217 *seq.*, 248, 255, 292. In other Parts, i.e. VI, VIII, IX, XI, XIV, XVI, XVII, no use of either “ship” or “vessel” seems to be found.

³¹ The work of the Second Committee at UNCLOS III led to the formulation of arts. 2 to 132, i.e. Parts II-X; the work of the Third Committee covered Parts XII, XIII and XIV, Nandan/Rosenne, *The United Nations Convention on the Law of the Sea – A Commentary* (1993), vol. II, 1; see also Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 56.

³² The difference between *chuanbo* and *chuanzhi* in Chinese, which is an authentic version of the Convention as well, is not so much that it has *per se* any legal significance as that it is a verbatim translation from the English text, since no distinction can be found at all between the two Chinese words.

Therefore, the words “ship” and “vessel” should not be interpreted as indicating different things in the Convention.³³ The same inference can be drawn also from the provisions of the Convention on the Law of Treaties, which reads:

Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of article 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.³⁴

From the drafting history of the Convention, it is also difficult to recognize the distinction between the two words. The Chairman of the Third Committee, the present judge of the ITLOS, *Yankov*, tried to establish the difference between “ship” and “vessel” in a report at the last session in 1982³⁵ and put forward an amendment proposal with the effect that ship and vessel are not identical with each other.³⁶ The proposal failed, however, to acquire necessary support. The English Language Group at UNCLOS III stated that it could not determine the legal distinction, if any, between the two nomenclatures.³⁷

It is notable that in June 1980, the US Government made an informal proposal for art.1 of the Convention in order to identify “ship” with “vessel”, but again, it was not adopted by the conference.³⁸

As in the Geneva Conventions, there is no definition of the term “ship” or “vessel” in UNCLOS. The absence of a definition could be traced back to the failure to include a draft article concerning a definition of the term “ship” in the draft Geneva Conventions by the ILC in 1955.³⁹ The idea of dispensing with the arduous definition of ship is deemed wise, given the background of the vast application scope and diverse subject matters of UNCLOS.

³³ Lagoni, ‘Merchant Ships’ in Bernhardt (ed.), *EPIL* (1989), 228; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 57.

³⁴ Art. 34(4) Convention on the Law of Treaties, 1969, UN Doc. A/CONF.39/27.

³⁵ At the session, Yankov noted that: “it was the understanding of the Third Committee that the broader term ‘vessel’ was more appropriate, for it would cover not only ships but also other floating structures whose use or operation might cause pollution of the marine environment.” See A/CONF.62/L.92 (1982), para.5, XVI, Off. Rec., 209 f.

³⁶ Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 56.

³⁷ Nandan/Rosenne, *The United Nations Convention on the Law of the Sea – A Commentary* (1993), vol. II, 45.

³⁸ One part of the proposal read: “For the purpose of the Convention ‘ship’ and ‘vessel’ have the same meaning...” Also Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 57.

³⁹ [1955] I *YBILC* 10; the draft article was drawn up by the special rapporteur of the Commission, Francois, in his sixth report and read: “A ship is a device capable of traversing the sea but not the airspace, with the equipment and crew appropriate to the purpose for which it is used.” [1954] II *YBILC* 9-10; Meyers, *Nationality of Ships* (1967), 16 f.

4. Extrapolations and definition of ship

From the above discussions, some extrapolations can reasonably be made with regard to the concept of ship and vessel.

Firstly, UNCLOS serves as an “umbrella convention” which leaves the task of specific definitions of ship or vessel to other special conventions and even to domestic legislations, provided they are compatible with it. This becomes much clearer in the domain of environment protection, where references are made to “applicable” or “generally accepted international rules and standards established through the competent international organization or general diplomatic conference”.⁴⁰ Various definitions of ship or vessel in national laws and regulations might lead to conflicts in the application of the Convention.

Secondly, so far as UNCLOS is concerned, there exists no difference in legal meaning between the two English words “ship” and “vessel”. In practice, “fishing vessel” and “warship” have been generally accepted as fixed expressions.

Thirdly, uncertain as the concepts of ship and vessel may be, the two terms distinguish themselves from other objects such as artificial islands, installations, structures⁴¹ or other devices.⁴² They are different objects and enjoy different legal statuses under UNCLOS. In addition, according to art. 94(2)(a) of the Convention, ships of small size (below 400 gross registered tons) could arguably be excluded from the concept of ship under the Convention.

Fourthly, the scope and implication of ship or vessel vary with the subject matters concerned, e.g. in the regulation of innocent passage and marine environment protection.⁴³ The precise connotation of ship will be determined in the concrete circumstances and given a context.

Finally, thanks to the developments of maritime law, especially in the field of environmental protection and technological progress, the notion of ship or vessel tends to be expanding. It would be advisable to leave the term “ship” with some elasticity.

Although it is impossible to produce a water-tight definition of ship that would be applicable to all subject matters of the law of the sea, for the purpose of the paper, the writer would like to venture to give a description of ship as follows:

“Ship” means self-propelled sea-going craft of any type whatsoever used in or being capable of maritime navigation, whether publicly or privately owned and used for whatever purpose.⁴⁴ Other devices including installations, structures, floating platforms may, *mutatis mutandis*, be taken as ship where they are engaged in navigation, either being towed or pushed by a waterborne craft.

⁴⁰ Arts. 211, 218, 220 UNCLOS.

⁴¹ Arts. 60, 80, 87 UNCLOS.

⁴² Arts. 145, 209 UNCLOS.

⁴³ Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 60.

⁴⁴ In the present international practice a ship is assumed to be not less than 500 GRT. See art. 2 UNCCORS; similar views expressed also in *the New Encyclopaedia Britannica* (1988), vol. 10, 746.

This broad definition of ship thus covers amphibious vessels, hydrofoils, hovercraft and submersibles, but excludes floating structures when they are not towed or pushed in navigation and boats, rafts or yachts propelled by paddles or sails. Therefore, such boat, raft or yacht may not claim the right of innocent passage in foreign territorial sea, but would have to be, at first, subject to the immigration laws of the coastal state.

In the following text, “ship” and “vessel” are considered as being legally identical, except as otherwise expressly specified. However, where the context permits, preference will be given to the word “ship”.

II. Categories of Ships

The categorization of ships may well depend on the various criteria employed. On the basis of ownership, ships can be divided into private and government/public ships. The latter include warships and government ships operated both for commercial purposes and non-commercial purposes,⁴⁵ such as police ships. The category of private ships also includes many different kinds of ships.

With regard to the purpose for which a ship is used, one may distinguish merchant ships from those used for other purposes. Merchant ships, whether owned publicly or privately, are ships mainly engaged in maritime transportation and include passenger ships, ordinary cargo ships, container ships, oil tankers and other bulk ships used for transporting coal, mineral ore and grain, etc. Non-merchant ships are research ships, surveying ships, supply ships, warships and other government ships operated for non-commercial purposes. The ships of the UN, its specialized agencies and the IAEA⁴⁶ are deemed to fall under this category.

Considering the different manner of propulsion and fuel, the notion of ship can be broken down into sailing ship, steamship, diesel ship, electric-driven ship, nuclear-powered ship and so on. In addition, based on building type or functional character, ships can also be grouped under several categories, such as passenger ships, container ships, Ro-Ro ships, tankers, bulk ships, tugboats, refrigerator ships, drilling vessels and ice-breakers.

III. Foreign Ship

The concept of foreign ship, as opposed to that of domestic ship, relates to the coastal State in question. It denotes a ship that is entitled to fly a flag other than that of the coastal State.

Normally the term of foreign ship is unequivocal enough and will not cause any problem. In general, the nationality of a ship is determined by its flag.⁴⁷

⁴⁵ See Subsecs. B, C under Sec. A of Part II UNCLOS.

⁴⁶ See art. 93 UNCLOS.

⁴⁷ See the second sentence, art. 91(1) UNCLOS.

However, the question may arise in practice whether a coastal State may, under certain special circumstances, refuse to recognize a ship not flying its flag as a foreign ship. In the case of *I'm Alone*, for instance, the American authorities did not regard the ship flying the British (Canadian) flag as a foreign ship, because it was *de facto* owned, controlled and managed by a group of persons who were nearly all American citizens. The ship was pursued and eventually sunk with gunfire in American waters.⁴⁸ The case related to the granting and recognition of the nationality of a ship, which will be examined in detail later.

In addition, the perception of foreign ship could meet with difficulties between two states which do not recognize each other. For instance, navigation of a North Korean merchant ship in the territorial sea of South Korea could pose the question of whether it is defined as a foreign ship. On the other hand, non-recognition of a state does not necessarily lead to non-recognition of its flag. For example, ships from the former GDR were treated as foreign ships and encountered no special restrictions in the coastal waters of the FRG.⁴⁹

IV. Legal Implication of Ship

As a means of navigation, a ship is in the first place a negotiable chattel with an assessable value.⁵⁰ However, it is not an ordinary chattel, but rather a chattel with a *sui generis* nature. First of all, a ship is a floating forum on which legal activities take place and are normally assumed to be subject to the laws and jurisdiction of the flag State. In this sense, a ship points towards its flag State. This appears to be more noticeable when, for example, non-discrimination, most-favoured-nation treatment, national treatment, or embargo are under discussion.

In some cases, a ship refers to the particular persons who have an interest in it.⁵¹ Where a ship is under custody or is involved in a lawsuit, the connotation of the ship may well extend to the operator, owner, crew on board, creditor bank, insurer and other persons who have a maritime lien or a statutory right to the ship or the goods on board the ship. Similarly, in the context of the right of innocent passage, a ship concerns more closely the relevant persons than the elusive flag state.

A ship is a unique subject matter of law. But pursuant to the views of many scholars, it is not an independent legal player nor does it possess a legal personality.⁵² The rights and obligations of a ship provided for in treaties are

⁴⁸ [1935] III *RIAA* 1607-1618.

⁴⁹ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 271.

⁵⁰ O'Connell/Shearer, *The International Law of the Sea*, (1984), vol. II, 747; Lagoni, 'Merchant Ships' in Bernhardt (ed.), *EPIL* (1989), 229; Meyers, *Nationality of Ships* (1967), 8.

⁵¹ *Ibid.*

⁵² Churchill/Lowe, *The Law of the Sea* (1983), 179; Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 295 f.;

broadly deemed to be derived from those of the State concerned in every given context. In other words, a ship cannot be the direct carrier of legal rights and obligations in the law of the sea, for a ship simply is not a subject of international law.

Bearing the above in mind, the example of innocent passage can be reverted to anew. Art.17 of UNCLOS stipulates: "Subject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." Here the right of innocent passage is actually to be enjoyed not by ships, but by the flag States of these ships. Nevertheless, it is to be admitted that "ship" is a general term which not only points to the flag State concerned, but may also cover other elements, such as crew, cargos, passengers, mortgage or other rights of any third parties. In this sense, it is necessary to refer to the contribution made by the ITLOS to the new development of the ship concept. In its Judgement of the *Saiga* (No.2) case, the Tribunal stated:

The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, ... Thus the ship, every thing on it, and every person involved or interested in its operation are treated as an entity linked to the flag state. The nationalities of these persons are not relevant.⁵³

Clearly, under the exegeses of the ITLOS, a ship is understood to be a unity composed of the ship itself, the cargoes on board, all persons involved in the operation of the ship and those who have interests in the ship and cargo. That is to say, a ship is no longer referred to solely as an inanimate object, but it could amount to an entity linked to the flag state.⁵⁴ It signifies the peculiar legal nature of a ship, which thus, in turn, deserves some special attention and treatment in the international law of the sea, given its essential importance in the field.⁵⁵

Along the same lines, persons having interests in a ship or cargoes on board would be legally entitled to claim damages from a coastal State if the latter has unlawfully denied the passage or intercepted the ship in the course of the passage. In that case, the ship as a unity may, normally represented by the master or owner of the ship, recover damages from the coastal state in question. Anyway, it does not mean that a ship can be an independent carrier of rights and duties in international law.

O'Connell/Shearer, *ibid.*, at. 752, 865 f; Meyers, "A ship is not a person nor is it territory." In *ibid.*, at, 14.

⁵³ Para.106 of the Judgment of the ITLOS of *Saiga* case on 1 July 1999, Case No.2, *Saint Vincent and the Grenadines v. Guinea*, ITLOS; available at <http://www.itlos.org/start2_en.html> (last visited: February 24, 2002).

⁵⁴ O'Connell/Shearer even went further by admitting the personality of a ship to a limited extent, in *The International Law of the Sea*, (1984), vol. II, 747; Schulte, *Die "Billigen Flaggen" im Völkerrecht* (1962), 37.

⁵⁵ Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 73.

B. Nationality of Ship

I. Introduction

The provenance of a ship's nationality goes back to the 1820s.⁵⁶ Before the term became current, some different factors, such as the nationality of the owner, composition of the personnel on board and the place of registration, were used to signify the connection of a ship to a country.⁵⁷ Notwithstanding the criticism and scepticism about the use of the term, the nationality of ship finds its legitimate place in international maritime law.⁵⁸ However, any effort to assimilate the nationality of a ship with that of a corporate or natural person would prove futile, inasmuch as the distribution purposes, preconditions, legal consequences and nature of these similar instruments are different from one another, though at the same time they have much in common.⁵⁹ International law allows, for instance, more than one nationality of a natural person or even a stateless person, but does not allow a ship to have dual nationality or to be a stateless ship, which may be ascribed to a ship without nationality.⁶⁰ In German law, two words are fortunately used to avoid any possible misunderstanding, namely, *Staatsangehörigkeit* referring to the nationality of a natural person and *Staatszugehörigkeit* to that of a ship or aircraft.

The instrument of nationality of ships is designed in international law to allocate jurisdiction and control as well as diplomatic protection over the ships and to place certain interests of the relevant persons under the authority of a particular state. The term "nationality of ships" reveals, as it stands at present, no more than that of the registration in a state and the right to fly the flag of the same state.⁶¹

⁵⁶ O'Connell/Shearer, *The International Law of the Sea*, (1984), vol. II, 751; Skourtos, *Die Billig-Flaggen-Praxis und die Staatliche Flaggenverleihungsfreiheit* (1990), 132 ff.

⁵⁷ Ready, *Ship Registration* (1998), 4.

⁵⁸ Both CHS 1958 and UNCLOS refer to ships as having a nationality. For further details see arts. 5-7 of CHS 1958 and arts. 91-92 of UNCLOS; Meyers used "allocation" instead of "nationality", in *Nationality of Ships* (1967), 31 ff.; the use of the term "nationality" is believed to have obscured the reason for identifying the connecting factor between the ship and State. O'Connell/Shearer *The International Law of the Sea*, (1984), vol. II, 752.

⁵⁹ Meyers, *Nationality of Ships* (1967), 26f.; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 73 f.

⁶⁰ Arts. 91, 92(2) UNCLOS.

⁶¹ It is "merely shorthand for saying that a ship is jurisdictionally connected with a State". O'Connell/Shearer, *The International Law of the Sea*, (1984), vol. II, 752.

The rationale of the nationality of ships can be justified for the maintenance of viable public order on the high seas for common use.⁶² Subject to related international rules and standards, the freedom of the high seas signifies the unrestricted access of ships of all nations to all parts of the seas except those under the sovereignty or jurisdiction of coastal States. Although international law lays down numerous rules for the sound exercise of this freedom, aimed at avoiding chaos at sea, the enforcement of the rules still rests with the flag States through the jurisdiction exercised over their ships. For this purpose, a cornerstone of the regime of the high seas has been built whose implication reaches into the law of the sea in general until today. It is that the jurisdiction over a ship on the high seas lies exclusively with the state to which the ship belongs.⁶³ As a result, every ship on the high seas must have a nationality. A stateless ship exposes itself to the arrest by the warships of any State on the high seas and enjoys no diplomatic protection, for the statelessness of a ship, unlike that of a physical person, is forbidden in international law in the interest of all mankind.⁶⁴ Such a ship may be denied access to a foreign port.⁶⁵ Nevertheless, a stateless ship is not a ship without law and jurisdiction. In such a case, the law of the State of which the ship-owner is a national applies.⁶⁶

It is worth mentioning that there exist many conterminous expressions pertaining to, more or less, the nationality of ships. In UNCLOS only, *inter alia*, appear "registration",⁶⁷ "right to fly its flag" and "documents",⁶⁸ "of their registry",⁶⁹ "ships of all States",⁷⁰ "genuine link",⁷¹ "using them according to convenience"⁷² and "duties of the flag State".⁷³ It is necessary to discuss these in more detail.

⁶² Similar views expressed by Churchill/Lowe, *The Law of the Sea* (1983), 179 f.; Brownlie, *Principles of Public International Law* (1998), 428; Ready, *Ship Registration* (1998), 1 f.

⁶³ Reflected in art. 6 CHS 1958 and art. 92 UNCLOS.

⁶⁴ Schulte, *Die "Billigen Flaggen" im Völkerrecht* (1962), 40; "in the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is a freedom for such vessels only as sail under the flag of a State." Oppenheim, *International Law: a treatise*, (1974), vol. 1, 546.

⁶⁵ Lagoni spoke of "ships under an unrecognized flag", in 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] *AVR* 270; Lagoni, *discussions* (1990), Heft 31, DGVR, 157; see different views of Wolfrum, *Rechte der Flagge und "billige Flaggen"* (1990), 182.

⁶⁶ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 755 f.; Lagoni, 'Merchant Ships' in Bernhardt (ed.), *EPIL* (1989), 230.

⁶⁷ Art. 91 UNCLOS.

⁶⁸ *Ibid.*

⁶⁹ Arts. 211(2), 217 UNCLOS.

⁷⁰ Art. 17 UNCLOS.

⁷¹ Art. 91 UNCLOS.

⁷² Art. 92(2) UNCLOS.

⁷³ Art. 94 UNCLOS.

II. Registration

The registration of ships is believed to have its origins in the law of imperial Rome.⁷⁴ The term “registration” means the entry of the ships in the public register of a State and is actually also a way of allocating national attribution to a ship. Registration generally, but not always, constitutes a prerequisite for the acquirement of a nationality and is ultimate evidence of that for a ship. It is also the basis for the right to fly the flag of the State where it is registered, for the issuance of relevant documents to the ship⁷⁵ and the exertion of diplomatic protection as the case may require. The determination of the procedure for registration and of the items required to be filed in the register falls within the scope of State legislation.

Given the importance of registration, it is desirable to find out whether international law lays down any rules with respect to the conferment of nationality on a ship. At the beginning of the last century, it appears that each State enjoyed absolute discretion in this regard. In the case of *The Muscat Dhows*, whereby Great Britain accused France of an infringement of a joint declaration concerning the independence of Muscat made by both countries in 1862 by having authorized subjects of Muscat fly the French flag, the Permanent Court of Arbitration asserted that “generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”⁷⁶ The finding has survived in art. 5(1) of CHS 1958 and art. 91(1) of UNCLOS. Nonetheless, the mentioned articles go on to limit the power of registration by adding a requirement of a “genuine link” which will be the topic of another section of the thesis.

Despite the present debate on a genuine link, it could fairly be stated that an unqualified freedom for a state to confer its nationality on ships does not seem to exist in international law. Registration is subject to some well-established general rules of, *inter alia*, no dual nationality of ships, behaving in good faith and no abuse of right etc., if they could be deemed as such. Therefore, on the one hand,

⁷⁴ Rienow, *The Test of the Nationality of a Merchant Vessel* (1937), 216.

⁷⁵ This is supported by Churchill/Lowe, *the Law of the Sea* (1983), 180; Brownlie, *Principles of Public International Law* (1998), 428; Ready, *Ship Registration* (1998), 2 f.; Oxman, ‘Jurisdiction of State’ in Bernhardt (ed.), *EPIL*, vol. III, 58; art. 3 of the Ship Registration Regulations of China; § 3 a) of *Flaggenrechtsgesetz* of Germany; Núñez-Müller would seem to go too far by amplifying certain exceptional state practice when he wrote: “Nicht maßgeblich ist hingegen die Eintragung des Schiffes in das Schiffsregister.” “vielmehr setzt, wie Art.94 Abs.2 Lit.a) SRÜ deutlich macht, die Registereintragung das Flaggenführungsrecht und damit die Staatszugehörigkeit voraus und macht diese nur publik.” in *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 76 f.

⁷⁶ [1905] XI *RIAA* 83 *et seq.*; Churchill/Lowe, *The Law of the Sea* (1983), 180; O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 752 f.; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 127 ff.; Skourtos, *Die Billig-Flaggen-Praxis und die Staatliche Flaggenverleihungsfreiheit* (1990), 104 ff.; Seidel, ‘The Muscat Dhows’ in Bernhardt (ed.), *EPIL* (1997), vol. 3, 196.

the act of registration falls without question in the competence of States. On the other, a valid registration under domestic law is not necessarily valid under international law.⁷⁷

In that sense, the generous recognition of the validity of *Saiga*'s provisional registration by the ITLOS in its Judgment,⁷⁸ although on the day of its arrest the registration had expired and no other registration whatever had been granted to it according to the laws of Saint Vincent and the Grenadines, tends to be too wide and thus questionable.⁷⁹ First, the ITLOS was obviously convinced by the creative submission made by the country that "just as a person would not lose nationality when his or her passport expires, a vessel would not cease to be registered merely because of the expiry of a provisional certificate."⁸⁰ However, a ship can not be assimilated with a natural person in this matter. A ship normally acquires nationality by registration, whereas a person gets nationality not based upon these formalities, but ultimately upon family affinity or other social fact of attachment. Additionally, there is the personal allegiance between a national and his or her State, but not between a ship and its flag State. Thirdly, the conclusion could be drawn from the case that the validity of the registration certificate does not affect that of the registration *per se* as a fact, once the ship has been registered. The legacy of the judgment could reach far beyond the case and debilitate the implementation of several international treaties that depend on the validity and conformity of relevant certificates.⁸¹

III. Documents: the right to fly a flag

Art. 91(2) UNCLOS follows art. 5(2) CHS 1958 almost verbatim.⁸² By "documents" mentioned in the articles are meant those issued by the competent authority of a state evidencing the ship's nationality and the right to fly its flag. Generally, registration and documentation go hand in hand in a process, but it is not always the case. In some States, particularly in flag of convenience states, provisional flag documents can be issued prior to formal registration.⁸³ In the case

⁷⁷ A similar point was made by Núñez-Müller when he stated "*Die wohl überwiegende Völkerrechtslehre geht daher davon aus, dass das Völkerrecht keine allgemeine Pflicht zur Anerkennung fremder Hoheitsakte – und seien sie völkerrechtmässig – kennt. ... Umgekehrt besteht keine völkerrrechtliche Pflicht zur Anerkennung völkerrechtswidriger Flaggenverleihungen; denn dies wäre ein Widerspruch des Völkerrechts in sich selbst.*" In *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 122 f.; see also O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 757 f.

⁷⁸ Paras. 60-62.

⁷⁹ For the comments on the registration of *Saiga*, see Lagoni, '*Folgen des Saiga-Urteils des internationalen Seegerichtshofs für die Seeschifffahrt*' (2000), 16 ff.

⁸⁰ Para. 60 of the Judgment.

⁸¹ Among others, LL 1966, SOLAS 1974, STCW 1978. The compromise on validity results inevitably in one on conformity.

⁸² UNCLOS employs "Every State" while CHS 1958 used "Each State".

⁸³ For example, in Panama. See Ready, *Ship Registration* (1998), 131 ff.

of bareboat charter, a ship registered in the ship-owning State can be entitled to fly the flag of the chartering State. Here again the document issued for the flag right is distinct from the registration.

It may thus be expected to distinguish registration from documentation. Registration, in general, serves as a prerequisite for the attainment of nationality and for the right to fly a flag. It refers to the recognition of the title and other rights, e.g. mortgages, to a ship as well; documentation, on the other hand, at least for the purpose of UNCLOS, is used for confirming the entitlement to fly a flag,⁸⁴ acting as an evidence of the flag right. Of course, in many countries the documents issued upon registration actually cover all issues concerned here.

A flag is merely the *prima facie* evidence for and a symbol of the ship's nationality, for some ships might not be properly registered as the flag indicates and ships without a flag are not necessarily without nationality. The flag should be flown from the stern whenever identification may be required, but there is no obligation in international law to show the flag at all times on the high seas.⁸⁵ In accordance with the provisions of UNCLOS, ships shall sail under the flag of one State and may not change their flags during voyage or while in a port of call.⁸⁶ In addition, a ship flying more than one flag may be deemed a stateless ship.⁸⁷

IV. Genuine Link Between the State and the Ship

In conventional international law of the sea, the requirement of "genuine link" first appeared in art. 5 (1) CHS 1958 and is repeated in art. 91(1) UNCLOS. Its origin⁸⁸ can be, however, traced back to the celebrated case of *Nottebohm* in 1955.⁸⁹ In the judgment of the case, the ICJ stated that, where a state purported to

⁸⁴ It is interesting to note that in art. 91(2) of UNCLOS only "the right to fly its flag" is mentioned with respect to "documents".

⁸⁵ Meyers, *Nationality of Ships* (1967), 163 f.; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 757.

⁸⁶ Art. 92(1) UNCLOS.

⁸⁷ Art. 92(2) UNCLOS.

⁸⁸ The origin of the genuine link concept is not clear. Quadri mentioned "*intenso collegamento*", which could be the ancestor of genuine link, for the first time in 1939. See Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 151 f.

⁸⁹ Nottebohm was born in Germany in 1881 and went to Guatemala to do business in 1905. After the outbreak of World War II, he went to Liechtenstein and submitted an application for the citizenship of that state. In October 1939, he obtained the nationality of Liechtenstein. In December, Guatemala declared war on Germany and as a result, he was arrested there and his property was confiscated. Nottebohm went to Liechtenstein in 1946 and the latter filed a case against Guatemala before the ICJ in 1951; Núñez-Müller, *ibid.*, at 156 ff.; Renton, *The Genuine Link Concept and the Nationality of Physical and Legal Persons, Ships and Aircraft* (1975), 43 ff.

exercise diplomatic protection for its nationals, the nationality should be the legal expression of a "genuine connection" between the individual and the state.⁹⁰

The introduction of the requirement of a genuine link was intended to curtail the deficit caused by flags of convenience. Nevertheless, in so far as the nationality of ship is concerned, two critical questions with respect to genuine link remain unanswered. One is what can be considered to amount to a genuine link as required;⁹¹ the other is which legal consequences there may be if no genuine link exists between the ship and the State. The vagueness of the prescription of genuine link leads to divergent interpretations concerning the concept. The proponents of "genuine link" regard it as a precondition for the registration that involves the conferment of nationality on a ship. Accordingly, the lack of a genuine link between the ship and the flag State would entitle other states to challenge the ship's nationality, or, at least, to reject the exercise of diplomatic protection by the flag State. The opponents of "genuine link" contend that a genuine link starts to exist only after the registration and reflects itself totally in the effective exercise of jurisdiction and control as required in art. 5(1) CHS 1958 and art. 94 UNCLOS.⁹² UNCCORS 1986 seems to have sought to substantiate the genuine link through an optional approach, namely, by reference to either ownership or manning of a ship.⁹³ However, the convention has not yet entered into force since its adoption 17 years ago.

The uncertainties of the concept of genuine link may help to explain the fact that this requirement as "*lex imperfecta*"⁹⁴ in international law has been poorly observed, if not totally ignored, in State practice. Therefore, it is necessary to resort to the relevant international adjudications to search for some certainty, if

⁹⁰ "... nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties... Conferred by a State, it only entitles that State to exercise protection *vis-a-vis* another State, if it constitutes a translation into juridical term of the individual's connection with the State which has made him its national." [1955] *ICJ Reports* 1, 23.

⁹¹ In its draft "Provisional Articles Concerning the Regime of the High Seas" the ILC put forward the criteria for ascertaining the existence of a genuine link in terms of ownership of ships in 1955, but it dropped them later due to lack of general support. See Schulte, *Die "Billigen Flaggen" im Völkerrecht* (1962), 104 ff.; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 164 ff.

⁹² Renton, *The Genuine Link Concept and the Nationality of Physical and Legal Persons, Ships and Aircraft* (1975), 106 ff.; Núñez-Müller, *ibid.*, at 155 ff.; Schulte, *ibid.*, at 73 ff.; Dörr, 'Das Zweitregistriergesetz' [1988] 26 *AVR* 377.

⁹³ "... a State of registration has to comply either with the provisions of paragraphs 1 and 2 of article 8 or with the provisions of paragraphs 1 to 3 of article 9, but may comply with both." See art. 7 UNCCORS 1986.

⁹⁴ Skourtos, *Die Billig-Flaggen-Praxis und die Staatliche Flaggenverleihungsfreiheit* (1990), 219 ff.; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 172.

there is any. In the *IMCO* case in 1960,⁹⁵ the ICJ held that the term of “largest ship-owning nations” was referable only to registered tonnage, because there was no other practical test for ship-owning nations, and that ships belong to the State in which they are registered.⁹⁶ With respect to the genuine link, the ICJ stopped short of adding any substance to the concept by merely stating that any further examination of a genuine link is irrelevant for the purpose of the case.⁹⁷ The advisory opinion of the ICJ in this case has been largely viewed as incapacitating the requirement of a genuine link for the registration of ships, considering that its legal impact should not be seen limited only to the case.⁹⁸ The case of *Barcelona Traction* in 1970 touched on the issue of a genuine link between a corporate person and a state but failed to reveal a new dimension.

In the *Saiga* case, the ITLOS rejected the chance of giving its support to the requirement of a genuine link. It asserted that the provisions of a genuine link in the Convention are not intended to challenge the registration and granting of nationality of ships, but to secure more effective exercise of jurisdiction and control of the flag State.⁹⁹ Dispensing with directly answering the question of what a genuine link is, the Tribunal proceeded solely to the proposition that there was a genuine link between the ship and the flag State at the time under discussion.¹⁰⁰ The interpretation of the ITLOS appears to be pragmatic, but is feared to have diminished the very meaning of the genuine link intended by the draftsmen of UNCLOS.¹⁰¹

The “genuine link” formula, as the direct approach against the flag of convenience, has not worked as well as expected. In consequence, the indirect approach has been increasingly employed by pressing flag States to implement international standards on the one hand and strengthening coastal/port state competence on the other.

V. What Could Be the Final Proof of Nationality?

In the *Muscat Dhows* case, the Arbitral Tribunal held that the Sultan of Muscat retained jurisdiction over the dhows, namely, that they still possessed Muscat

⁹⁵ The case concerned the constitution of the Maritime Safety Committee of the IMCO, which was renamed as the IMO in 1982. The ICJ was asked to give an advisory opinion about the constitution, especially the meaning of “largest ship-owning nations”.

⁹⁶ [1960] *ICJ Reports* 167-171.

⁹⁷ *Ibid.*, at 171.

⁹⁸ Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 233 ff.; Renton, *The Genuine Link Concept and the Nationality of Physical and Legal Persons, Ships and Aircraft* (1975), 125 ff.

⁹⁹ Para. 83 of the Judgment of the *Saiga* case (No.2) of the ITLOS on 1 July 1999.

¹⁰⁰ *Ibid.*, para. 87.

¹⁰¹ For further comments on the case, see Lagoni, ‘*Folgen des Saiga-Urteils des internationalen Seegerichtshofs für die Seeschifffahrt*’ (2000), 18 f.

nationality even though they were authorized to fly the French flag.¹⁰² There was presumably no registration of those dhows at that time. In modern international law, we have registration, flag documentation and genuine link, that all bear, more or less, upon the determination of the nationality of a ship. The relationship between them, however, remains unclear.

The wording in the second sentence of art. 91(1) UNCLOS is somewhat misleading.¹⁰³ From the wording it may well be inferred that nationality depends upon the right to fly a flag, apparently having nothing to do with the registration of ships. Anyway, registration, generally speaking, serves as the ultimate basis of nationality, because the flag is only the *prima facie* evidence of the nationality and needs to be justified by the right to fly a flag, that in turn has to be borne out by the flag document issued to that effect. The document, except in the cases of ownership transfer and bareboat charter arrangement, is in turn based firmly upon the valid registration.

That is to say, the valid registration would normally be final and conclusive proof of the nationality of a ship. The position is supported by the ITLOS in its judgment in the *Saiga* case.¹⁰⁴ The position is also reflected in state practice, as suggested earlier. For instance, a certificate of documentation, that is supposed to be similar to the certificate of registration and issued under US shipping law, is conclusive evidence of nationality for international purposes.¹⁰⁵

VI. Flag of Convenience

Since the 1950s, the expression of flag of convenience (FoC) has been used to refer to States like Panama and Liberia that permit foreign ship-owners with no real connection with them to register their ships in these states and confer their nationality on the ships.¹⁰⁶ The other terms with the same or similar connotation are open register, flag of refuge, flag of necessity, tax-free flag.¹⁰⁷ Besides the two mentioned States, Cyprus, Bahamas, Malta and Vanuatu also fall within the group of well-known FoC States. These States have attracted and collected a large part of the total world tonnage of commercial ships through the low threshold policies in terms of registration conditions, economic costs and management requirements.

¹⁰² [1905] XI *RIAA* 83; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 753.

¹⁰³ "Ships have the nationality of the State whose flag they are entitled to fly." art. 91(1) UNCLOS.

¹⁰⁴ Paras. 64, 66, the judgment of the *Saiga* case (No.2) on 1 July 1999, ITLOS. In this regard, the neglect of the importance of registration of ships by Núñez-Müller is noticeable, in *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994).

¹⁰⁵ See Sec. 659 of Title 46, USC; Sohn/Gustafson, *The Law of the Sea in a Nutshell* (1984), 12 f.

¹⁰⁶ Churchill/Lowe, *The Law of the Sea* (1983), 181; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 45 f.

¹⁰⁷ Núñez-Müller, *ibid.*, at 45; the German counterpart is "*billige Flaggen*".

In other words, the easy admission to the register, low fees and tax levied by such States,¹⁰⁸ low operational costs as a result of low salaries and manning levels, and loose jurisdiction and control that is believed to encourage the enterprises not to observe the relevant rules and standards give the shipowners considerable advantage over those who do not have their ships registered in such a way.

According to an annual report of the OECD, the proportion of FoC in total world tonnage has been increasing steadily in the last 60 years, viz. from 1.2% in 1939 to 37.8% in 1992.¹⁰⁹

Registration in the FoC states runs more like a business than a governmental act.¹¹⁰ In this connection, credit should be given to *Grundey* when he looked scathingly into the nature of the phenomenon.¹¹¹ The existence of FoC has prompted great concerns because of its negative impact on the national macro-economy, as well as security,¹¹² the implementation of international rules and standards with regard to the safety of ships, environmental protection and the social conditions of crew members. Particularly in the 1970s and 1980s, the issue of FoC became a target to be eliminated in the establishment of a New World Economic Order promoted by the UNCTAD. Notwithstanding the conclusion of UNCLOS, the fight against FoC has not proved to be as successful as expected. The “phasing-out” of the issue turns out to be unrealistic.

It can reasonably be supposed that the campaign against the FoC might be more effective if not motivated solely by political and economic considerations, but mainly by legal ones.¹¹³ The point appears to have been borne out by international practice in the last few years as the indirect approach has been used to incorporate the States of FoC into the international regime by inducing them to exercise effective jurisdiction and control over their ships on the one hand, and by strengthening the competence of coastal and port States on the other.

¹⁰⁸ For a merchant ship with 10,000 NRT registered in Panama, for example, the annual tax and consular rate amount to only about US\$3,000.

¹⁰⁹ Maritime Report 1992, OECD, Paris, 1993, 174.

¹¹⁰ For some FoC States, the registration of ships is handled by an office abroad. Liberia, for instance, has its office in Trenton, New York City.

¹¹¹ “A Flag of Convenience is the flag of a state whose government sees registration not as a procedure necessary to impose sovereignty and hence control over its shipping, but as a service which can be sold to foreign ship-owners wishing to escape the fiscal or other consequences of registration under their own flag.” Grundey, *Flags of Convenience in 1978* (1978), 2; cited after Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 47.

¹¹² Owing to flagging-out, the number of German merchant ships operated for international navigation fell sharply from 595 in 1978 to 267 in 1988. It is believed that at the beginning of 1987 the German fleet was not able to transport enough essentials of life to sustain Germany in case of a crisis. Dörr, ‘Das Zweitregistriergesetz’ [1988] 26 *AVR* 370 ff.

¹¹³ States of FoC feel that objections to the issue are based solely on the political and economic desire to destroy their shipping performance. Renton, *The Genuine Link Concept and the Nationality of Physical and Legal Persons, Ships and Aircraft* (1975), 112 ff.

It is worth noting that in the 1980s west European countries changed their attitude towards FoC.¹¹⁴ Since then they have developed so-called "Second Registers",¹¹⁵ which resemble FoC in some aspects. The phenomenon may well be explained with two reasons. First, they were frustrated by the failure of the long fight against FoC and aware that any attempt to eliminate it on the international level would be destined to fail due to its complexity. Secondly, west European States were faced with growing fiscal deficits at that time and could not afford to maintain the competitiveness of their fleets through subsidies and other financial assistance. However, by introducing "Second Registers" they can make their ships internationally competitive and keep them under the national flag. Consequently, they started to adopt some measures of FoC as practical alternatives. So far, the UK, France, Portugal, the Netherlands, Norway, Germany and Denmark as well as Spain have established their secondary or international registers situated either offshore or on the mainland.¹¹⁶ The German International Register¹¹⁷ is noticeably open only to German-owned ships and not intended to attract footloose tonnage from overseas. However, some typical elements of FoC including "home-land salary"¹¹⁸ have been introduced into the register. In 1998, "tonnage tax" was made applicable to all German sea-going ships aimed at further lowering the operational costs of the ships.¹¹⁹

In the light of the vigorous development of secondary registers, the Commission of the EC proposed a Council Regulation in 1989 aimed at rectifying the order of ship registration in Europe and establishing a Community Ship Register (EUROS)¹²⁰ which would offer many of the advantages of FoC or secondary registers. The proposal met, unfortunately, with no great enthusiasm from the European shipping industry,¹²¹ but strong opposition from trade unions¹²² and so

¹¹⁴ At the Registration Conference, these states opposed the definition of "genuine link" in detail with the same arguments that the US and Open Registers used in 1958, namely State sovereignty. See Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 325.

¹¹⁵ They are called "international registers" as well.

¹¹⁶ Ready, *Ship Registration* (1998), 29 ff.; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 44.

¹¹⁷ For details see *das Zweitregistergesetz* of 23 March 1989 (BGBl. 1989 I, 550); Dörr, 'Das Zweitregistergesetz' [1988] 26 *AVR* 366 ff.

¹¹⁸ Art. 21(4) of *Flaggenrechtsgesetz* reads: "Arbeitsverhältnisse von Besatzungsmitgliedern eines im internationalen Seeschiffsregister eingetragenen Kauffahrteischiffes, die im Inland keinen Wohnsitz oder standigen Aufenthalt haben, unterliegen bei der Anwendung des Artikels 30 EGBGB vorbehaltlich der Rechtsvorschriften der Europäischen Gemeinschaft nicht schon auf Grund der Tatsache, dass das Schiff die Bundesflagge führt, dem deutschen Recht. ..."

¹¹⁹ See art. 6 *Änderung des Einkommensteuergesetzes, Seeschiffsanpassungsgesetz* (BGBl. 1998 I, 2860).

¹²⁰ Ready, *Ship Registration* (1998), 33.

¹²¹ *Ibid.*

¹²² Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 387 f.

eventually ran into snags.¹²³ Despite the failure of the EUROS, the European Commission updated its “Guidelines on State Aid to Maritime Transport” on 5 July 1997¹²⁴ in order to encourage the flagging-in of ships in the EU Member States.

VII. Flag State Jurisdiction

1. Nature of flag State jurisdiction

UNCLOS contains no definition of “flag State” and “flag State jurisdiction”. Based on the usual understanding, nonetheless, a flag State is a state of which a ship possesses the nationality and whose flag the ship is entitled to fly. The view is reflected in UNCCORS 1986.¹²⁵ Flag State jurisdiction can be taken as the extension of the jurisdiction of a flag State to their ships regardless of where they are. More elaboration will be given to the concept of jurisdiction itself in the next section.

There is some debate as to the nature of flag State jurisdiction. The proposition regarding a ship as a floating portion of State territory has since long fallen into disrepute. In consequence, the view that flag State jurisdiction is the jurisdiction of territoriality tends to be obsolete.¹²⁶ In addition, some authors saw flag State jurisdiction as the jurisdiction over persons or the jurisdiction that originated therefrom.¹²⁷ Given the personalizing use of the ship concept in legal instruments and the unity connotation of ship concept as examined earlier, this school of thought can be expected to gain more ground in contemporary international law of the sea. However, what is more acceptable is the assertion that flag State jurisdiction should be considered a kind of jurisdiction *sui generis*.¹²⁸ This view seems to provoke comparatively less opposition from the professional circle.

¹²³ The proposal was withdrawn in 1997. See O.J. 1997 C 2/2.

¹²⁴ O.J. 1997 C 205/5.

¹²⁵ Art. 2 of UNCCORS 1986, “‘Flag State’ means a State whose flag a ship flies and is entitled to fly.”

¹²⁶ PCIJ, Series A, No. 10 (1927), 25; Colombos, *The International Law of the Sea* (1967), 285 ff.; O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 735 ff.; Skourtos admitted that the theory of territoriality bears some weaknesses, but he contended that it remains the best explanation of flag State jurisdiction, in *Die Billig-Flaggen-Praxis und die Staatliche Flaggenverleihungsfreiheit* (1990), 117 ff.; Lagoni, ‘Merchant Ships’ in Berhardt (ed.), *EPIL* (1989), vol. 11, 230 f.; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 82 f.

¹²⁷ Heyck, *Die Staatszugehörigkeit der Schiffe und Luftfahrzeuge* (1935), 12; Stoerk, ‘Das offene Meer’ in Holtzendorff (ed.), *Handbuch des Völkerrechts* (1889), vol. II, 520 f.; Basedow, *discussions* (1990), in *Heft 31*, DGVR, 76.

¹²⁸ Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschiffahrt und das Völkerrecht’ [1988] 26 *AVR* 336; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 86 f.; Ready, *Ship Registration* (1998), 6 ff.

Whatever the nature of flag State jurisdiction might be, flag State jurisdiction has already become a well-established and generally accepted concept that is reflected in numerous influential instruments including UNCLOS.

2. Effective jurisdiction and control

Upon granting its nationality to a ship, the flag State acquires the right to exercise jurisdiction and control over the ship. The jurisdiction and control of the flag State apply in principle wherever its ships are, but are at their maximum on the high seas where ships shall be subject to the exclusive jurisdiction of the flag State, save in several exceptional cases.¹²⁹

At the same time, it is also a duty for the flag State to exercise jurisdiction and control over its ships, especially when “effective” or “effectively” is stressed. In accordance with art. 94 UNCLOS, which has taken over and extended the prescription of art. 10 CHS 1958, every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. The specific duties set out in the article range from the maintenance of public register and the proper implementation of domestic laws to the taking of measures to ensure safety at sea with regard to ships’ construction, equipment, seaworthiness, manning, use of signals and regular surveys, as well as to the appropriate qualifications of crew members. By taking such measures, the flag State is required to conform to generally accepted international regulations, procedures and practices,¹³⁰ whereby some related conventions and protocols of the IMO and the ILO are meant.

To help attain the goal of effective jurisdiction and control of the flag State, a low-key intervention right is conferred on third States.¹³¹ It is an invention in comparison with CHS 1958. However, the intervention right is limited to the report of facts to the flag State, when a third State has clear grounds for believing that proper jurisdiction and control over a ship have not been exercised. When the matter is reported, the flag State is obliged to investigate it and take any appropriate action necessary to remedy the situation. The provisions are expected to indirectly reinforce the jurisdiction and control of the flag State.

Another novelty can be found in art. 94(7) UNCLOS, that imposes upon a flag State an obligation to investigate every serious marine casualty or incident involving its ship. The regulation demonstrates the progress made in the law of the sea since the First UN Conference on the Law of the Sea (UNCLOS I). However, given the qualifications like “on the high seas” and constituent foreign factors in

¹²⁹ See the first part of art. 92(1) UNCLOS; exceptional cases here refer to the suppression of the slave trade, piracy, illicit drug traffic and unauthorized broadcasting prescribed in arts. 99, 100, 108 and 109 of the Convention.

¹³⁰ Here regulations, procedures and practices are substituted for “standards” employed in art. 10(2) CHS 1958; on the question of terminology, see Lagoni, *discussions* (1990), DGVR, 126 f.

¹³¹ Art. 94(6) UNCLOS; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 88 f.

the said paragraph, it is considered somewhat conservative as compared with ILO 147.¹³²

With respect to the marine environment, the jurisdiction and control of the flag State have been underscored basically through the provisions in art. 211(2) and art. 217 UNCLOS. The former lays down the stringent standards for national legislation of the flag State in this regard,¹³³ while the latter focuses on effective enforcement by the flag State, ranging from the enforcement of applicable international rules and standards, the verification of certificates on board, the investigation of violations by ships and possible proceedings and the availability of relevant information to the level of penalties provided for the delinquent ships.

3. Diplomatic protection

As stated earlier, the jurisdiction and control of the flag State are assumed to be not only the right but also the duty of this State under international law. Diplomatic protection for ships normally emerges merely as a right or entitlement. No international responsibility falls upon a flag State which has not exerted its diplomatic protection. Nonetheless, diplomatic protection lies roughly in the domain of the flag State jurisdiction¹³⁴ and is a substantial element of it in practice. It covers everyone and everything on board as a unity, and concerns both the interests of the ship in question and the right of the flag State under international law. In principle, the diplomatic protection for a ship is performed only against a foreign State's act or omission that violates international law,¹³⁵ irrespective of where the State infraction happens, either on the high seas or in internal waters or the territorial seas.

It is widely accepted that only the flag State of the ship is entitled to exercise diplomatic protection for the ship, as in the case of a State for its nationals.¹³⁶ Consequently, the nationality of a ship, besides the existence of an international

¹³² With respect to the duties of flag States, the convention provides in art. 2, *inter alia*, that:

“(9) to hold an official inquiry into any serious marine casualty including ships registered in its territory, particularly those involving injuring and/or loss of life, the final report of such inquiry normally to be made public.” [1976] 15 *ILM* 1290; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 283; Hasselmann, *Die Freiheit der Handelsschiffahrt* (1987), 88.

¹³³ The laws and regulations adopted by flag States “shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.”

¹³⁴ Meyers, *Nationality of Ships* (1967), 39; similar submissions of Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 101 f.

¹³⁵ Similar opinions of Geck, ‘Diplomatic Protection’ in Bernhardt (ed.), *EPIL* (1995), vol. I, 1046; Núñez-Müller, *ibid.*, at 102.

¹³⁶ Skourtos, *Billig-Flaggen-Praxis und die Staatliche Flaggenverleihungsfreiheit* (1990), 98; Schulte, *Die “Billigen Flaggen” im Völkerrecht* (1962), 93; Von Münch, ‘Der diplomatische Schutz für Schiffe’ in *Recht Über See: FS Stödter* (1979), 244; Hoog, ‘*Deutsche Flaggenhoheit*’ in *DVIS* (1979), 22 ff.; Núñez-Müller, *ibid.*, at 103.

delict and the exhaustion of local remedies, is a prerequisite for the diplomatic protection of a ship.¹³⁷ However, the conclusion is doubtful that the preconditions for the nationality of a ship or for the granting of it are identical with those for the diplomatic protection of the ship,¹³⁸ for, as shown in the *I'm Alone* and *Nottebohm* cases, the nationality and the protection can be separated and handled in different ways.¹³⁹ The recognition or acceptance of the nationality of a ship does not signify necessarily the recognition of diplomatic protection. It seems that, in customary international law, the genuine link between a ship and a State is much more underlined for the purpose of diplomatic protection than for registration or nationality. Anyhow, nationality of a ship can well serve as the starting point or *prima facie* evidence for claiming the right of diplomatic protection.

Additionally, pursuant to general opinions, diplomatic protection should be exercised only for those persons who subject themselves voluntarily to the jurisdiction of the protecting State. In this sense, the judgment of the *Saiga* case (No.2)¹⁴⁰ is open to criticism on account of its inclination to cover an ambitiously wide scope of protection objects.¹⁴¹

The question of whether the State as beneficial owner of a ship, the State as cargo owner or the State as crew member is entitled too to exercise diplomatic protection remains to be answered by the law of the sea. The answer tends to be affirmative at first sight, given the background of nationality jurisdiction principle and the limited ability of the flag State in some cases. A close scrutiny of international law reveals, however, the implausibility of the hasty answer. As already discussed, international law forbids the multiple nationality of a ship¹⁴² and thus tries to make sure that a ship is subject only to the jurisdiction of its flag State on the high seas save in exceptional cases. This cardinal rule is critical for maintaining good order at sea and has been adopted in other maritime zones. The existence of parallel diplomatic protection would inevitably disrupt the single nationality rule and consequently compromise the purpose and objective of the law of the sea. In addition, the permission of concurrent protection could cause enormous operational difficulties and legal uncertainties, considering the com-

¹³⁷ Lagoni, 'Folgen des Saiga-Urteils des internationalen Seegerichtshofs für die Seeschiffahrt' (2000), 19 f.; Schulte, *ibid.*, at 94; Geck, 'Diplomatic Protection' in Bernhardt (ed.), *EPIL* (1995), vol. I, 1050 ff.

¹³⁸ Schulte inferred that the prerequisites for nationality apply also to diplomatic protection and *vice versa*, in *ibid.*, at 94; doubts about it are expressed by Skourtos, *Die Billig-Flaggen-Praxis und die Staatliche Flaggenverleihungsfreiheit* (1990), 99 f.

¹³⁹ Both cases kept silent on the nationality issues, but actually refused the exercise of diplomatic protection by Canada and Liechtenstein respectively. For more information see Joint Final Report of the Commissioners. [1935] 29 *AJIL* 329; [1955] *ICJ Reports* 1, *Nottebohm Case*.

¹⁴⁰ *Supra* note 53.

¹⁴¹ Lagoni, 'Folgen des Saiga-Urteils des internationalen Seegerichtshofs für die Seeschiffahrt' (2000), 21.

¹⁴² Art. 92(1) UNCLOS.

plexity of capital and personnel composition of a ship nowadays.¹⁴³ Therefore, it can be fairly asserted that the practice of concurrent diplomatic protection, if any, has not acquired the authority of an established rule in international law. Instead, such practice appears to have more to do with political or economic wrangling than legal dispute. Nevertheless, if the flag State concerned did not and will not exercise diplomatic protection for whatever reason or committed an unlawful act against a ship or crew members, the State of the ship-owner or of the crew members can grant diplomatic protection on different grounds to flag State jurisdiction.¹⁴⁴

C. Jurisdiction over Foreign Ships

I. The Term of Jurisdiction

With references to the powers which a State enjoys over maritime zones and ships, the word jurisdiction is frequently used in legal instruments of international law. Still, its meaning is far from uniform. For instance, the “jurisdiction” appearing in art. 92(1) UNCLOS seems to have a much wider scope than that in art. 94(1) of the Convention, which in turn denotes more broadly compared with the “jurisdiction” in arts. 27, 28 of the same Convention. The question is now what connotations, if without strict consistency, the term jurisdiction may have.

For a correct understanding of jurisdiction, it is desirable first to draw the distinction between jurisdiction and sovereignty. The two terms are closely related to each other, for both are usually employed to describe the competence of States in respect of their territory and acts as well as objects thereon.¹⁴⁵ Despite the obscurity of terminological usage in the practice, one can find some degree of uniformity in the use of the two concepts. Generally speaking, “sovereignty” basically signifies the normal complement of State rights and the legal personality of statehood; “jurisdiction” refers rather to particular aspects of the general legal competence of States, which is often described as sovereignty, in the form of

¹⁴³ Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 108.

¹⁴⁴ Von Münch, ‘Der diplomatische Schutz für Schiffe’ in *Recht Über See: FS Stödter*, 247 ff.; Hoog, ‘*Deutsche Flaggenhoheit*’ in DVIS, 24 f.; Núñez-Müller, *ibid.*, at 108 f; in a diametrically opposed view, Geck even seems to hold that diplomatic protection based on the nationality of the shipowner or of the crew members should prevail over that based on the flag State jurisdiction when he wrote “It may not be unreasonable to grant the owners’ and the crew members’ home State the right to give diplomatic protection vis-a-vis the flag State.” See Geck, ‘Diplomatic Protection’ in Bernhardt (ed.), *EPIL* (1995), vol. I, 1055.

¹⁴⁵ Coastal State jurisdiction in the EEZ and the CS vested by UNCLOS is nevertheless not based upon absolute territoriality. See arts. 56, 50 and 80 of the Convention.

rights, liberties and powers.¹⁴⁶ That is to say, jurisdiction is a subordinate concept to sovereignty, from which the former derives.¹⁴⁷ Sovereignty itself embodies various kinds of jurisdiction.

The comparison helps us understand jurisdiction better, but the question raised still remains to be answered. On the basis of existing conventions, international judgments and legal literature, it appears justifiable to say that the term jurisdiction is largely used in three ways with different meanings. First, in its broad sense, it means the competence of a State to exercise its sovereignty, including any kind of powers and authorities permissible under international law.¹⁴⁸ In a middle sense, jurisdiction would seem to refer to the right of a State to establish rules of conduct and have their application adjudicated in its courts by identifying the breaches of the rules and the consequences thereof. Lastly, the word could refer solely to "the power of courts to adjudicate" in its narrow sense.¹⁴⁹ The jurisdiction in arts. 92(1), 94(1) and in arts. 27, 28 of the Convention can well exemplify the above views respectively and thus the answer to the earlier question is rendered self-evident.

In spite of the method of paraphrasing the term jurisdiction in three senses, in some cases the concrete meaning still remains far from clear. So the only solution, if any, that could be prescribed here may be to dig out the very meaning of jurisdiction from the given context, taking into account the purpose, scope, history and so on in question.

1. Applicable principles of jurisdiction

Whatever the very meaning of jurisdiction may be in a given case, a State which claims jurisdiction has to show that there is a recognized basis for its exercise or, at least, that there is no prohibition on its exercise of the jurisdiction. For establishing such bases and hence attributing jurisdiction to the certain States, several principles have been developed in international law upon which jurisdiction is commonly based.¹⁵⁰

a. *The territorial principle.* This principle has received universal recognition and has been regarded as the most fundamental of all principles governing

¹⁴⁶ Brownlie, *Principles of Public International Law* (1998), 106 f., 301; Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in Reisman (ed.), *Jurisdiction in International Law* (1999), 140; Bowett viewed jurisdiction as a manifestation of State sovereignty in 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in *ibid.*, at 237.

¹⁴⁷ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht', [1988] 26 *AVR* 329.

¹⁴⁸ Cf. *ibid.*; Meyers, *Nationality of Ships* (1967), 40.

¹⁴⁹ In his celebrated work *The Law of Territorial Waters and Maritime Jurisdiction* (1927), xxxiii. P. C. Jessup wrote: "In this work, therefore, jurisdiction will be used to connote the power of courts to adjudicate, whereas control will be taken to mean the power of administrative or executive officers to govern the actions of individuals or things."

¹⁵⁰ Oxman, 'Jurisdiction of State' in Bernhardt (ed.), *EPIL* (1997), vol. III, 55.

jurisdiction, by which a State can enact laws for, and apply them to, all persons, objects and activities within its territory.¹⁵¹ The view that a State has jurisdiction over its own territory has indeed been considered axiomatic, for it is the single reflection of the essential and complete territoriality of sovereignty, i.e. of the total legal competence of a State. In addition, the principle boasts a series of practical strengths, including the taking of evidence, the convenience of the forum, the availability of witnesses and the involvement of related parties in the case. Although it is sometimes implied that the territorial principle is exclusive,¹⁵² the special constellation in which an act as the object of jurisdiction is commenced inside and ended outside the territory might pose some challenge to the above proposition. In such a case, jurisdiction can be justified when one of the constituent elements of the act is consummated within the State territory.¹⁵³ Without doubt, a State enjoys jurisdiction over its land territory, internal waters, territorial sea and archipelagic waters, as well as the airspace above the areas. Under UNCLOS, a coastal State has sovereign rights and jurisdiction in the EEZ and the CS over certain matters.¹⁵⁴ This jurisdiction is not fully fledged territorial jurisdiction, because the areas are beyond the territory's limits.

b. *The nationality principle.* There is general support for the basic opinion that a State may exercise jurisdiction over the extraterritorial conducts of its nationals. However, the opinion obviously requires a qualification, namely, the performance of the jurisdiction based on the nationality should be permissible under the *lex loci delicti commissi*. Furthermore, no jurisdiction may go so far as to amount to interference with the domestic jurisdiction of another State.¹⁵⁵ A writer¹⁵⁶ has suggested that the principle can be extended by reference to residence as alternative evidence of allegiance owed by foreigners to the host State, such jurisdiction appearing to be based more on the territorial principle. In the light of the probable overlapping jurisdiction and double burden, States show in practice restraint in applying this principle, which is commonly limited to certain grave offences.

c. *The protective principle.* The principle has emerged to meet the need of a State to assume jurisdiction, aimed at protecting its security, over foreigners for acts done aboard. Whether the security covers also that of citizens of the State is

¹⁵¹ Brownlie, *Principles of Public International Law* (1998), 301; Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in Reisman (ed.), *Jurisdiction in International Law* (1999), 240; Verzijl, *International Law in Historical Perspective* (1970), Part III State Territory, 12 f.; Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 331 ff.

¹⁵² Brownlie, *ibid.*, at 303.

¹⁵³ Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in Reisman (ed.), *Jurisdiction in International Law* (1999), 242 f.

¹⁵⁴ It has sovereign rights for the purpose of exploring and exploiting its natural resources, and jurisdiction over, *inter alia*, artificial islands, installations and structures. See arts. 56, 60, 77, 88 UNCLOS.

¹⁵⁵ See art. 1(7) UN Charter.

¹⁵⁶ Brownlie, *Principles of Public International Law* (1998), 306.

still controversial.¹⁵⁷ It is clear, however, that the principle is applied primarily in the sphere of penal law, inasmuch as the acts threatening the security of a State may generally be so serious as to be characterized as criminal ones, such as espionage and counterfeiting of currency. The problem of the principle lies in the vagueness of the concept of "security" that may lead to arbitrary interpretation and then possibly to abuse of the principle.

d. *The universality principle.* The rationale of the principle rests upon the understanding that some international crimes, with the notable examples of piracy and its analogy hijacking, as well as the current hot topic of terrorism, are regarded as being committed against the international community as a whole. Any State is hence entitled to punish such crimes. Despite the uncertainty of which international crimes except piracy may be subject to universal jurisdiction,¹⁵⁸ it seems true that not all crimes against international law are exposed to the principle. The newly articulated jurisdiction of a port State can be treated as "creeping" universal jurisdiction to prosecute foreign ships visiting its ports for the violation of international rules and standards elsewhere outside its jurisdictional zones.¹⁵⁹

Additionally, some other principles or doctrines have been mentioned in publications to this effect. As earlier indicated, flag jurisdiction can be viewed as jurisdiction *sui generis*, but it may arguably be seen *mutatis mutandis* as according to the nationality principle. The effects doctrine, which was founded in the US in 1945,¹⁶⁰ and the passive personality principle developed in the *Lotus* case have not gained enough ground so far. Broadly speaking, both could be integrated into the protective principle.¹⁶¹

¹⁵⁷ Higgins favors the inclusion of citizens of a State in 'Chapter IV 'Allocating Competence: Jurisdiction' in Reisman (ed.), *Jurisdiction in International Law* (1999), 103; Brownlie and Bowett tend to reject it, in respectively *Principles of Public International Law* (1998), 307, and 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in Reisman (ed.), *Jurisdiction in International Law* (1999), 246 f.

¹⁵⁸ Oxman counts the slave trade, genocide, war crimes, apartheid and terrorism in the group of universal jurisdiction. In 'Jurisdiction of State' in Bernhardt (ed.), *EPIL* (1997), vol. III, 58; Brownlie specifies murder and drug traffic as those, in *Principles of Public International Law* (1998), 307 f; Higgins argues that universal jurisdiction exists over war crimes, crimes against peace and crimes against humanity but not over hijacking and apartheid; in 'Chapter IV 'Allocating Competence: Jurisdiction' in Reisman (ed.), *Jurisdiction in International Law* (1999), 96 ff; in this regard, Bowett is one of the most conservative when he repudiates war crimes, genocide, terrorism, apartheid and even hijacking as being within universal jurisdiction; in Jurisdiction: Changing Patterns of Authority over Activities and Resources' in Reisman (ed.), *Jurisdiction in International Law* (1999), 248 f.

¹⁵⁹ Art. 218 UNCLOS.

¹⁶⁰ The doctrine was established by the US Supreme Court in the *Alcoa* case (*US v. Aluminium Co. of America* 1945), Higgins, 'Chapter IV 'Allocating Competence: Jurisdiction' in Reisman (ed.), *Jurisdiction in International Law* (1999), 110.

¹⁶¹ For a similar view, see *ibid.*, at 101 ff., 110 ff.

2. Containment of jurisdictional conflicts

Owing to the multiplicity of the above-mentioned bases and the varied implementation of them in practice, concurrent claims to jurisdiction over the same matter are unavoidable.¹⁶² As far as the law of the sea is concerned, the issue may well arise where a foreign ship enters any of the maritime zones under coastal State jurisdiction with varying density. However, the concurrent claims can be kept to a minimum level through various avenues before the issue is aggravated to become an intractable dispute.

In pursuance of the prevalent opinions, in general, territorial jurisdiction is primary and extraterritorial jurisdiction such as flag jurisdiction is supposed to be restrained in deference to the former.¹⁶³ In addition, the restraint to a reasonable extent in applying various bases of jurisdiction may be necessary for curtailing concurrent jurisdiction. To this end, many coastal States choose to refrain from asserting their jurisdiction in their coastal waters over certain matters that belong to the “internal economy” of foreign ships. The States may not, nonetheless, shirk their international obligation, which is not discretionary as far as unilateral restraint is concerned.¹⁶⁴

Bilateral consular or shipping agreements can definitely contribute to help expel the ghost of parallel jurisdiction. The Sino-German Agreement on Maritime Transport of 1995,¹⁶⁵ for example, provides for the mutual recognition of the relevant ship documents and certificates of crew members issued by either of the two parties,¹⁶⁶ as well as the avoidance of double taxation on the shipping industry.¹⁶⁷ Considering that bilateral agreements cover merely a small part of all transnational operations, the conclusion of an international convention seems to be the solution for addressing the issue by achieving general uniformity with regard to jurisdiction among States.¹⁶⁸

¹⁶² E.g. although both States rely upon the nationality principle, one considers the nationality of the owner of a juridical person in question, whereas the other focuses on that of the corporation itself; something similar could happen to ships as well.

¹⁶³ Cf. Oxman, ‘Jurisdiction of State’ in Bernhardt (ed.), *EPIL* (1997), vol. III, 60; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 337; Brownlie, *Principles of Public International Law* (1998), 321; Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ in Reisman (ed.), *Jurisdiction in International Law* (1999), 137.

¹⁶⁴ Lagoni, *ibid.*, at 337.

¹⁶⁵ See BGBl. 1996 II, Nr. 38, 1451.

¹⁶⁶ *Ibid.*, arts. 6, 11.

¹⁶⁷ *Ibid.*, art. 7.

¹⁶⁸ E.g. Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial matters, 1968, Brussels; International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collisions, 1952, Brussels, 439 *UNTS* 217; International Convention on Arrest of Ships, 1999, see the website available at <<http://www.uncad.org/en/docs/imo99d6.pdf>> (last visited: February 24, 2002); arts. 27, 28 UNCLOS; many other conventions also touch upon the issue of jurisdiction. Cf.

At any rate, consultation and collaboration should be encouraged to minimize the friction that might result from the overlapping jurisdiction.

II. Types of Jurisdiction

As jurisdiction reflects particular aspects of sovereignty, it thus refers to legislative, judicial and administrative competence. Correspondingly, jurisdiction can be classified in three types, namely, legislative or prescriptive jurisdiction, judicial jurisdiction and administrative or executive jurisdiction.¹⁶⁹ The majority opinion and international practice, however, appear to prefer to reduce the latter two kinds of jurisdiction to a single one, i.e. enforcement jurisdiction.¹⁷⁰ A further distinction, which is common to almost all legal systems, is made between civil and criminal jurisdiction in judicial jurisdiction. It has to be pointed out that sometimes the line between legislative and enforcement jurisdiction may be nebulous as shown in the common law system, for in the system “judge-made law” a part of legislation is seen in a broad sense, given its law-making character.¹⁷¹ The distinction between civil and criminal jurisdiction might be blurred as well in the cases of marine environmental pollution and anti-trust actions, for instance.

1. Legislative jurisdiction

Legislative jurisdiction is exercised through those acts of a State whereby the State prescribes the rules of conduct normally through the enactment of laws and regulations. The jurisdiction concerns not only parliament or congress but administrative authority as well.¹⁷² For this purpose, the ratification of or accession to international conventions by the State also falls within the sphere of legislative jurisdiction. It is widely accepted that the jurisdiction to prescribe rules constitutes the basis for enforcement jurisdiction. Some writers even suggest that

Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 338.

¹⁶⁹ Oxman, ‘Jurisdiction of State’ in Bernhardt (ed.), *EPIL* (1997), vol. III, 55; Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ in Reisman (ed.), *Jurisdiction in International Law* (1999), 237.

¹⁷⁰ Mann, ‘The Doctrine of International Jurisdiction Revisited after Twenty Years’ in Reisman (ed.), *Jurisdiction in International Law* (1999), 139 ff.; Brownlie, *Principles of Public International Law* (1998), 301; Bowett, *ibid.*, at 237; Lagoni, ‘Die Abwehr von Gefahren für die marine Umwelt’ in DGVR (1992), 142 f.; see also Section 6. Enforcement, Part XII, UNCLOS.

¹⁷¹ “Judge made law” is also called case law. That is to say, the previous judgments made by superior courts in the hierarchy are binding on inferior courts, *stare decisis*. Faulkner, *Historical Background of the Common Law System* (2001), Lecture Materials at the Hamburg University.

¹⁷² For example, the delegated legislation in the UK, Presidential Proclamation or Directive in the US, *Rechtsverordnungen* and *allgemeine Verwaltungsvorschriften* in Germany, Administrative Regulations in China.

there can be no valid enforcement unless there is legislative authorization.¹⁷³ Yet a question may arise here: can international law be invoked directly to justify the enforcement action of a State? The answer appears to be positive. It may be reasonable when a State enforces the well-established rules of customary international law concerning environmental protection in its territorial sea without enacting any specific environment law or regulations there to confirm the effect of the rules, if only the State respects the right of innocent passage of foreign ships at the same time. We have often heard countless examples that a certain State has taken certain measures solely according to international law in international affairs.

To reconcile the phenomena with the aforesaid widely accepted view, a legal fiction needs to be made if the State concerned has not explicitly incorporated general international law into its domestic legislation.¹⁷⁴ It is that customary international law might have been fused into domestic legislation and hence serves as the basis of the enforcement.

Notwithstanding the above legal fiction or the general reference to international law in certain domestic legislation, the presence of complete domestic legislation would be more desirable in international law considering the dictates of legal certainties and transparency. In this sense, a doctrine of legislation jurisdiction is a significant ingredient of an adequately developed system of international law.¹⁷⁵

2. Enforcement jurisdiction

Legislative jurisdiction is the basis for enforcement jurisdiction, whereas the latter in turn is the realization of the former. Generally, enforcement jurisdiction refers to all acts designed to enforce legislative jurisdiction, either by the way of adjudication in the courts or even adjudication by the responsible administrative organs of a State, and by the way of administrative law-enforcing actions or the execution of judgments and other enforceable instruments.

With respect to enforcement jurisdiction, the following propositions can be made:

First, normally a State exercises its enforcement jurisdiction on the basis of its legislative jurisdiction. However, in some exceptional cases, notably in civil cases involving a foreign factor, enforcement jurisdiction of a State can be asserted not

¹⁷³ Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in Reisman (ed.), *Jurisdiction in International Law* (1999), 237; Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in *ibid.*, at 134; Oxman challenges this point, but the challenge tends to be unconvincing, in 'Jurisdiction of State' in Bernhardt (ed.), *EPIL* (1997), vol. III, 55.

¹⁷⁴ According to the US Constitution and art. 25 of the German Basic Law, nevertheless, general international law is seen as the part of domestic legislation.

¹⁷⁵ Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in Reisman (ed.), *Jurisdiction in International Law* (1999), 132 f.

on the basis of its own legislative jurisdiction but on that of a third State under the rules of conflict of laws.

Secondly, the mere fact that a State enforces its legislation within its territory or jurisdictional zones successfully does not necessarily mean that the legislation or enforcement are legal. A State might have smoothly implemented, for example, its stringent legal requirements on the design and construction of foreign ships exercising the right of innocent passage in its territorial sea.¹⁷⁶ The forced and seeming subjection of the foreign ships to the enforcement does not imply any legal recognition of such jurisdiction in international law.

Thirdly, a State enjoying legislative jurisdiction does not mean that the State is authorized to exercise the correspondent enforcement without any problem. A flag State has, in principle, both legislative and enforcement jurisdiction over its ships regardless of where they are. In practice, however, the enforcement jurisdiction of the flag State can rarely be carried out without the consent of the State in which the ship finds itself.

Lastly, enforcement jurisdiction can be broken down further into different types, such as executive jurisdiction and judicial jurisdiction, which again can be divided into two sorts, namely, civil and criminal jurisdiction that surely merit our discussion below.

a) Civil and criminal jurisdiction

Basically, a State has civil jurisdiction over its territory and arguably in its jurisdictional zones as well, as in the EEZ. Public international law governing civil jurisdiction remains more firmly rooted in territoriality compared with most other branches of law, perhaps because in civil jurisdiction certainty and foreseeability are more necessary than in others.¹⁷⁷ Therefore, a coastal State may, in principle, exercise its civil jurisdiction over a foreign ship in its internal waters, the territorial sea and, for limited purposes, in the EEZ, while the flag State of the ship, where the ship is the defendant in a case, may also adjudicate the case¹⁷⁸ alternatively if the coastal State failed to do so. However, some further theories in international civil jurisdiction seem to be appearing. One of them is justified by reference to the existence of a substantial connection between the plaintiff and the forum in terms of allegiance, residence and prior express submission to the jurisdiction of the State of the forum.¹⁷⁹ The other initiative was launched by the US Supreme Court in 1945, whereby the strict territoriality of civil jurisdiction was replaced by the fairness theory. The theory is based upon the Due Process

¹⁷⁶ See art. 21(2) UNCLOS.

¹⁷⁷ Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in Reisman (ed.), *Jurisdiction in International Law* (1999), 187; Brownlie, *Principles in Public International Law* (1998), 302.

¹⁷⁸ The rule was expressed by the maxim *actor sequitur forum rei*, i.e. the plaintiff has to submit to the defendant's court. Cited as per Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in Reisman (ed.), *Jurisdiction in International Law* (1999), 187.

¹⁷⁹ Brownlie, *Principles in Public International Law* (1998), 302.

Clause of the Constitution and embraces several elements, including reasonableness, fairness and convenience.¹⁸⁰ Still, there is no indication that the new theories have gained so much ground as to present a challenge to the commanding position of territoriality.

It is notable that States are usually reluctant to assume civil jurisdiction over foreign ships unless their momentous interests are at stake. One reason may be that States find it cumbersome and inconvenient to exercise civil jurisdiction with foreign factors that could, furthermore, result in the application of foreign law rather than their own under the rules of the conflict of laws.¹⁸¹ The other deterrent may well come from the reasonable perception that the excessive and abusive assumption of civil jurisdiction over foreign ships might lead to the traps of international responsibility.

In contrast with civil jurisdiction, criminal jurisdiction exhibits more empiricism accumulated in national adjudications and more adherence to national policies.¹⁸² Accordingly, in criminal matters the courts of a State always apply the law of the State.¹⁸³ The offences committed by a ship or on board the ship in the coastal waters of a State fall in the scope of the criminal jurisdiction of the State, subject to some restrictions laid down by international law.

It is feared that the dogmatic classification into civil and criminal jurisdiction could blur the similarity in nature and purpose of various legislative provisions. The similarity goes back to the fact that both civil and criminal jurisdiction serve the same State policy. Therefore, it is suggested that sometimes to find out the State policy behind the provisions might be more important than to label them as civil or criminal jurisdiction, which is the emanation of State policy.¹⁸⁴

b) Enforcement means and limitations

The lawfulness of enforcement rests not only on the presence of legislative jurisdiction that lies within the blessing of international law, but also on the propriety of the measures taken and the procedures undergone for the purpose of enforcement. Enforcement at sea is legally much more complex in comparison with enforcement ashore, for the former mainly operates in a domain governed fundamentally by public international law.

So far as enforcement against foreign ships is concerned, the measures or means may include monitoring, trailing, stoppage, prevention, interception, hot pursuit, boarding, investigation, arrest, detention, confiscation, judicial proceedings, auction, etc. The measures to be taken should be limited to the extent necessary and reasonable to effect the due enforcement.

¹⁸⁰ Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in Reisman (ed.), *Jurisdiction in International Law* (1999), 188 f.

¹⁸¹ Brownlie, *Principles in Public International Law* (1998), 302; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 113.

¹⁸² Brownlie, *ibid.*, at 303.

¹⁸³ Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in Reisman (ed.), *Jurisdiction in International Law* (1999), 238.

¹⁸⁴ *Ibid.*

In international practice, the use of force against a ship is always the source of controversy. Notwithstanding the diversity of State practice in this respect and the lack of express provisions in related conventions, customary international law has indeed laid down some rules on the use of force. At first, there must be adequate instruction and warning through internationally recognized auditory or visual signals.¹⁸⁵ Only where these signals are ignored may further action be taken, including the firing of blank shots, or solid shots deflected across the bows of the ship. It is only after these appropriate actions prove ineffective that the ship may be fired upon as the last resort. In this case, nonetheless, only the solid shot of the lowest possible calibre can be used, unless the intended enforcement is resisted by return fire.¹⁸⁶ These rules have been confirmed in the leading cases *I'm Alone*¹⁸⁷ and *The Red Crusader*¹⁸⁸ and recently echoed by the ITLOS in its judgment of the *Saiga* (No. 2)¹⁸⁹ case.

Additionally, international law places some general limitations on enforcement against foreign ships. In the first place, the specific enforcement action against a foreign ship should be proportionate to the need to control and punish the offences committed by the ship. Secondly, the enforcement may not obtrude upon the immunities enjoyed by foreign warships or other government ships operated for non-commercial purposes.¹⁹⁰ Thirdly, the enforcement should be subject to the provisions governing enforcement such as "safeguards" in UNCLOS. Needless to say, some general rules of international law, including the prohibition of discrimination and the abuse of rights, apply here too. Besides, according to some authors,¹⁹¹ it appears to be an obligation for each State to exercise moderation and restraint in any enforcement involving a foreign element. Finally, enforcement may only be exercised by officials or by warships, military aircraft, or other ships or aircraft on government service that shall be identifiably indicated as such.

¹⁸⁵ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 1072.

¹⁸⁶ *Ibid.*

¹⁸⁷ [1935] III RIAA 1609; *Ibid.*, at 1072.

¹⁸⁸ [1962] 35 ILR 485; *Ibid.*, at 1072.

¹⁸⁹ The Tribunal found that "international law, ... , requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstance." Para. 155, the Judgment of the *Saiga* (No. 2) case of the ITLOS on 1 July 1999, see also <http://www.itlos.org/start2_en.html> (last visited: February 24, 2002).

¹⁹⁰ Art. 32 UNCLOS.

¹⁹¹ Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' in Reisman (ed.), *Jurisdiction in International Law* (1999), 146; Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' in *ibid.*, at 254 ff.

III. Development of Jurisdiction over Foreign Ships

1. Extension of coastal State jurisdiction

CTS 1958 failed to establish a uniform breadth of the territorial sea and the 1960 Conference failed by the same token. This fact, however, did not restrain many States from extending their claims over the territorial sea in the 1960s and 1970s from three miles up to as far as 200 miles.¹⁹² Meanwhile, a multiplicity of types of maritime zones reaching out to much greater distances has emerged, notably the fishery zone, EEZ, CS,¹⁹³ customs zone and pollution prevention zone. The unprecedented extension of coastal State jurisdiction can be accredited to the change in the maritime landscape. From a political perspective, many States have achieved independence with the process of decolonisation, particularly since 1945, and most of these are coastal States. The newly independent States desired to bring coastal waters under their control to highlight their sovereignty over them.¹⁹⁴ Economically, the over-fishing and pollution in coastal waters posed a big threat to the interests of coastal States, which were forced in turn to strengthen corresponding jurisdiction, especially over foreign ships. Additionally, the new development of marine science and technology has made some maritime activities in deep seas, which were not conceivable before, commercially feasible. Thus it became necessary to expand towards the sea the jurisdiction of coastal States.

Obviously, the expansion of coastal State jurisdiction restricts, more or less, the freedom of navigation accordingly. In other words, the more control coastal States have over maritime areas, the less freedom of navigation there is. In principle, the freedom of navigation exists likewise in the EEZ, but it is not as complete as on the high seas, for it is subject to the sovereign rights and jurisdiction of coastal States for limited purposes.¹⁹⁵ Similarly, the more restrictions accruing from the reinforced competence of coastal States in the territorial sea may aggravate the existing threat to the right of innocent passage of foreign ships. Whereas UNCLOS has set limits to the national enclosure of seas and hopefully brought it to an end already, it is also true that the Convention has given its approval to the vast enclosure and, as a result, placed foreign shipping activities much more under the control of coastal States than ever before. Under the regime of UNCLOS, 35.8% of all global seas are estimated to fall under the national jurisdiction of coastal States.¹⁹⁶

¹⁹² Ecuador, for instance, established its 200-mile territorial sea in 1966, see Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 96; some other South American States claimed 200-mile territorial sea as well, see Churchill/Lowe, *The Law of the Sea* (1983), 61.

¹⁹³ The new regime has been developed following the renowned Truman Proclamation of 1945. See US Presidential Proclamation No. 2667 of 28 September 1945.

¹⁹⁴ Cf. Churchill/Lowe, *The Law of the Sea* (1983), 61.

¹⁹⁵ Arts. 58, 56 UNCLOS.

¹⁹⁶ Editing Committee, 'Ocean Vol.' in *Natural Resources Series of China* (1995), III.

2. Weakness of flag State enforcement

Under the auspices of the IMO, various conventions pertinent to shipping have been successfully concluded, but many of them – especially earlier ones – have not been successfully implemented. One basic reason is suggested to be that in the IMO conventions the power of enforcement lies largely with the flag States.¹⁹⁷ The similar symptom can be found to different degrees in other conventions. Given the background of the predominant weight of FoC in world fleets, it is not surprising that the provisions of the conventions prove to be ineffective in practice when coping with the problems at which they are directed. For these countries, it is virtually impossible to enforce international rules and standards as they are intended. On the one hand, these small States are generally not capable of discharging their enforcement duty over their ships all over the world, and the ships seldom, if ever, visit the port of registration. On the other hand, stringent enforcement may frighten away ship-owners and hence diminish the income from ship registration, which constitutes a significant source of national revenue for FoC States. What is more, the flawed enforcement of international rules and standards is not only true of FoC States, but is, by and large, the case of many flag States to various degrees. Therefore, though it has to be admitted that the exercise of flag State jurisdiction has been remarkably improved as a whole, particularly through the “indirect approach” in the last few decades, relying exclusively or too much on flag-State enforcement does not seem to be appropriate.

3. Growing competence of coastal/port States

In the light of the weakness of flag State enforcement of international rules and standards, primarily concerning safety, environment and labour conditions, it has been found necessary to step up coastal/port State competence over foreign ships to ensure that the relevant rules and standards can be more satisfactorily followed.

The fundamental reinforcement of coastal/port State competence has been actually achieved in three ways. First, the extension of internal waters and the territorial sea and the establishment of the EEZ under UNCLOS themselves already constitute the strengthening of coastal State competence over foreign ships in terms of both the extended geographical application reach and substantial added therein.¹⁹⁸ Secondly, the port State control provided in many multilateral conventions seems to be increasingly important in practice. Thirdly, coastal and port State jurisdiction with respect to the marine environment first enshrined by UNCLOS is also supposed to help beef up the competence of coastal/port States.¹⁹⁹ Notwithstanding that the final practical implementation of the extended

¹⁹⁷ Cf. Churchill/Lowe, they labeled it as a basic defect of the IMO conventions, in *The Law of the Sea* (1983), 190.

¹⁹⁸ Similar views expressed by Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 240 f.

¹⁹⁹ See art. 218 Enforcement by Port States, art. 219 Measures relating to Seaworthiness of Vessels to Avoid Pollution and art. 220 Enforcement by Coastal States, UNCLOS.

competence remains, to some degree, on hold, the maritime powers are already apprehensive that if flag State jurisdiction is extensively undermined in favour of coastal/port States, the latter might progressively encroach upon the right of innocent passage in the territorial sea and the freedom of navigation in the EEZ. State practice so far shows, however, that this apprehension fortunately tends not to come true. “Creeping jurisdiction” has not happened, let alone developed. The reason for that lies on the one hand presumably in the restraint exercised by coastal States, on the other in the restrictive effect reflected in the subtle balance achieved by UNCLOS between coastal and flag State jurisdiction.

IV. Legal Basis of Jurisdiction over Foreign Ships

Under the territorial principle as enunciated above in 3.1.1.a., coastal State jurisdiction over foreign ships is of territorial character in the internal waters and territorial sea, and of quasi-territorial character in the EEZ. However, jurisdiction over foreign ships may be supplemented or qualified by international agreements. Of course, the generally accepted rules of customary international law continue to play their role in this regard as always.

1. Territorial sovereignty

The most fundamental legal basis of jurisdiction over foreign ships is no doubt the territorial sovereignty enjoyed by the coastal State in its internal waters and territorial sea. That is to say, the coastal State may take any measures and acts to exercise its jurisdiction as long as they are not prohibited by applicable international law, either conventional or customary.

2. International conventions

Given its transnational character, jurisdiction over foreign ships has commonly been regulated by various international conventions. Art. 218 of UNCLOS, for example, virtually accords in part extraterritorial jurisdiction over foreign ships to port States which can hardly be derived from the territorial sovereignty of the States. Many IMO conventions grant the power of port State control to the port authorities. Some other provisions of international conventions may, on the other hand, circumscribe jurisdiction over foreign ships and lay down certain restrictions on the exercise of jurisdiction.²⁰⁰

3. Bilateral agreements

Bilateral shipping or trade or consular treaties may also provide the legal basis for the jurisdiction concerned. Theoretically, a small State with a large fleet could by treaty empower certain coastal States to exercise jurisdiction over its ships that

²⁰⁰ In this sense, Sec. 3, Part II, UNCLOS may serve as the outstanding paradigm.

would otherwise belong specifically to the flag State. Besides, bilateral treaties may well touch upon the jurisdictional matters by covering fields like the prevention of double taxation,²⁰¹ the mutual recognition of ship documents,²⁰² as well as civil and criminal jurisdiction respecting ships.²⁰³

4. Regional arrangements

Regional arrangements can also help substantiate the legality of coastal State jurisdiction over foreign ships. The prominent examples might be some directives and regulations issued by the European authorities.²⁰⁴ In addition, some regional conventions, such as the 1992 Helsinki Convention,²⁰⁵ may touch upon the jurisdiction here concerned. The regional arrangement on port State control, including the Paris MOU 1982 and the Latin-American Agreement 1992, might contribute as well to the legal basis for jurisdiction considering that they have at least duly established relevant guidelines and procedures, while the essential competence of port State control can be traced back to several international conventions.²⁰⁶

²⁰¹ Art. 7 of the Sino-German Shipping Agreement of 9 May 1995 (BGBl., 1996 II, 1451).

²⁰² *Ibid.*, art. 6.

²⁰³ Art. 32 of German-British Consular Treaty of 30 June 1956 (BGBl., 1957 II, 284); Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 291, 338.

²⁰⁴ E.g. the Directive 95/21 of the Council of the EC on 19 June 1995, O.J. 1995 L 157/1; Lagoni (ed.), *The Reception of Oily Waste from Ships in European Ports* (1997), 27.

²⁰⁵ O.J. 1994 L 73/19; German BGBl. 1994 II, 1355. art. 8 of and Annex IV to the Convention deal with the prevention of pollution from ships.

²⁰⁶ E.g. LL 1966, MARPOL 73/78, SOLAS 1974 and STCW 1978.

Part 2: Jurisdiction over Foreign Merchant Ships in Internal Waters

A. Introduction

The view that internal waters form an integral part of the territory of a coastal State and are subject to the same legal regime as the landmass remains unchanged today. For that reason they have been excluded from the subjects of detailed provisions in CTS 1958 and in UNCLOS, except where briefly touched upon as necessary in dealing with other subject matters.²⁰⁷ The principal distinction of internal waters, as compared with the territorial sea, lies in the fact that there is no right of innocent passage of foreign ships therein. But the introduction of straight baselines has complicated this distinction. In principle, the coastal State enjoys full territorial sovereignty over foreign ships in its internal waters. However, the exercise of this sovereignty may be limited by international customary law and by bilateral or multilateral international treaties.

B. Scope and Legal Status of Internal Waters

I. Baselines

Baselines determine the seaward limit of internal waters. They fall into several different sorts in practice.

Traditionally, normal baselines are employed along the coast for measuring the breadth of the territorial sea. Under UNCLOS, it means “the low-water line along the coast as marked on large-scale charts officially recognized by the coast State”.²⁰⁸ The ambiguity of the term “low-water line” may give rise to the divergent State practice. But normally the mean low-water line of springs is preferred to the mean low-water line of neaps.²⁰⁹ In the case of an indented coast with island fringes, nonetheless, it is less desirable to draw normal baselines because of

²⁰⁷ See UN GA Res.2750C (XXV) of 17 December 1970; also the Final Act of UNCLOS III.

²⁰⁸ Art. 5 UNCLOS, which springs verbatim from art. 3(1) CTS 1958.

²⁰⁹ Brown, *The International Law of the Sea*, (1994), vol. I, 23.

their poor operability and identifiability. Therefore the straight baselines came into existence. The use of straight baselines was first recognized by the ICJ in its judgment of the *Fisheries* case (*UK v. Norway*) 1951. The Court concluded that the drawing of straight baselines by Norway was not contrary to the rules of international law but just an application of general international law to a specific case of special geographical conditions.²¹⁰

The pronouncements made by the ICJ in the *Fisheries* case 1951 have been codified in CTS 1958²¹¹ and later in UNCLOS²¹² as well. Straight baselines are to be drawn in localities where the coastline is deeply indented, and their drawing should be consistent with the provisions laid down in UNCLOS.

As for river mouths, the baseline shall be a straight line across the mouth of a river between points on the low-water line of its banks.²¹³ The baseline of a single-State bay shall be the closing line of the bay, as provided in art. 10 UNCLOS, while the determination of the baselines of historic bays or multi-State bays are not regulated in the Convention.²¹⁴

It has been suggested that the drawing of baselines be done in line with the rules of international law, for there is always an international aspect, although only the coastal State is competent to establish its baselines.²¹⁵ Nevertheless, disputes over the lawfulness of baseline drawing may well, from time to time, arise because the rules of international law in this regard are relatively imprecise, for instance, as respects the choice of base points, the status as an island, etc.²¹⁶

II. Scope of Internal Waters

Internal waters are those waters that lie on the landward side of the baselines from which the territorial sea and other maritime zones are measured. The point reflected in CTS 1958 has been revised in UNCLOS by excluding the archipelagic waters. Appearing as a neologism to the law of the sea, they do lie within the

²¹⁰ [1951] *ICJ Reports* 130-131.

²¹¹ Art. 4 CTS 1958.

²¹² Art. 7 UNCLOS.

²¹³ Art. 9 UNCLOS, art. 13 CTS 1958.

²¹⁴ These special bays are explicitly excluded from the application of the closing line method provided for in Paragraphs 2-5, art. 10 UNCLOS. See Paragraphs 1 and 6 of the article.

²¹⁵ Lagoni, 'Internal Waters, Seagoing Vessels in' in Bernhardt (ed.), *EPIL* (1989), vol. 11, 155; Churchill/Lowe, *The Law of the Sea* (1983), 41; in the *Fisheries* case 1951 the ICJ pointed out: "the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal laws. ... the validity of the delimitation with regard to other States depends upon international law." [1951] *ICJ Reports* 132.

²¹⁶ The Declaration of China concerning Baselines of the Territorial Sea of 15 May 1996, taken as an example, sparked protests from the Philippines and Vietnam. See [1996] 32 *LOS* 88-91.

baselines concerned.²¹⁷ It is necessary to note, however, that within the archipelagic waters, the archipelagic State may also establish its internal waters by drawing closing lines across river mouths, bays or connecting the outermost points of permanent harbour works.²¹⁸ In addition, internal waters may well exist within a strait used for international navigation.

Generally speaking, internal waters embrace “different kinds of natural waters or artificial waterways of a State”,²¹⁹ including lakes, rivers, bays, gulfs, estuaries, creeks, ports and canals.²²⁰ Based upon art. 11 UNCLOS, it may be safe to assume that deepwater ports, port facilities outside internal waters mentioned in art. 18(1)(a) and airports at sea cannot be put on the same footing with ports.²²¹ On the other hand, roadsteads used for the loading, unloading or anchoring of ships²²² and some straits²²³ may be situated within internal waters as well. It is necessary to make clear that, as far as this paper is concerned, internal waters are intended to refer purely to the sea areas within baselines.²²⁴ As a result, no inland river or lake is included in the scope of the following elaborations.

III. Legal Status

Although CTS 1958 and UNCLOS do not explicitly pronounce on the legal status of internal waters, an analogy that the sovereignty of a coastal State exists over its internal waters and extends to the air space over internal waters as well as to the bed and subsoil thereof may be safely drawn from art. 2 UNCLOS.²²⁵ The view can further be strengthened by the basic presumption that the coastal State shall enjoy no less sovereignty in its internal waters than in the territorial sea. Furthermore, compared with the territorial sea, internal waters possess the closer

²¹⁷ Art. 8(1) UNCLOS.

²¹⁸ Art. 50 UNCLOS.

²¹⁹ Lagoni, ‘Internal Waters, Seagoing Vessels in’ in Bernhardt (ed.), *EPIL* (1989), vol. 11, 153.

²²⁰ O’Connell/Shearer, *The International Law of the Sea* (1982), vol. I, 338; Lagoni, *ibid.*, at 153; Churchill/Lowe, *The Law of the Sea* (1983), 45.

²²¹ Christian H. Peters holds different views in stating that “*Sofern sich aber nun ein Staat entschließen sollte, Tiefwasserhäfen größeren Ausmaßes in die Küstengewässer auszu-dehnen oder überhaupt erst zu bauen, bestünde eine Möglichkeit, durch die dann in das Küstenmeer ragenden Teile neue Bereiche zu inneren Gewässern zu erklären.*” In *Innere Gewässer im neuen Seerecht* (1999), 41.

²²² Lagoni, ‘Internal Waters, Seagoing Vessels in’, in Bernhardt (ed.), *EPIL* (1989), vol. 11, 153.

²²³ Colombos, *The International Law of the Sea* (1967), 175.

²²⁴ Here an interesting yet difficult question may be: where is the inward limit of the sea areas? In practice, the setting of the inward limit is done for specific purposes, such as environmental protection and navigation control. The setting of inward limits may vary with different purposes.

²²⁵ Art. 2 reads: “The sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea. ...”

and more direct linkage to land territory. Thus the State has far more vital interests therein in terms of territorial integrity, defence, commerce and industry.²²⁶ It has been stated that internal waters and land territory are subject to the same legal regime. That is to say, both have the same legal status.²²⁷

Under the contemporary customary international law of the sea, the coastal State enjoys, no doubt, full and complete territorial sovereignty in its internal waters. Except in special cases, it is not limited by an obligation to recognize a right of innocent passage of foreign ships as in the territorial sea. A coastal State may reserve the right of fisheries, cabotage, dredging, salvage, pilotage, towage and pushing services in its internal waters for its nationals. In a word, it has the exclusive right to regulate the activities and enforce the relevant laws and regulations in internal waters. However, the sovereignty in internal waters is in no way an absolute one in the sense that its exercise may not be confined by international law. In practice, the exercise of jurisdiction by the coastal State, either prescriptive, adjudicative or executive, is subject to the limitations that may be imposed by customary international law and international treaties entered into by the coastal State.²²⁸ For example, now that the coastal State enjoys full and exclusive jurisdiction in its internal waters, the same State has, as a corollary, also a duty not to allow its internal waters to be used for acts impairing the rights of other States,²²⁹ particularly their integrity and stability as well as the safety of foreign ships there.

C. Right of Access to Foreign Ports

I. Legal Basis with Respect to the Right of Access to Foreign Ports

1. Customary international law

In practice, coastal States generally admit foreign ships to their maritime ports and waterways that are open to international trade and navigation. The question is, however, whether there is a right of access to ports in customary international law,

²²⁶ Lagoni, 'Internal Waters, Seagoing Vessels in' in Bernhardt (ed.), *EPIL* (1989), 153.

²²⁷ Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 79; Lagoni, 'Internal Waters' in *ibid.*, at 153; the *Fisheries* case (*UK v. Norway*) 1951, [1951] *ICJ Reports* 133.

²²⁸ Brown, *The International Law of the Sea*, (1994), vol. I, 38.

²²⁹ Judge Huber, 'some general remarks on sovereignty', the *Island of Palmas* case 1928, [1928] 2 *RIAA* 838-839; Brown, *ibid.*, at 37; similar submissions expressed by the ICJ in the *Corfu Channel* case by asserting that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States", [1949] *ICJ Reports*, 22. Cited after Lagoni, 'Internal Waters, Seagoing Vessels' in *EPIL* (1989), 154.

or whether the access of foreign ships to its ports is basically within the discretion of the coastal State. This has been answered differently in the relevant publications.

Some writers seem to argue that there is a general right of access to foreign ports in time of peace and accordingly the ports of a State must be open to foreign ships.²³⁰ The proposition is largely based on the freedom of navigation and international maritime trade on the one hand,²³¹ and on the frequent stipulation of the access to the ports in bilateral treaties on the other.²³² The rule adopted by the *Institut de Droit International* (IDI) in 1928 was that “as a general rule, access to ports and roadsteads is open to foreign vessels”. However, at its Amsterdam meeting in 1957, the general rule reduced itself to the *desideratum* that all States should facilitate international communications and abstain from refusing foreign ships access to their internal waters.²³³

To support the view of the existence of the right in customary law, the award in the *Aramco* arbitration of 1958 was frequently cited as it stated:

According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require.²³⁴

Nevertheless, other scholars cast their doubts on the presence of the right of entry into foreign ports in customary international law.²³⁵

²³⁰ Colombos, *The International Law of the Sea* (1967), 176; Brown, *The International Law of the Sea*, (1994), vol. I, 38 f.; Sohn/Gustafson, “accepted as reflecting a customary rule of international law”, in *The Law of the Sea in A Nutshell* (1983), 80; Peters, *Innere Gewässer im neuen Seerecht* (1999), 114 ff.

²³¹ Colombos regarded “the promotion of international intercourse, navigation and trade” as duties imposed by customary international law, in *The International Law of the Sea* (1967), 176. The point seems to be flawed in our time; Guggenheim, *Lehrbuch des Völkerrechts* (1948), vol. 1, 381; De La Fayette, ‘Access to Ports in International Law’ [1996] 11.1 *IJMCL* 18; Brugmann, *Access to Maritime Ports* (2003), 6 f.

²³² Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 354.

²³³ Colombos, *The International Law of the Sea* (1967), 176; Lagoni, ‘Internal Waters, Seagoing Vessels’ in *EPIL* (1989), vol. 11, 156.

²³⁴ *Saudi Arabia v. Aramco*, Arbitration Tribunal, 23 August 1958, [1963] 27 *ILR* 212; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 306; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 355; Churchill/Lowe, *The Law of the Sea* (1983), 47; Peters, *Innere Gewässer im neuen Seerecht* (1999), 114.

²³⁵ O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 848; Churchill/Lowe, *The Law of the Sea* (1983), 46 ff.; Lowe, ‘The Right of Entry into Maritime Ports in International Law’ [1977] 14 *San Diego Law Review* 597 ff.; Lagoni, ‘Internal Waters, Seagoing Vessels’ in *EPIL* (1989), 156; Bolte, *Die Rechte des Uferstaates in Seehäfen über ausländische Handelsschiffe* (1969), 82; Steinert, *Die internationalrechtliche Stellung des Schiffes im fremden Küstenmeer* (1970), 128; Hasselmann, *ibid.*, at 356 f.; Brugmann, *Access to Maritime Ports* (2003), 2.

At the latest since UNCLOS I, it has been established that the freedom of navigation does not exist in the territorial sea and internal waters, and that there is no general right of innocent passage in internal waters either.²³⁶ The postulate of a supposed right of access to ports, namely, that each State has a duty to facilitate international maritime trade, appears to hardly sustain a close inquiry into the issue, because no rule of international law requires a State to engage in global transactions at sea.²³⁷ The “duty”, if it really existed, might be substantially diluted on account of the existence of alternative means of transportation other than shipping.²³⁸

Therefore, coastal States have the right to open their ports and to close them where the vital interests, such as peace, order, security or public health, are at stake. Under customary international law, there are no obstacles for a State to do so. The view finds support in broad State practice and some multilateral treaties, including the 1923 Geneva Statute on the International Regime of Maritime Ports.²³⁹

In addition, a right of entry into ports in customary law can scarcely accrue from the magnitude of provisions in many bilateral treaties or from some regulation concerning access to ports in the 1923 Geneva Statute, “because the provisions of such treaties lack the ‘fundamentally norm-creating character’ necessary for the transition, the mere repetition of rights of entry in these treaties could not constitute a rule of customary law.”²⁴⁰

Furthermore, as some authors contended, the recurrent stipulation of the right of entry in international agreements itself reflects the fact that there exists no such rule in customary international law. Otherwise the staunch repetition might be rendered superfluous.²⁴¹

The dictum of the *Aramco* arbitration, which is always invoked as the main piece of international adjudication in sympathy with the general right in question under customary law, is found to be not well-grounded either. It has been criticized for the misunderstanding of the literature and legal instruments on which the award was based.²⁴² *O’Connell* meant that in the award the rule of international law referred to may be more the dictates of non-discrimination among

²³⁶ Arts. 1, 2 CHS 1958; arts. 86, 87 UNCLOS; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 305.

²³⁷ Churchill/Lowe, *The Law of the Sea* (1983), 47; Lagoni, *ibid.*, at 304 f.

²³⁸ Similar views expressed by Lagoni, *ibid.*, at 305.

²³⁹ See [1926-27] 58 *LNTS* 285.

²⁴⁰ Lowe, ‘The Right of Entry into Maritime Ports in International Law’ [1977] 14 *San Diego Law Review*, 619; Peters, *Innere Gewässer im neuen Seerecht* (1999), 115; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 355.

²⁴¹ Hasselmann, *ibid.*, at 355; Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 98.

²⁴² Churchill/Lowe, *The Law of the Sea* (1983), 47; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 306 f.; Hasselmann, *ibid.*, at 355; the dictum is believed to have been made without necessity, for it had not been argued by either side during the process.

foreign ships visiting ports than the access right of every ship.²⁴³ More recently, *Brugmann* maintained that the tribunal in the *Aramco* case “was mistaken in assuming the existence of any authority for such a general pronouncement”.²⁴⁴

In addition, the coastal State enjoys a right to set conditions for access to its ports, especially with respect to the standards and requirements of ship safety and environmental protection. However, the conditions set may not be stricter than those provided for in the relevant international agreements to which the State concerned is a party. Only when a matter has not yet been regulated in an international convention, or the coastal State is not a State party to the relevant convention addressing the conditions for access to ports, may it adopt the conditions at its will or adopt more stringent port entry requirements for its ports. Apart from that, some general requirements in customary international law, such as no abuse of rights and proportionality, should be respected as well. In this context, the right of the coastal State to set conditions for access to its ports has been acknowledged broadly in State practice and the codification efforts of international law.²⁴⁵ Besides, the ICJ concluded in the *Nicaragua* case 1986 that: “It is by virtue of its sovereignty that the coastal State may regulate access to its ports.” The dictum was repeated by the Court in the case of *Land, Island and Maritime Frontier Dispute* 1992.²⁴⁶

Although there exists no general right of access to ports, it would be of no great risk to state that there is a reasonable presumption based on shipping practice that open maritime ports are left open to all foreign ships and can be entered under the conditions as usual, unless otherwise duly publicized by the port authorities.²⁴⁷ Consequently, there would be an obligation upon the coastal State to announce any change in terms of the access conditions or the status of access channels to ports as well as the information of port closure. An arbitrary closure of port without prior notification or delayed publication of newly introduced entry conditions would render the coastal State accountable internationally. Similarly, the coastal State would have a duty to ensure that the waterways that are used as necessary access channels leading to the ports remain in a sound state once it grants the entry right to the ships concerned. To this end, the ICJ held in the *Nicaragua* case that, where the ships of one State enjoy a right of access to ports

²⁴³ O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 848; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 355.

²⁴⁴ Brugmann, *Access to Maritime Ports* (2003), 2.

²⁴⁵ Arts. 25(2), 211(3) UNCLOS; Art. 16(2) CTS 1958.

²⁴⁶ For the *Nicaragua* case 1986, cf. [1986] *ICJ Reports* 111, para. 213; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 306. For the case of *Land, Island and Maritime Frontier Dispute* 1992, [1992] *ICJ Reports* 588, para. 351; Peters, *Innere Gewässer im neuen Seerecht* (1999), 115.

²⁴⁷ Churchill/Lowe, *The Law of the Sea* (1983), 47; Lagoni, *ibid.*, at 310; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 357.

of another State, the impediment of the right by laying mines constitutes an infringement of the freedom of communication and of maritime commerce.²⁴⁸

Apart from its duty to provide information, aimed at protecting *bona fide* trust, the coastal State is also supposed under the obligation not to discriminate among foreign ships in internal waters as well. While the starting point of this view is undoubtedly correct, it appears still to need some further analysis and clarifications in the context of State practice and the development of international law.

The clause of non-discrimination has been broadly employed in international agreements, either bilateral or multilateral. However, its effect is limited, strictly speaking, merely to the member States of the agreements. It is hard to claim that third States could be likewise bound by such a clause. Nonetheless, the recurrent introduction of equal treatment in State practice seems to have gradually turned it into a general rule in customary law. Following the same lines, some scholars demanded the ubiquitous application of non-discrimination to foreign ships.²⁴⁹

Another weakness for equal treatment to be a widely accepted principle in customary international law may, at first sight, lie in the fact that the requirement of non-discrimination is always subject to reciprocity.²⁵⁰ But the reciprocity typically embodied in bilateral treaties does not impair the generality of the principle of non-discrimination as an established rule in customary law. Furthermore, such a principle is not derived from the maxim of sovereign equality of States.²⁵¹ In other words, the principle in question is not a rigid one, but a flexible one. At least, this principle cannot be successfully invoked to claim the equal right of access to ports, because even the requirement of non-discrimination does not prevent unequal treatment with particular good reasons. Therefore, there is no customary rule for coastal States to prevent them from treating foreign ships differently. Yet a State may not go so far as to arbitrarily discriminate against a flag without any justifiable ground. That would amount to the violation of basic principles of general international law.²⁵² In this sense, it can fairly be stated that the prohibition of flag discrimination without any justifiable ground has been arguably established as a general rule in customary international law.

The introduction of the requirement of general non-discrimination in UNCLOS²⁵³ can be seen as a sign that the contemporary international law of the

²⁴⁸ Cf. [1986] *ICJ Reports* 128, para. 253, cited after Lagoni, 'Internal Waters, Seagoing Vessels in' in *EPIL* (1989), 156.

²⁴⁹ Among others, O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 848.

²⁵⁰ So in art. 2 of the 1923 Geneva Statute, 58 *LNTS* 285; art. 3 of the Sino-German Treaty on Maritime Transport of 9 May 1995, BGBl. 1996 II, 1451; exceptionally, art. 227 of UNCLOS is free of mutuality requirement.

²⁵¹ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 307. But he stated further that equal treatment in respect of port access of the foreign ships under distress or *force majeure* is required, considering that there is a customary right of access to a port under such circumstances. *Ibid.*

²⁵² *Ibid.*, at 309.

²⁵³ For example, arts. 131, 227 UNCLOS.

sea has attached increasingly more importance to the subject and begun to regard non-discrimination as a general rule of international law, which may no doubt extend to the access of foreign ships to ports.²⁵⁴

In practice, coastal States usually seek to refrain from enforcing discriminatory measures against particular flags, except in the case of reprisal action directed towards specific States, because discrimination could normally lead to diplomatic disputes, political quarrels or economic reactions. After all, discrimination is considered to be inimical behaviour against the State suffering therefrom.²⁵⁵

2. The 1923 Geneva Statute on the International Regime of Maritime Ports

The legal basis for access to ports may be found at least among those States which are Contracting States to the 1923 Geneva Statute.²⁵⁶ The Statute was purported to liberalise the shipping industry and to promote international trade, which still remains an outstanding issue so far under the framework of the General Agreement on Trade in Services (GATS), among the Contracting States by stipulating the equality of treatment of foreign ships. The ships embrace not only ordinary merchant ships but also tug ships, research ships, drilling ships, salvage ships, etc.²⁵⁷ However, the Statute has not gained world-wide acceptance as expected. Until 2000, it had been ratified or acceded to by only 40 States.²⁵⁸ Even some big flag States such as Liberia, Bahamas, South Korea, China, Singapore, Canada and the US are still outside it. It is difficult not to admit that, in State practice, the Statute has merely played an inconspicuous role.²⁵⁹

Nevertheless, in terms of the liberalization of maritime transport services or, specifically, of the access of foreign ships to the ports, the Statute has made big strides in the right direction and thus deserves considerable credit. The main accomplishments achieved lie in the successful establishment of a subtle but well-

²⁵⁴ Lagoni spoke of a developing principle in customary law concerning the entry of foreign ships into the maritime ports in 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 308.

²⁵⁵ *Ibid.*

²⁵⁶ The Statute is the result of the second general transportation conference of the League of Nations in Geneva in 1923. Besides the Statute, there is still a Convention that serves as the cover to the former; for more information *ibid.*, at 275 ff.

²⁵⁷ Art. 13 of the Statute sets a wide scope of ships except warships, government ships operated for non-commercial purposes and fishing vessels; *ibid.*, at 281.

²⁵⁸ These States are: Antigua and Barbuda, Australia, Belgium, Burkina Faso, Cyprus, Croatia, Ivory Coast, Denmark, Fiji, France, Germany, Greece, India, Iraq, Italy, Japan, Yugoslavia, Madagascar, Malaysia, Malta, Morocco, Marshall Islands, Mauritius, Mexico, Monaco, New Zealand, the Netherlands, Nigeria, Norway, Austria, Panama, Sweden, Switzerland, Trinidad and Tobago, Czech Republic, Czechoslovakia, Hungary, Vanuatu, Zimbabwe. German BGBI. 2000 II, *Fundstellennachweis B, Völkerrechtliche Vereinbarungen*, 219 f.

²⁵⁹ So also Lagoni with the deep analysis on the reason for that in 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 276.

conceptualised balance between coastal State jurisdiction and flag State jurisdiction. The Statute enshrines the principle of equal treatment on condition of reciprocity²⁶⁰ on the one hand, while it reserves a wide range of jurisdictional powers in favour of coastal States on the other.

The most important provisions, i.e. those about the principle of equal treatment, are contained in art. 2(1), which reads:

Subject to the principle of reciprocity and to the reservation set out in the first paragraph of article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.

Pursuant to the provision, a Contracting State shall afford ships of other parties either national treatment or most-favoured-nation treatment (MFNT) on the basis of reciprocity.

There has been some debate on the provisions. It is suggested, for example, that the stipulation should have guaranteed the freedom of access under ordinary circumstances for State parties by combining national treatment, MFNT and reciprocity.²⁶¹ Similarly, the view was expressed that the provisions, which are seen as reflecting a customary rule of international law, established the principle of freedom of access to ports by foreign merchant vessels on the reciprocity basis.²⁶² On the other hand, some writers argued that the stipulation was aimed at eliminating discrimination on access to ports and using ports, rather than at proclaiming a universal and subjective right of access, let alone freedom of access. The Statute can be relied upon in State practice but it does not create any rule in customary law yet.²⁶³

²⁶⁰ Some scholars speak of “right of access” or “freedom of access”, see *infra* notes 263, 264 and 265.

²⁶¹ Steinert, *Die internationalrechtliche Stellung des Schiffes im fremden Küstenmeer* (1970), 129; see also Colombos, *The International Law of the Sea* (1967), 177.

²⁶² Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 79 f; Churchill/Lowe used the term of “right of access” and “reciprocal right of access”, in *The Law of the Sea* (1983), 47; Peters called as “*friedliches Hafenzugangsrecht*”, in *Innere Gewässer im neuen Seerecht* (1999), 119.

²⁶³ O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 848; Lowe held similar opinions in this regard, by inferring that the art. 1 of the Statute is “to secure equality of treatment for vessels in foreign ports, not to establish a general right of entry ... In other words, the Convention regulated the *conditions* of entry rather than the *right* of entry.” in ‘The Right of Entry into Maritime Ports in International Law’ [1977] 14 *San Diego Law Review* 605. Apart from that, he asserted that “a coastal State may close its ports to foreign ships whenever it chooses, subject only to any rights of entry granted under treaty.” *Ibid.*, at 621; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 354.

Notwithstanding the differences in the legal effect of the provisions concerned, the two main opinions expressed above tend not to be irreconcilable with each other. From the wording of the stipulation, it deals more with conditions of entry or measures to remove discrimination regarding entry than with the freedom/right of entry. "Freedom of access" emerges obviously as one of the application areas of the key requirement of "equality of treatment", implying the accessory nature of the former. Nonetheless, from the legislative purpose and State practice, the Statute might be intended to establish and has actually established the right of access to port, at least, among State parties based upon the equal treatment principle. Therefore the different views refer plainly to the different perspectives of one and the same thing.

However, one could wonder why "freedom of access" has been employed, inasmuch as there has never existed freedom of access to ports. In general understanding, the exercise of a freedom in the sense of international law is generally free of any substantial requirement from any other State.²⁶⁴

Art. 2 of the Statute, at any rate, covers merchant ships and their operations, whether owned publicly or privately. Hence as far as international maritime transport is concerned, the relevant provisions can be seen as indicating a developing customary rule of international law on which the clauses of national treatment and MFNT of both the General Agreement on Tariffs and Trade (GATT) and GATS are modeled.²⁶⁵

The other aspect of the subtle balance which merits further inquiry lies in the wide reservation of rights for the coastal State as earlier indicated. That constitutes another pillar of the 1923 Geneva Statute.

In the first place, art. 16 permits a Contracting State, in the case of an emergency threatening its safety or other vital interests of the State, to take general or particular interim measures that may deviate from the provisions of arts. 2 to 7. Clearly "measures" mean any measures, including the closing of a port, that the case might demand. The 1923 Statute grants its parties the right of retorsion as well.²⁶⁶ That is to say, a Contracting State is entitled to revoke the benefit of equal treatment for access to and use of its ports for the ship of a State which failed to play its role accordingly. However, it is required that diplomatic efforts be made first to solve the issue prior to the revocation. Furthermore, the Statute reserves cabotage, towage and pilotage services, regulation on warships, ships on governmental non-commercial services and fishing vessels within the full discretion of

²⁶⁴ Some of the freedoms, for instance, freedom of navigation and of the laying of submarine cables and pipelines in the EEZ as provided for in arts. 87 and 58 of UNCLOS, nonetheless, are believed to be subject to coastal State regulations on the conservation of the living resources and that on the laying of such cables and pipelines adopted under art. 79(3) of the same Convention.

²⁶⁵ Arts. III(4) and I GATT, arts. II and XVII GATS, available at: <<http://www.wto.org/english/docs>> (last visited: March 22, 2002). National treatment and MFNT under GATS can, however, be excluded from the application by a Member. See also Brugmann, *Access to Maritime Ports* (2003), 26 ff.

²⁶⁶ See art. 8(1) of the 1923 Statute.

each Contracting State.²⁶⁷ Each Contracting State is still seized of reins over the transit and the traffic of contraband, the transport of dangerous goods, immigration control and other rights in pursuance of general international conventions in which it has participated.²⁶⁸ Last but not least, art. 3 accords port authorities a nebulous but open-ended power to take “such measures as they may deem expedient for the proper conduct of the business of the port” subject to the principle of equal treatment.

To sum up, the 1923 Statute has laid the cornerstone for liberalizing international shipping operations and particularly contributed a lot to the eradication of discrimination with respect to the right of access to and the use of foreign ports. Notwithstanding the principle of equal treatment, the Statute does not seem to have created a freedom of access to ports even among Contracting States. The right of access may be reasonably regulated by coastal States and is still subject to a broad range of measures taken by the States, such as closure of port and refusal of access to port. Although the Statute is solely binding upon its parties, it has to be admitted that the provisions therein have far-reaching impact on State practice and may be seen as reflecting a growing rule of customary international law. It becomes even clearer when one looks at it in the background of a new wave of liberalization in maritime transport services in the last couple of years.

3. *Bilateral agreements*

The right of access to foreign ports may derive from bilateral treaties covering the issue of navigation. Many bilateral treaties have been concluded even between the Contracting States of the 1923 Statute in order to further regulate shipping activities in greater detail.²⁶⁹

The bilateral treaties, agreements or protocols normally provide for equal treatment on a mutual basis. Many of them explicitly regulate the issue of access to port. The Sino-German Agreement on Maritime Transport of 1995, for instance, is believed to have established such a right. It stipulates:

The ships of each Party are entitled to navigate between the ports of both Parties, which are open to international trade, and to transport goods or passengers between the two Parties or between one Party and third States.²⁷⁰

Similarly, according to the provisions of the Treaty of Commerce, Establishment and Navigation between the UK and Japan of 1962, the ships of each side have “liberty of access to all ports, waters and places open to international commerce

²⁶⁷ See arts. 9, 10, 11, 13 and 14 of the Statute.

²⁶⁸ Art. 17 of the Statute.

²⁶⁹ E.g. the Treaty of Establishment and Navigation of 27 October 1954 between Germany and France, German BGBl. 1957 II, 1661; The Commerce and Navigation Treaty of 20 July 1927 between Germany and Japan, German RGBl. 1927 II, 1087.

²⁷⁰ Art. 2 of the Agreement, BGBl. 1996 II, 1451. English translation is prepared by the author.

and navigation” in the territory of the other side.²⁷¹ Among more than 50 bilateral treaties in respect of navigation entered into by Germany, the right of access to port has been accorded to one another in 18 treaties.²⁷² Given the background of the general introduction of equal treatment, it is doubtful that any extra preference could accrue from such a stipulation.

An investigation has recently been made on the way the right of port access is addressed in 263 existing bilateral treaties.²⁷³ According to it, 90 treaties use the mode of MFNT, while 110 treaties turn to the choice of national treatment. Among all the treaties investigated, 21 combine MFNT and national treatment, while 14 explicitly mention a right of port access. Additionally, in some treaties other issues that may have impact on port access are regulated as well, such as reciprocal treatment, chartered ships, cargo-sharing agreements, search and rescue arrangements, advance notice and privileges for members of special trade agreement.²⁷⁴

The scope of application of bilateral treaties is, geographically, not limited to open ports. It covers also other waters and places open to international trade or generally “the waters under the sovereignty”²⁷⁵ of the parties. This can be deduced either from the express wording of the text or from the very purpose of the treaty, whereby clear indication of geographical coverage may be absent. Anyhow, “the waters under sovereignty” may not be understood as everywhere in internal waters but only those parts of them which normally serve as customary routes, channels or waterways leading to the open ports.

Bilateral shipping agreements are generally trade-oriented. Consequently, many of them clearly pinpoint merchant ships as their object of regulation. Warships, other government ships not used for commercial purposes and fishing vessels are normally excluded from the application of the treaties. In the case of no clear-cut circumscription of ships in a treaty concerned, the interpretation of the treaty can be made by reference to the stipulation in the 1923 Geneva Statute as usual treaty practice.²⁷⁶ To protect the domestic shipping industry, coastal and inland transport services are usually excluded from the bilateral agreements and remain reserved only for the respective nationals.

It is interesting to note that, in some cases, bilateral treaties are designed to apply not only to the operation between the two parties, but also to that between one party and any other third State.²⁷⁷ In addition, although a bilateral treaty applies basically to the ships flying the flag of either party, a ship flying a flag of a

²⁷¹ Art. 20(1)(a) of the said Treaty, 478 UNTS 6934; Brown, *The International Law of the Sea*, (1994), vol. I, 39.

²⁷² Peters, *Innere Gewässer im neuen Seerecht* (1999), 116.

²⁷³ Brugmann, *Access to Maritime Ports* (2003), 35 ff.

²⁷⁴ *Ibid.*, at 41 ff.

²⁷⁵ “*Hoheitsgewässer*” in art. 3 of the Sino-German Treaty on Maritime Transport of 1995.

²⁷⁶ Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 294.

²⁷⁷ Art. 2(1) of the Sino-German Agreement on Maritime Transport of 1995.

third State but being put in operation by a shipping company of one party is also entitled to enjoy all rights and facilities provided for in the treaties.²⁷⁸ As the corollary of such provisions, the flag State of the said ship is not in the position to assert diplomatic protection, as it could in other cases, insofar as the application of the treaty is concerned. On the contrary, the State party whose shipping company controls, but not necessarily owns, the ship during the transport in question holds the legal basis to exercise its diplomatic protection at least under the treaty. However, it is questionable whether this will be recognized as a legal basis or right by other States under general international law.

Unlike the 1923 Geneva Statute, bilateral treaties on shipping usually embrace the stipulation with respect to the facilitation of navigation that models itself on the Convention for Facilitation of International Maritime Transport (FAL 1965).²⁷⁹ The relevant prescription is aimed at promoting the treaty parties to take appropriate measures within the framework of their laws and regulations to facilitate and accelerate maritime transport, including the access to ports, avoid unnecessary delay of ships, and simplify and speed up the completion of customs and other formalities.²⁸⁰ Of course, the facilitation of maritime transport would not be achieved without resting on the mutual recognition of the relevant certificates and documents.²⁸¹

While the ships of both parties to the bilateral agreements enjoy a wide scope of rights and facilities granted on a reciprocal basis, they nevertheless have to face some qualifications. The ships of each party and their crew members should, no doubt, observe the relevant laws and regulations of the other party during their stay in the ports and internal waters of the other party.²⁸² That is also dictated by general international law in reliance upon the principle of the territorial jurisdiction, as earlier noted. Among the aforesaid laws and regulations are naturally those governing access to and the use of ports. In addition, ships under bilateral treaties would be exposed to potential reprisal imposed by one party on account of a severe non-compliance of the other party,²⁸³ or to limitation as may be necessitated by a series of essentially critical issues of either party.²⁸⁴ In principle, the limitations laid down by parties are permissible under international law, if they do not go so far as to constitute arbitrary unilateral action or to violate the

²⁷⁸ See definition of "ship" in art. 1(1) of the Sino-German Agreement of 1995; Also art. 2(2) of the German-Brazilian Treaty on Maritime Transport of 4 April 1979, German BGBl. 1980 II, 697.

²⁷⁹ It was reached under the auspice of the IMO on 9 April 1965. 591 *UNTS* 265.

²⁸⁰ Art. 5 of the German-Brazilian Treaty; art. 4 of the Sino-German Agreement.

²⁸¹ Arts. 6, 7 of the German-Brazilian Treaty; arts. 6, 11 of the Sino-German Agreement.

²⁸² Art. 15 of the Sino-German Agreement; art. 11 of the German-Brazilian Treaty.

²⁸³ A US Statute, for example, permits the President to suspend trade rights of foreign ships whose State discriminates against US ships. 46 USC §142; Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 81.

²⁸⁴ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 298 ff.

principle of equal treatment, which always serves as the basis and permeates every aspect of the treaties.

4. UNCLOS

Although internal waters were basically precluded from the negotiations at UNCLOS III, several articles of UNCLOS bear, more or less, upon the access of foreign ships to ports.

In this sense, art. 211(3) of UNCLOS should be first mentioned and it runs as follows:

States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. ...

The paragraph, which was originally proposed by the French delegation at the seventh session of the Conference in 1978, is intended to harmonize the control of coastal States over foreign ships navigating in the territorial sea and proceeding to internal waters or port facilities outside internal waters.²⁸⁵ It has to be read together with the basic rules for the innocent passage of foreign ships in the territorial sea.

The text of the paragraph appears to pay more attention to how the legislation is made known to the world than to the scope of the legislative jurisdiction concerned. However, given that the article deals largely with the prescriptive competence of States with regard to pollution from ships, it would be reasonable and safe to read a prerequisite into the cited paragraph. That is, a foreign ship in port or internal waters shall be subject to the territorial jurisdiction of the port State and the State may prescribe those requirements as a condition for port entry as long as they constitute no breach of the treaty obligations of the same State. The omission of the precondition in the paragraph might be due to the fact that it is not necessary to repeat an uncontested rule of customary law. In this connection, however, it should be noted that the coastal State may not apply more stringent regulatory measures than generally accepted international rules and standards in respect of the design, construction, manning or equipment of foreign ships.

The paragraph encourages States to establish cooperative arrangements concerning port entry requirements by providing for an inquiry right for them.²⁸⁶ Accordingly, a foreign ship sailing within the territorial sea of a State participating in such arrangements is obliged to inform the State on request whether it is proceeding to a State of the same region which also participates in the arrangements and, if so, to indicate whether it complies with the port entry requirements.

²⁸⁵ Rosenne/Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (1991), vol. IV, 193 ff.

²⁸⁶ Hasselmann, *Die Freiheit der Handesschifffahrt* (1987), 419.

In connection with art. 211(3), art. 25(2) of the Convention allows the coastal State “to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject”, where ships proceed to internal waters or a call at a port facility outside internal waters. Here, the intervention by the coastal State is a form of enforcement of the prescriptive competence hinted in art. 211(3). Nonetheless, two questions are still to be answered. First, whether a State has right of inquiry if it has not joined any cooperative arrangement. Second, whether the conditions envisaged in art. 25(2) have the same connotation as that in art. 211(3). To the first question the answer tends to be affirmative. Whereas the coastal State has the right to prevent any breach of the conditions, it has at first to find a way to identify whether the conditions are being violated. To this end, inquiry together with monitoring is supposed to be indispensable for the coastal State to effectively exercise its right. As for the second question, the difference may be clear at first sight, i.e. “the conditions” (*plural*) in art. 25(2) contain definitely more contents than “a condition” (*singular*) in art. 211(3). This can be elucidated in light of the fact that the former may refer to a much broader coverage not limited to environmental issues.

In Part X of UNCLOS, namely, “Right of Access of Land-locked States to and from the Sea and Freedom of Transit”, it is implied that land-locked States enjoy the right of access to ports. Otherwise the right of access to and from the sea and freedom of transit could hardly be exercised by these States. However, the ports here are not purported to include all the open maritime ports of the transit State, but only those which are agreed upon by the land-locked States and the transit State concerned in pursuance of art. 125(2). Apart from this, art. 131 guarantees equal treatment of ships flying the flag of the land-locked States to that accorded to other foreign ships in the maritime ports of the transit State. The equal treatment here can be understood as the MFNT granted to foreign ships, since the treatment “accorded to other foreign ships” may, in practice, be different from one foreign State to another. Although the right of port access is usually linked to the requirement of reciprocity, land-locked States may not be denied access to port solely due to their inability to return the service.²⁸⁷

The Convention also establishes a principle of non-discrimination with respect to foreign ships to the extent of the implementation of Part XII concerning marine environment.²⁸⁸ But the principle may be applied, as a customary rule, in other fields of the law of the sea as well.

Finally, while art. 255 deals basically with facilitating access to foreign ports for research ships, it seems unreasonable to refuse to extend analogically its core spirit also to the merchant ships that constitute the focus of the thesis.

²⁸⁷ Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 81.

²⁸⁸ Art. 227 UNCLOS.

5. State practice

It is beyond question that not all parameters related to access to foreign ports have been fully delineated either through the generally accepted rules of customary law or through international treaties. State practice comes out with another perspective in respect of the legal basis concerning the entry into ports by foreign ships.

Many States have established their regulations on port access. In Germany, for example, the access of foreign merchant ships to the Port of Hamburg is made subject to approval by the competent authority if: a ship is in the danger of sinking; a ship or its cargo is in flames or is suspected of being in flames, or a fire has not been completely put out; oil leaks from a ship; a ship should be punished because of its wrongdoing at sea.²⁸⁹ According to the law, the commercial transportation of passengers to and from the Port must be permitted by the Port authority.²⁹⁰ Additionally, ships are required to conduct entry and exit registration and to apply for an approval in respect of berth at latest 24 hours prior to the expected time of arrival at the Port.²⁹¹ Under the German War Weapons Control Act 1961, an approval is required for any transport of war weapons within German territory, including ports and internal waters.²⁹² As for atomic, biological, chemical weapons and land mines, transport is absolutely forbidden all over the jurisdiction.²⁹³ Obviously, a foreign merchant ship carrying such weapons has no legal access to any port in Germany unless otherwise authorized.

Access to open ports is sometimes restricted for security reason. By the Executive Order No. 1613 issued on 23 September 1912, the US Government once prohibited foreign ships from entering certain strategic ports without authorization in advance.²⁹⁴ The act is in line with art. 16 of the 1923 Geneva Statute. The US also lays down the safety, anti-pollution and even competition conditions on port entry. Under Navigational Safety Regulations 1977, all large ships destined for US ports must test equipment twelve hours before entering US navigable waters.²⁹⁵ The Port and Waterways Safety Act 1972, as amended, imposes more stringent equipment and construction requirements on large ships.

²⁸⁹ Art. 7 of the *Hafenverkehrs- und Schiffahrtsgesetz* of 3 July 1979 with the text of 10 December 1996, HambGVBl. 1996, 307. The translation is prepared by the author.

²⁹⁰ Art. 15 of the same law as in previous note.

²⁹¹ Arts. 7, 8, 28 of the *Hafenverkehrsordnung* with the version of 20 May 1997, HambGVBl., 1997, 145.

²⁹² See art. 3 of the *Kriegswaffenkontrollgesetz* of 20 April 1961, German BGBl. 1961 I, 444, in the version of 22 November 1990, BGBl. 1990 I, 2506, last amended on 10 November 2001, BGBl. 2001 I, 2992

²⁹³ Arts. 17, 18 and 19, *ibid.*

²⁹⁴ Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 81.

²⁹⁵ 33 CFR § 164.25. "Navigable waters" is a frequently employed term in US maritime legislation; it is deemed to cover rivers, lakes, internal waters and territorial sea as well as the EEZ, in some cases like US Oil Act 1990.

The Act prohibits any ships deemed unsafe and having not been issued a certificate of compliance under the Act from going into US navigable waters.²⁹⁶

The Coast Guard is entitled, under 46 USC § 391a(10), to establish manning standards for foreign ships, which are bound for a US port and carry oil or other dangerous cargoes. Non-compliance with the standards may lead to the refusal of entry into the port and, much worse, to civil and criminal punishments as well.²⁹⁷ If a foreign ship has committed a contravention against the prohibition of rebates to shippers or of other unfair competition operations, as stated in the Shipping Act 1916, it is likewise unable to enter US ports.²⁹⁸ Besides, the occurrence of the *Exxon Valdez* accident precipitated the promulgation of the Oil Pollution Act 1990 in the US (OPA 1990). Under the Act, foreign oil tankers shall abide by the compulsory prescription of double-hull construction in navigable waters. In other words, single-hull tankers are withheld access to ports in the US.²⁹⁹

The Chinese practice with respect to the access of foreign ships to ports can be taken as the barometer of its foreign relations. From the 1950s to 1970s China was largely isolated from the outside world, resulting from the embargo imposed by some western countries. It maintained limited trade relations basically with a handful of socialist States. Under these circumstances, China had to take different attitudes towards foreign ships with different nationalities regarding the regulation of access to its ports. At that time no port in China had ever been officially declared open to international trade. For the ships of the States with which no diplomatic relations were established, a special approval besides boarding inspection on arrival was required, while the ships from “friendly” countries met with far fewer formality requirements.

In the late 1970s China embarked on the “reform and opening” policy and began to update its regulations on foreign ships. Since then, foreign merchant ships have actually enjoyed convenient access to all the ports that are appointed as open ports for international trade. However, the entry into port is still, in form, put under the approval in advance by the port authorities.³⁰⁰ Specifically, ships or their agents shall, seven days prior to the expected time of arrival at port, file the application with the competent port authorities for permission for the intended

²⁹⁶ 46 USC § 391a, 46 USC § 391a(8) and 33 USC § 1228, cited after Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 84.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*, at 83.

²⁹⁹ See Subchapter IV: Prevention and Removal of the Act; Schmuck, *Der US-Oil Pollution Act* (1995), 58.

³⁰⁰ Arts. 3, 5 of the Regulations Governing Supervision and Control of Foreign Ships 1979, in *Collection of the Maritime Laws and Regulations of China* (1991), 5 f; art. 11(1) of the Maritime Traffic Safety Law 1983, in the same Collection; art. 6 of the Regulations on the Inspection of the Foreign-going Ships in the Open Ports 1995, available at <<http://law.people.com.cn/bike/note.html?d=253>> (last visited: April 22, 2002).

entry and,³⁰¹ 24 hours before the arrival, notify the competent authorities of the time of arrival, docking place, plan of berth shift as well as the information about crew members and passengers on board.³⁰²

The requirement for approval runs virtually just like notification, particularly for those ships from the States that have concluded a bilateral treaty covering navigation with China. Theoretically, however, the port authority reserves the right to decline the desired access of a foreign ship if the ship is deemed to cause a threat to port safety on account of, for instance, the carriage of hazardous goods.³⁰³ It is not surprising that more stringent requirements are placed on foreign ships carrying highly dangerous goods.³⁰⁴ Noticeably, the Regulations on the Inspection of the Foreign-going Ships in the Open Ports 1995 does not draw any line between foreign and domestic ships, whereas the Regulations Governing Supervision and Control of Foreign Ships 1979 was directed merely at foreign ships. It symbolizes, to some extent, the greater integration of China into the international community.

Sometimes the shipping industry unfortunately becomes the victim of political wrangling. In 1986, Syria prohibited all British ships from entering its ports as a response to the unilateral freezing of diplomatic relations by the UK,³⁰⁵ while the US has maintained its long-standing blockade policy against Cuba since 1961. In the 1970s and 1980s, ships carrying hazardous waste frequently suffered from being refused entry into their destination ports. The odysseys of *Ammerssee*, *Karin B* and *Petersberg* may well illustrate the delicacy of this situation.³⁰⁶ The nightmares can hopefully be prevented from occurring again by the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989 (Basel Convention 1989), which has been generally accepted by all major maritime States except the US.³⁰⁷

³⁰¹ Art. 6 of the Regulations on the Inspection of the Foreign-going Ships in the Open Ports 1995; art. 3 of the Regulations Governing Supervision and Control of Foreign Ships 1979.

³⁰² Art. 7 of the Regulations on the Inspection of the Foreign-going Ships in the Open Ports 1995.

³⁰³ Arts. 18, 33 of the Maritime Traffic Safety Law 1983; art. 67 of the Marine Environmental Protection Law 1982, as last amended in 1999, available at <<http://www.chinalawinfo.com/xxlf/falv/1999122502.asp>> (last visited: April 23, 2002); art. 28 of the Regulations Governing Supervision and Control of Foreign Ships 1979.

³⁰⁴ *Ibid.*

³⁰⁵ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 270.

³⁰⁶ In case of *Petersberg*, the German ship was caught up in trouble in the Black Sea and kept there for nearly a year. For more information, see *ibid.*, at 272 ff.

³⁰⁷ Art. 8 of the Basel Convention states: "When a transboundary movement of hazardous wastes or other wastes ... , cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal ..." See Brown, *The International Law of the Sea, Documents, Cases and Tables* (1994), vol. II, 301 f.; German BGBl. 2000 II, 618 f.

6. Ships in distress

It is a long-established rule in customary international law since the *Eleanor* case in 1809³⁰⁸ that ships in distress or under *force majeure* may enter foreign ports to seek shelter.³⁰⁹ This right of ships in distress finds its expression frequently in bilateral treaties³¹⁰ and many well-known adjudications involving international elements.³¹¹ It has been reflected, to varying degrees, in some multilateral conventions as well.³¹² Although UNCLOS abstains from pronouncing squarely on the right of entry into foreign ports by ships in distress, some lateral references can still be found.³¹³

³⁰⁸ The *Eleanor* case (1809), *Edwards* 135. In the case Lord Stowell stated that “real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws.” Cited after Colombos, *The International Law of the Sea* (1967), 177.

³⁰⁹ Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 194, 208; Colombos, *ibid.*, at 177, 330; O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 853 f.; Lagoni, ‘Internal Waters, Seagoing Vessels in’ in Bernhardt (ed.), *EPIL* (1989), vol. 11, 160; the same author, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 311; Churchill/Lowe, *The Law of the Sea* (1983), 46; Brown, *The International Law of the Sea*, (1994), vol. I, 39; Telfer, ‘Comment, Maritime Insurgency and the Law of the Sea: An analysis Using the Doctrine of Distress’ [1983] 20 *San Diego Law Review* 625 ff.; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 358; Peters, *Innere Gewässer im neuen Seerecht* (1999) 120; the rule was referred to as “enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws”, the *Rebecca* case, see *infra* note 312.

³¹⁰ For example, art. 10 of the Sino-German Agreement on Maritime Transport of 1995 prescribes that each Party shall give every possible assistance and support to the ships in distress of the other Party, its crew, passengers and cargoes on board. Art. 12 of the German-Brazilian Agreement expressly establishes the principle of national treatment to be accorded to each other in respect of the ships in distress, crew members, passengers and goods.

³¹¹ In the *Creole* case 1853, Mr. Bates, umpire of the case, said that: “the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the law of her own country – must be respected by all nations, for no independent nation would submit to their violation.” Cited after Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 202; the *Alliance* case 1903, IX *RIAA* 140; *Kate A. Hoff (the Rebecca)* case 1929, IV *RIAA* 447.

³¹² Cf. art. 14(3) CTS 1958; art. IV SOLAS 1974; Regulation 11 Annex I to MARPOL 73/78; art. 5 LDC 1972, 11 *ILM* 1291; art. 5 of the Tonnage Convention 1969, German BGBl. 1975 II, 65.

³¹³ “*force majeure* or distress” shows up in art. 18(2) of UNCLOS when, however, the passage in the territorial sea is talked about; the wording of “when a vessel is voluntarily within a port or ...” in arts. 218, 220 of the Convention appears to indicate the exclusion of the case in which a ship is compelled to stay within a port or at an off-shore terminal of a State.

A distress is, no doubt, more serious than a mere danger. It can be caused by various factors, including natural forces such as tsunami, sea ice and fire, technical problems such as machinery breakdown, or human mistakes in operation. A distress exists as well when a ship is forced into port by physical constraint that could be either from outside, for example, a collision with other ships, or from inside as in the case of a mutiny on board.³¹⁴ Nevertheless, not all bad weather, technical bugs and incidents on board can be justified as the existence of a distress. In order to immunize a ship in distress from local regulations, the state of the ship has to be reviewed to see whether it can be established as such. To this end, in 1809 a test of distress was put forward by Lord *Stowell* that still remains enlightening in practice nowadays:

It must be an urgent distress; it must be something of grave necessity; such as is spoken in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. ... Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, ..., for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.³¹⁵

The proposition was echoed and further developed by the US Supreme Court nine years later, as it stated that “the necessity must be urgent and proceed from such a state of things as may be supposed to produce, in the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo, or of the lives of the crew”.³¹⁶ The requirements of urgency and necessity were basically restated in different ways in the following cases concerning ships in distress or *force majeure*. While equipment breakdown does not necessarily amount to a required necessity as shown in the case of *May v. The King* 1931,³¹⁷ “necessity” does not mean, however, that a ship must be hopelessly on the brink of sinking. The fact that it may be able to get into port under its own power cannot be used for

³¹⁴ In 1841, the brig *Creole* was carried into Nassau by the slaves on board after they carried out a bloody mutiny. See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 198; also the *Louise F.* case 1923, 293 Fed. 933; for general information on distress see also Lagoni, ‘Vorsorge gegen Schiffsunfälle im Küstenvorfeld: Gemeinschaftliches Schiffsmeldesystem und Hafenzugang im Notfall’ [2001] 7/8 *Transportrecht* 289 f.

³¹⁵ *The Eleanor* case 1809, Edwards 135; O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 855.

³¹⁶ *The New Yorker* case 1818, 3 Wheat. 59; Colombos, *The International Law of the Sea* (1967), 330; O’Connell/Shearer *ibid.*, at 855.

³¹⁷ In the case the Canadian Supreme Court concluded that an American vessel was forfeitable because the claimed leaking of the oil pump did not affect the usefulness of the pump and thus did not curtail the seaworthiness of the vessel. In a word, the leaking of the oil pump did not amount to distress. ILR, 1931, Case No. 81, 154 ff.; O’Connell/Shearer, *ibid.*, at 856; De Zayas, ‘Ships in Distress’ in Bernhardt (ed.), *EPIL* (1989), vol. 11, 288 f.

overruling the claim of distress.³¹⁸ The exhaustion of fuel can be seen as an indication of a distress, where it is caused by superior force.³¹⁹

Notwithstanding the far-reaching dicta in many cases, the concrete criteria both applicable to and operable in the related cases are still to be developed. Therefore, affirmation or rejection of a distress claim will further be left to the best judgment of individual umpires.

Besides the right of entry into a foreign port, a ship driven by a distress may normally claim immunity from the local jurisdiction with respect to any incapacities, penalties, prohibitions, taxes, duties, charges and dues.³²⁰ Here again, the term “ship” refers to a unity as earlier stated. Therefore, the immunity extends also to the crew members, passengers and goods on board. The establishment of the distress rule is dated back to as early as 1809, when the *Eleanor* case was ruled.³²¹ The rule of immunity in distress cases was well-grounded later in the case of the *Enterprise*.³²² In this regard, a classical formulation was also given out by Jessup.³²³

However, the rule of exemption does not mean that a ship in distress is absolutely immune from local laws and regulations. Rather, the exemption applies solely to those violations that have been committed by the ship in distress and inevitably resulted from the distress.³²⁴ Therefore, the ship in distress shall, after entering the port, comply with the instructions of the port authority, with the laws and regulations regarding navigation management, environmental protection, port facility protection and safety control, as long as it is in a position to do so. On the other hand, breaches of customs law, frontier control and entry clearance are normally deemed unavoidable by reason of *force majeure*. Anyhow, the ship is not immune from civil liabilities accruing either from the damage inflicted to port facilities or from specific services rendered to the ship at the port. In some exceptional cases, the ship in distress may not claim exemption from local jurisdiction. Firstly, if a distress is intentionally contrived in order to evade local laws and regulations, especially the prohibition of entry by foreign ships, the ship suffering from the distress could lose the right of access to foreign port and then

³¹⁸ In the *Rebecca* case, the US-Mexican Claims Commission held that such a fact “can obviously not be cited as conclusive evidence that the plea is unjustifiable”.

³¹⁹ *The Alliance* case 1903.

³²⁰ Colombos, *The International Law of the Sea* (1967), 329; Lagoni, ‘Internal Waters, Seagoing Vessels in’ in *EPIL* (1989), vol. 11, 160; Lagoni, ‘Vorsorge gegen Schiffsunfälle im Küstenvorfeld: Gemeinschaftliches Schiffsmeldesystem und Hafenzugang im Notfall’ [2001] 7/8 *Transportrecht*, 292.

³²¹ See *supra* note 308.

³²² O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 856 ff.

³²³ “If a ship is driven in by storm, carried in by mutineers, or seeks refuge for vital repair or provisioning, international customary law declares that the local State shall not take advantage of its necessity.” Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 194.

³²⁴ Similar views also O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 857; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 312.

enjoy no immunity from local jurisdiction.³²⁵ Even then, certain specific circumstances, for instance the necessity to protect innocent persons on board, may render the admission of the ship imperative and necessary.³²⁶ Anyway, in this case, the distress displays only a part of a *mala fide* fraud, which violates the general principle of prohibition of the abuse of rights in international law. Secondly, if a distress occurs to a ship while it is engaged in an unlawful activity, such as smuggling, espionage, subversive broadcasting, conspiracy and illegal fishing against the laws of the State in whose port the ship takes refuge, or terrorism, drug traffic and piracy against the international community as a whole, the ship cannot claim exemption either.³²⁷

Apart from the two special constellations, under some extreme circumstances, the entry into port by foreign ships in distress may be reasonably refused on the ground that the presence of the ship might impair the vital interests of the coastal State or pose a grave threat to public health.³²⁸ Supertankers or nuclear-powered ships sustaining distress could well serve as notable examples in this respect.

One of the latest precedents of distress may be the *Tampa* case in 2001. The Norwegian merchant ship on a voyage between Australia and Singapore rescued 433 mainly Afghani asylum seekers from a sinking Indonesian ship on the high seas on 27 August 2001. In light of the urgent medical situation on board and the poor seaworthiness of the overloaded ship, the captain decided to sail to the Australian territory of tiny Christmas Island in the India Ocean, to disembark these people. But the ship was refused access to the island. To keep the ship in a tight grip, Australian Special Air Service (SAS) troops boarded *Tampa* until an agreement was eventually hammered out among Australia, New Zealand and Nauru on 1 September. In pursuance of the agreement, New Zealand took 150 persons for the further review, the rest went to Nauru at the expense of Australia.³²⁹ Notwithstanding the tough criticism directed against the Australian government during the event, it is noteworthy that the traditional duty to rescue at sea with regard to ships in distress is increasingly challenged, basically because of the growing concerns over illegal immigrants and environmental pollution.

³²⁵ Lagoni, *ibid.*; O'Connell/Shearer, *ibid.*, at 855; Brown, *The International Law of the Sea* (1994), vol. I, 39.

³²⁶ Lagoni, *ibid.*

³²⁷ So was held by the French *Cour de Cassation* in 1832, see O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 856; Lagoni, *ibid.*, at 313; De Zayas, 'Ships in Distress' in Bernhardt (ed.), *EPIL* (1989), vol. 11, 289.

³²⁸ Lagoni, *ibid.*, at 312, 320; De Zayas, *ibid.*, at 288.

³²⁹ Summarized from reports in the press. Yahoo News, Rescued at Sea Said Endangered, 29 August 2001 and Australia Court Blocks Govt from Moving Asylum Ship, 31 August 2001; available at <<http://www.peopledaily.co.jp/GB/guoji/22/82/>> (last visited: August 31 September 1, 2001).

II. Right of Entry into Ports in the EU

Presumably due to its complexity, maritime transport was simply set aside by the draftsmen of the Treaty establishing the European Community (TEC).³³⁰ In the TEC, the issue is plainly referred to the Council of the European Community (EC) for further regulation.³³¹ Nonetheless, the Council has never given up its efforts to unify the regulation of maritime transport and to liberalize the industry in Europe. The efforts taken bear directly upon the right of access to foreign ports.

In 1978 the Council of the European Economic Community (EEC) issued a Directive on minimum requirements for the entry by certain tankers into maritime ports of the Community and their departure³³² with a view to preventing and reducing the danger coming from large tankers in ports. Pursuant to the Directive, all tankers of 1,600 GRT and more carrying oil, gas and chemicals are required to notify the port authority in time before their arrival in ports and submit a tanker check list. In addition, they shall inform the transport/navigation authorities of defects and incidents, and take appropriate precautions when they approach the ports.³³³

After five years' negotiation within the EEC, the Council finally adopted a "maritime package" consisting of four Regulations on 22 December 1986.³³⁴ The first Regulation is designed to focus on applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries,³³⁵ whereas the remaining three Regulations concentrate largely on the economic issues.³³⁶ Under the first Regulation, the

³³⁰ The Treaty, that was originally called the Treaty establishing the European Economic Community (TEEC), was first concluded in Rome in 1957 by six founding Member States, to wit, Belgium, France, Germany (former FRG), Italy, Luxemburg and the Netherlands. According to art. 8 of the Treaty on European Union (TEU), which was signed in Maastricht in 1992, the TEEC has been renamed as the Treaty establishing the European Community (TEC), which boasts 15 Member States up to now. Matthias Herdegen, *Europarecht* (1999), 33, 36 f; 'Vertrag über die Europäische Union, Vertrag zur Gründung der Europäischen Gemeinschaft' in *Europa-Recht* (2000); German BGBl. 2000 II, *Funstellennachweis B, Völkerrechtliche Vereinbarungen/Verträge zur Vorbereitung und Herstellung der Einheit Deutschlands*, 357 ff.

³³¹ Art. 80(2) of the TEC prescribes that the Council can decide by qualified majority, whether, how far and through what procedure relevant regulations should be enacted. See *Vertrag zur Gründung der Europäischen Gemeinschaft*, loc. cit. as previous note.

³³² The Council Directive on 21 December 1978, No. 79/116/EEC, O.J. 1979 L 33/33; Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 322.

³³³ *Ibid.*

³³⁴ Aussaut, 'Cabotage and the Liberalization of the Maritime Services Sector' [1993] 28 *European Transport Law* 347 ff.

³³⁵ Council Regulation (EEC) 4055/86, O.J. 1986 L 378/1.

³³⁶ The three Council Regulations (EEC) are: No.4056/86 exception for agreements between carriers concerning the operation of scheduled maritime transport services and between transport users and conferences concerning the use of scheduled maritime

ships registered in Member States are, subject to the restrictions on freedom to provide services that are possibly still kept in place, entitled to carry out maritime transport services between any two Member States and between any Member State and a third country.³³⁷ In other words, for the ships flying the flags of the EEC Member States, the Regulation has created a right to enter the harbors of the States which are open to international navigation. It also confirms a right of the ships to come into the open harbors of a third country, as long as the Member States maintain maritime transport relations with this country. While the freedom of access to foreign ports within the European Union (EU)³³⁸ has been considerably realized,³³⁹ it appears advisable to conclude bilateral agreements on maritime transport between third States and the EU as a whole in order to guarantee the right of access to the ports of third States, because the EEC Regulations are not binding upon these States. In December 2002, the EU-China Maritime Transport Agreement was concluded as the first maritime agreement at European level and is meant to replace existing bilateral agreements entered into by individual EU Member States and China.³⁴⁰

Apart from the headway seen in cross-border maritime transport, strides have also been made in the liberalization of cabotage, i.e. coastal navigation, within the EU since 1993. In this sense a historical legal document should first be mentioned: the EEC Council Regulation No. 3577/92 with the title of "applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)",³⁴¹ which was issued under the time pressure provided for in the TEC.³⁴²

Under the Regulation, every Member State of the EC is obliged to allow any ships under the flag of a Member State to undertake cabotage along its coast on a non-discriminatory basis, so long as the ships fulfil "all conditions for carrying out cabotage in the Member State in which they are registered at that time".³⁴³ Therefore, the requirements for access to the cabotage market within the EC rest

transport services, O.J. 1986 L 378/4; No. 4057/86 on unfair pricing practices in maritime transport, O.J. 1986 L 378/14; No.4058/86 concerning coordination to safeguard free access to cargoes in ocean trades, O.J. 1986 L 378/21.

³³⁷ Arts. 1(1), 1(2) and 9 of the Regulation No. 4055/86.

³³⁸ The EU was founded under the Maastricht Treaty of 1992.

³³⁹ Basedow, 'Dienstleistungs- und Kabotagefreiheit im Rahmen von Transportketten' [1994] 32 *AVR* 457.

³⁴⁰ Available at <http://europa.eu.int/comm/external_relations/china/summit/ipss_301003.htm> (last visited: March 28, 2004).

³⁴¹ O.J. 1992 L 364/7. The Regulation came into force on 1 January 1993 as prescribed in art. 11 of the Regulation; Milbradt, *Liberalisierung der Seekabotage unter völkerrechtlichen und europarechtlichen Aspekten* (1998), 110 ff.

³⁴² Pursuant to art. 14, as the latest numbering, of the TEC, the Community should take necessary measures with a view to realizing the internal market step by step before the date of 31 December 1992 in accordance with, *inter alia*, art. 80 of the Treaty. 'Vertrag zur Gründung der Europäischen Gemeinschaft' in *Europa-Recht* (2000).

³⁴³ Art. 1 of the said Regulation.

in principle with the flag States on the one hand.³⁴⁴ On the other, the laws and regulations of the host States would have no reason to cease to be effective over foreign ships, unless they have such an effect as to discriminate against foreign ships regarding participation in the cabotage market. The application of this Regulation is supposed not only to cement the right of entry into ports within the EC, but also to bring about the right of free passage in internal waters. Nonetheless, the implementation has not proved to be so homogeneous in Europe. The liberalization of cabotage has substantially been achieved in northern Europe, whereas in the southern part no complete liberalization can be expected until 2004.³⁴⁵

The Regulation attracts some criticism as well on account of its provisions on transitional periods, public service contracts and the mechanism of fickle safeguard measures. However, it is a far-reaching initiative and may be evaluated as “a stock at a premium” on the international plane, given the tendency of liberalization in maritime transport services.

In 1993 the EEC Council enacted its Directive No. 93/75 on the minimum requirements for ships that enter or leave the maritime ports of the Community and carry hazardous or environmentally harmful goods, which was in turn repealed by the Directive 2002/59/EC in August 2002.³⁴⁶ The new Directive is meant to establish a Community vessel traffic monitoring and information system in order to further prevent, reduce and control environmental pollution through vessel traffic by strengthening the reporting duty of ships and the competence of relevant authorities of the Member States. It is believed to have imposed substantial restrictions on the entry into the ports of EC countries for the ships concerned, while the entry is basically still allowed there. It crystallizes a trend that access to ports by foreign ships is being increasingly submitted to the densely accumulated conditions laid down by the port States.

D. Right of Passage in Internal Waters

I. Right of Access to and Passage in Foreign Internal Waters

Access to foreign internal waters is normally for the purpose of entering the ports that lie therein. But there are some exceptional constellations whereby ships enter foreign internal waters without intending to visit the ports. Thus the question that may arise is what international maritime law looks like in this regard. In general,

³⁴⁴ Flag State enjoys primacy as well for the manning issues in respect of the mainland cabotage, cruise liners and island cabotage preceding or following a border-crossing voyage. Arts. 3(1) and (3) of the Regulation.

³⁴⁵ Basedow, ‘Dienstleistungs- und Kabotagefreiheit im Rahmen von Transportketten’ [1994] 32 *AVR* 460.

³⁴⁶ O.J. 1993 L 247/19; O.J. 2002 L 208/10.

internal waters fall fully under the sovereignty of the coastal State. Therefore, the access of foreign ships to internal waters shall be subject to the complete jurisdiction of the coastal State, unless the latter is restricted by treaty duties or by established rules of customary international law, such as the rule concerning ships in distress. There is, in principle, no right of access to foreign internal waters.

Similarly, there exists no general right of passage either under international law in internal waters that fall completely within the territorial jurisdiction of coastal States. However, in some special cases, the right of passage in internal waters is guaranteed under international law. Of course, the right in question can also be established with the consent of the coastal State, for example, on the basis of a bilateral shipping agreement.³⁴⁷

In most cases, the right of passage in internal waters is closely related to the right of access to ports, because the former is normally the prerequisite for the effective assertion of the latter. Nevertheless, the right of passage in this context cannot be taken as an independent right which stands on its own feet, but merely as an accessory right resting upon the right of access to port.

II. Innocent Passage Pursuant to art. 8(2) of UNCLOS

The question of navigational right in internal waters was raised as early as 1951 in the *Fisheries* case.³⁴⁸ Under the sway of the judgment of the ICJ in the case, the ILC was first faced with the issue at its eighth session in 1956.³⁴⁹ Prompted mainly by the reply of the British government,³⁵⁰ the ILC inserted a new paragraph (Para. 3) in art. 5 of its draft by stating that:

Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which *previously had been* considered as part of the territorial sea or of the high seas, a right of innocent passage, ..., through those waters will be recognized by the coastal State in all those cases *where the waters have normally been used for international traffic*.³⁵¹ (emphasis added)

From such a wording it may be deduced that the existence of a right of innocent passage in the waters concerned would rest upon a "historic" right of international navigation in the same waters. This drafting technique is, it is believed, intended

³⁴⁷ Similar opinion by Brown, *The International Law of the Sea* (1994), vol. I, 40.

³⁴⁸ The ICJ did not pronounce on the navigational right in internal waters, in view of Norway's assurance that "there would be no interference with international navigation notwithstanding the inclusion as internal waters by straight baselines". *Fisheries* case (*UK v. Norway*), [1951] *ICJ Reports*, 120 ff.

³⁴⁹ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 76.

³⁵⁰ The British government insisted that the use of straight baselines be reconciled with the right of innocent passage. For details see the Report of the ILC Covering the Work of its 7th Session, Doc. A/2934, New York, 1955, 23 ff.; Ngantcha, *ibid.*, at 76.

³⁵¹ [1956] II *YBILC* 257.

to limit the scope of internal waters subject to innocent passage and thus to soften the vehement opposition against the addition of this paragraph.³⁵²

However, *Ngantcha* drew his misleading conclusion that “the idea that there existed a historic right of innocent passage in internal waters created by straight baselines if such waters had been subject to such a right appears to be tautological”,³⁵³ by mistakenly taking into account only some special cases that were actually not envisaged under the above-cited art. 5(3). In these cases, waters susceptible of being enclosed as internal waters by employing straight baselines have not yet been so demarcated and thus are still considered to form part of other maritime zones than internal waters.³⁵⁴ Beyond doubt they are, as usual, subject to the regime of innocent passage or even of freedom of navigation.

Based on the general understanding either of art. 5(3) of the ILC’s 1956 draft or of its final legal products, i.e. art. 5(2) of CTS 1958 and art. 8(2) of UNCLOS, the regime of innocent passage in internal waters is applicable only when the waters in question have been legally declared as such by employing straight baselines. In other words, despite the legality of their possible establishment as internal waters, the waters remain, no doubt, subject to the regime of other maritime zones before being included as internal waters. The expression “previously had been” or “had ... previously been” in all the three legal instruments may particularly demonstrate it. Consequently, the draft art. 5(3) is virtually inapplicable to the special cases put by *Ngantcha* to support his criticism.

At UNCLOS I in 1958, the draft paragraph was altered by eliminating the former qualifying condition of “having normally been used for international traffic”³⁵⁵ in order to fully prevent the extension of internal waters from encroaching navigational rights of other States.

Art. 8(2) of UNCLOS³⁵⁶ is roughly a reproduction of art. 5(2) of the Geneva Convention except for some small changes. The most significant change may lie in the substitution of “areas which had not previously been considered as such” for “areas which previously had been considered as part of the territorial sea or of the high seas”.³⁵⁷ The change reflects the new developments of the law of the sea that witnessed the origin of some new maritime zones, such as the EEZ. Like art. 5(2) of CTS 1958, art. 8(2) of UNCLOS does not require that the waters enclosed as

³⁵² The view can be inferred from the commentary by the ILC on article 5(3), *ibid.*, at 268.

³⁵³ *Ngantcha, The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 77.

³⁵⁴ *Ibid.*

³⁵⁵ Art. 5(2) CTS 1958.

³⁵⁶ It reads: “Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.”

³⁵⁷ The change occurred at the fourth session of the Conference in 1976. See Nandan/Rosenne, *The United Nation’s Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 106.

internal waters by straight baselines had actually been used for international navigation.³⁵⁸

Under the present regime, internal waters break down into two parts. The first part consists of the waters intervening between the straight baselines and the low-tide mark along the coast or the closing lines across river mouths and bays or of ports drawn pursuant to arts. 9, 10 and 11 of UNCLOS. In this part of internal waters there exists a right of innocent passage. The second part is formed by the areas lying between the low-tide line or the above closing lines and the land territory *stricto sensu*, where there is no such right. Otherwise both parts totally share the legal parameters.

In spite of the provisions of art. 8(2) of UNCLOS, the sound implementation of it is still open. In practice, there are some ways of evading the provisions. First, it is held, by some writers, that the obligation of a coastal State to respect the right of innocent passage in its internal waters of other States can only be brought into play in those cases in which the internal waters concerned have been enclosed as such after UNCLOS came into force.³⁵⁹ Secondly, many States may claim that they established the baselines based on the criteria other than those set forth in art. 7 of UNCLOS, and that they should therefore be exempt from the provisions. There is no reason in international law to nullify the long-existing State practice so long as it has acquired necessary acquiescence or recognition. Thirdly, it is frustratingly difficult to ascertain whether the delimitation of internal waters is carried out in accordance with the method as provided for in art. 7, given its ambiguity. Last but not least, due to the lack of transparency in the related information published, sometimes outsiders can hardly be certain whether some areas "had not previously been considered as such".³⁶⁰ Despite these misgivings, it is still hoped that art. 8(2) could be implemented at least on the basis of international comity and tolerance in favour of navigation.

It is noteworthy that the right of innocent passage applies also to the areas in the straits used for international navigation, where they have been included as internal waters by the establishment of straight baselines.³⁶¹ Nonetheless, no comparable right exists in internal waters of an archipelagic State, for such internal waters are delimited not by straight baselines but by closing lines.³⁶²

³⁵⁸ Lagoni, 'Internal Waters, Seagoing Vessels' in *EPIL* (1989), vol. 11, 154.

³⁵⁹ Peters, *Innere Gewässer im neuen Seerecht* (1999), 87.

³⁶⁰ Not until May 1995 did China publish information concerning the base points and baselines, although it declared it employed straight baselines to delimit its territorial sea in 1958.

³⁶¹ So also Lagoni, 'Internal Waters, Seagoing Vessels' in *EPIL* (1989), vol. 11, 154.

³⁶² Art. 50 UNCLOS; art. 8(1) excludes such internal waters from the definition of the internal waters in the sense of art. 8.

III. Freedom of Transit

Under UNCLOS, land-locked States have the right of access to and from the sea for the purpose of exercising the rights provided for in the Convention. To ensure the effective assertion of this right, the Convention grants land-locked States freedom of transit through the territory of transit States by all means of transport.³⁶³ Conceivably, the freedom of transit may well cover the right of passage in internal waters of transit States, presuming that “all means of transport” refer most commonly to waterway transport besides railway and highway transport.³⁶⁴

The freedom of transit extends not only to the transit of goods and persons, but also to that of means of transport themselves, including all types of ships navigating on lakes, rivers or other areas of internal waters of transit States.³⁶⁵ It can be asserted that the Convention creates, for the first time, a subjective right of access to and from the sea, i.e. a right of passage for land-locked States in internal waters of transit States.³⁶⁶ To facilitate the exercise of the freedom of transit, the Convention imposes upon both the land-locked States and the transit States concerned an obligation to enter into the negotiations in good faith so as to agree on the terms and modalities for the said exercise.³⁶⁷ Therefore it would be a violation of the obligation to negotiate when a transit State closes the door of talks against the proposal of a land-locked State. It is submitted that, failing an agreement between them, the land-locked State may engage in traffic in transit only when it is permitted by the transit State.³⁶⁸ Under the Convention, no customs duties, taxes or other charges may be levied except charges payable for specific services rendered during transit, such as pilotage, towage, pushing or bunkering. Means of transport in transit and use of related facilities shall be handled with the principle of national treatment.³⁶⁹ Apart from that, transit States are required to take all proper measures to avoid delays or other technical difficulties of traffic in transit. In the case of the occurrence of such problems, the transit State and land-locked State concerned are under an obligation to collaborate for the expeditious removal of the problems.³⁷⁰ It is noticeable that the privileges accorded to land-locked States, either by the Convention or by any special agreements for the purpose of exercising the right of access to and from the sea, are excluded from the application of the MFNT clause pursuant to art. 126 of the Convention.

³⁶³ Art. 125(1) UNCLOS.

³⁶⁴ By comparison, ship is the only means of transport explicitly mentioned in art. 3 CHS 1958.

³⁶⁵ Arts. 124(c)-(d) UNCLOS.

³⁶⁶ Art. 125(1) UNCLOS; the principle was first put forward at the Preliminary Conference of Land-locked States in Geneva in February 1958; Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 350.

³⁶⁷ Art. 125(2) UNCLOS.

³⁶⁸ Lagoni, ‘Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht’ [1988] 26 *AVR* 353.

³⁶⁹ Art. 127 UNCLOS.

³⁷⁰ Art. 130 UNCLOS.

However, freedom of transit is not an absolute freedom without any limitation. Transit States are still entitled to take all measures necessary to ensure that the rights and facilities prescribed in the Convention shall in no way impinge upon their legitimate interests.³⁷¹ Of course, the measures taken should be subject to the dictates of general rules in international law, such as reasonableness and proportionality, etc.

In fact, some core provisions of UNCLOS can be traced back to several earlier multilateral legal instruments. The first to be mentioned should be the Barcelona Convention and Statute on the Freedom of Traffic in Transit 1921, which has attracted to date 48 States as Parties.³⁷² The 1921 Barcelona Statute has a broad scope of application covering traffic in transit of persons, baggage, goods, seagoing and inland ships as well as other means of transport via railways, roads and waterways. Instead of establishing a right of free transit, it merely lays down a duty for each State Party to facilitate free transit and also the general prohibition of discrimination.³⁷³ Similarly, the Statute forbids any transit taxes and charges, and requires a fair and non-discriminatory transport tariff.³⁷⁴ While the Statute rests on a reciprocal basis, land-locked States are considered exempt from the requirement to reciprocate. Nonetheless, no MFNT or special privileges for land-locked States have been forged in the Statute.³⁷⁵ Needless to say, transit States have, as usual, a wide range of rights to take appropriate measures to safeguard their vital interests as the case requires. Furthermore, unlike port States under the Geneva Statute 1923, transit States here are not obliged to grant "equality of treatment",³⁷⁶ be it national treatment or MFNT, to the ships and cargoes in transit.

In the well-known GATT,³⁷⁷ freedom of transit is dealt with in art. V. Generally speaking, the main provisions here model themselves on those in the 1921 Barcelona Statute. Nevertheless, there are some variations. In the first place, traffic in transit in GATT refers to the transit of "goods (including baggage) and also vessels and other means of transport", but not to the transit of persons.³⁷⁸ Aircraft can only be included in terms of "other means of transport" when they are engaged in the air transit of goods.³⁷⁹ Secondly, the general principle of non-discrimination is underlined in GATT and extended to all charges, regulations and

³⁷¹ Art. 125(3) UNCLOS.

³⁷² The Convention and Statute was adopted at the first general transport conference on 20 April 1921, 7 *LNTS* 11; German RGBl. 1924 II, 387; German BGBI. 2000 II, 213; for the discussion in detail see Lagoni, 'Der Hamburger Hafen, die internationale Handelsschiffahrt und das Völkerrecht' [1988] 26 *AVR* 346 ff.

³⁷³ Arts. 1, 2 of the 1921 Barcelona Statute.

³⁷⁴ Arts. 3, 4 of the 1921 Barcelona Statute.

³⁷⁵ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschiffahrt und das Völkerrecht' [1988] 26 *AVR* 347.

³⁷⁶ Art. 2(1) of the 1923 Geneva Statute.

³⁷⁷ See the text of the GATT 1994. The GATT boasts so far 144 Members including the last newcomer China. Available at: <<http://www.wto.org/english/docs>> (last visited: September 10, 2002).

³⁷⁸ Art. V(1) GATT.

³⁷⁹ Art. V(7) GATT.

formalities concerning transit. The rule of non-discrimination has been particularly substantiated by introducing MFNT clause into traffic in transit.³⁸⁰

As an agreement in international trade, GATT relies basically on reciprocal and mutually advantageous arrangements. However, a land-locked State is, it is believed, not required to reciprocate in the same way as afforded because of its limited capacity, so far as transit on waterways leading to the sea is concerned. Like other rights and facilities stipulated in GATT, freedom of transit is subject to "General Exceptions" contemplated for protecting public order and health, some functions of the customs system and other national vital interests. The freedom is also subject to "Security Exceptions" focusing on national essential security interests.³⁸¹

On 8 July 1965, another related convention came into existence, namely, the Convention on Transit Trade of Land-locked States.³⁸² It seems that the convention plays an unimportant role in the area on account of its poor acceptance by significant States.

While there is much in common among the above conventions and agreements, there exist some variations between them.³⁸³ The variations can largely be accredited to the different historical backgrounds, legislative purposes and also membership constellations. Among these independent legal instruments with different focuses, no convention or agreement possesses supremacy over others. In practice, nonetheless, it is no wonder that a State usually rushes to lean upon the one which serves its interests best.

Besides multilateral treaties, the right of transit can be a subject matter in bilateral agreements: for instance, the German-Austrian Treaty on Inland Navigation of 20 November 1985³⁸⁴ and the German-Polish Agreement on Inland Navigation of 8 November 1991.³⁸⁵ The issue is found regulated also in some bilateral agreements governing maritime transport.³⁸⁶

³⁸⁰ Arts. V(2), (5) GATT.

³⁸¹ Arts. XX, XXI GATT.

³⁸² 597 UNTS 42; for an analysis on the Convention, see Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 AVR 352 f.

³⁸³ For example, UNCLOS takes the preference to leave the "terms and modalities" of transit to be agreed upon by the States concerned (art. 125(2)), whereas GATT expressly requires that freedom of transit through the territory of each contracting party be exercised "via the routes most convenient for international transit" (art. V(2)). However, this difference might be left behind, taking into account the primacy of reserved rights involving public interests.

³⁸⁴ German BGBl. 1987 II, 78; Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 AVR 355.

³⁸⁵ German BGBl. 1993 II, 779.

³⁸⁶ See art. V of the German-Uruguay Trade Treaty of 1953; art. XXIII of the German-US Treaty on Friendship, Trade and Navigation of 1954; cited as Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 AVR 346.

IV. Right of Passage in Canals

As artificial waterways connecting either two rivers or two seas, a canal is considered an integral part of the territory of a State in which the canal lies. Without exception, canals are to be found on the landward side of the baselines of the territorial sea of the host States. Under international law,³⁸⁷ therefore, they form parts of internal waters and thus stand normally under the full and complete territorial jurisdiction of the States. In other words, a State may exercise its full legislative, executive and adjudicative jurisdiction over canals running through its territory, subject to treaty obligations and customary law.

Compared with inland canals, inter-oceanic canals present more implications in an economic and military sense and, meanwhile, bear more upon the law of the sea. The three inter-oceanic canals in the world, namely, the Suez Canal, the Panama Canal and the Kiel Canal, all have their own sagas.

The Panama Canal was put into operation by the US as its final builder in 1914.³⁸⁸ Since then its operation had been fully under the control of the US in accordance with the 1903 US-Panama Treaty³⁸⁹ until the coming into force of the US-Panama Panama Canal Treaty of 1977 on 1 October 1978.³⁹⁰ From then on, Panamanians began to phase in the management of the Canal with a view to taking over all responsibilities concerning the Canal on 31 December 1999, as provided for in the Treaty.³⁹¹ At the same time, the jointly established Panama Canal Commission replaced the former US Government agencies, known as the Panama Canal Company and the Canal Zone Government.³⁹² Following the transfer of jurisdiction over the Canal, the Panama Canal Authority has assumed full competence to manage, operate and maintain the Canal.

It is widely believed that the Panama Canal had been already internationalized and kept all the time open to international shipping before the conclusion of the 1977 Treaty. To further preserve this nature of the Canal, Panama declared in

³⁸⁷ Art. 8(1) UNCLOS; art. 5(1) CTS 1958.

³⁸⁸ LaFeber, *The Panama Canal: the Crisis in Historical Perspective* (1989), 46; available at: <<http://www.pancanal.com/eng>> (last visited: April 15, 2002).

³⁸⁹ The Treaty is also called the Hay-Bunau-Varilla Convention, signed at Washington on 18 November 1903. Pursuant to the Treaty the US enjoyed a broad range of rights, privileges and monopoly "in perpetuity" in respect of the Canal and the Canal Zone with the width of ten miles. See arts. 2, 3, 5, 7 and 8 of the Treaty; for the text of the Treaty, see LaFeber, *The Panama Canal: the Crisis in Historical Perspective* (1989), 225 ff.

³⁹⁰ The 1977 Treaty (Torrijos-Carter Convention) signed on 7 September 1977 superseded the 1903 Treaty but still retained many substantial American rights and privileges over the Canal until the end of the last century. Nevertheless, upon its entry into force Panama gained, *inter alia*, the sovereignty over the Canal Zone. See arts. I, II, VII of the 1977 Treaty; website as in previous note; LaFeber, *ibid.*, at 230 ff.

³⁹¹ "This Treaty shall terminate at noon, Panama Time, December 31, 1999." See art. II of the 1977 Treaty.

³⁹² Arts. III(3)(a) and (10) of the 1977 Treaty.

another treaty³⁹³ with the US that “the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this treaty”.³⁹⁴ Moreover, Panama commits itself to the goal that the Canal shall remain secure and open to peaceful transit by the ships of all nations on terms of entire equality.³⁹⁵ So there should be no discrimination against any nation or its citizens for any reason. In order to promote the international recognition of the above regime of the Panama Canal, a protocol to the said treaty, which can be joined by all States of the world, was worked out to encourage other nations to acknowledge, observe and respect the regime of permanent neutrality of the Canal.³⁹⁶

The Suez Canal, built by the famed French engineer *Ferdinand de Lesseps*, was the first inter-oceanic canal ever in human history.³⁹⁷ The Canal was finally put into use in 1869 after eleven years of building.³⁹⁸ From the start of the building, the Canal had remained under the control of the Suez Canal Company (SCC). The Company had many privileges and immunities until 26 July 1956, when Egypt nationalized it and began to assume full jurisdiction over the Canal.³⁹⁹ The Canal had presumably been accessible to ships of all States and remained, in principle, neutral prior to the Egyptian nationalization.⁴⁰⁰ The openness and neutrality rested on, to a great extent, the international character of the capital composition of the SCC. Following the nationalization,⁴⁰¹ Egypt solemnly stated

³⁹³ The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, signed at Washington on 7 September 1977; LaFeber, *The Panama Canal: the Crisis in Historical Perspective* (1989), 240 ff.

³⁹⁴ Art. I of the Treaty.

³⁹⁵ Art. II of the Treaty.

³⁹⁶ See Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. LaFeber, *The Panama Canal: the Crisis in Historical Perspective* (1989), 243.

³⁹⁷ Shehada, *Die Suezkrise von 1956 unter besonderer Berücksichtigung der ägyptischen Darstellung* (1992), 13 f.

³⁹⁸ *Ibid.*, at 19 ff.

³⁹⁹ Kunz, *The Economic Diplomacy of the Suez Crisis* (1991), 73; Shehada, *ibid.*, at 17 ff.; 152 ff.

⁴⁰⁰ The UK occupied Egypt and the Canal in 1882. In July 1952, the officers led by Nasser rose in a revolution against the monarchy, established the Republic of Egypt and required the withdrawal of English troops. On 19 October 1954, Egypt and the UK signed an agreement on withdrawal to end the 72-year presence of UK troops in Egypt. Anyhow, the freedom of passage for all ships of all nations was already guaranteed in the Convention of Constantinople in 1888. The regime survived the independence of Egypt in 1936. For more see Shehada, *Die Suezkrise von 1956 unter besonderer Berücksichtigung der ägyptischen Darstellung* (1992), 37 ff.; available at: <<http://www.muslimintents.com/abdelazeem/history.htm>> (last visited: April 17, 2002).

⁴⁰¹ Probably triggered by the extreme disappointment at US and UK revoking the promised aids to the Aswan Dam Project, Egypt angrily rushed to the nationalization of the Canal in July 1956 that, in turn, resulted in an armed conflict with Israel, France and UK from

that, notwithstanding the nationalization of the "Egyptian Company", freedom of navigation through the Canal would be fully preserved.⁴⁰² Nonetheless, Israeli ships were, as before, refused passage through the Suez Canal⁴⁰³ until Israel was officially recognized by Egypt many years later. On 8 April 1957 the Canal, completely under Egyptian control, reopened to international shipping.⁴⁰⁴ Later on, certain western powers tried to impose some form of international control over this strategic waterway; yet these attempts were squarely rejected by Egypt. Therefore, Egypt has exercised its full sovereignty over the Suez Canal since taking it over in 1956.

The third canal of our concern is the Kiel Canal, which was open to shipping in 1895.⁴⁰⁵ Unlike the other two canals just discussed, the Kiel Canal was built by the host State, Germany itself. Consequently, the Canal, from the outset, was under full sovereignty of Germany. From the very beginning of the operation of the Canal, it was stipulated in the Regulation on the Canal Operation 1895 that "ships of all nations may sail through the Canal day and night, so long as the following dimensions are not exceeded: ..."⁴⁰⁶ That is to say, the Kiel Canal was, at its beginning, meant to be open to all merchant ships in the world without any requirement of prior approval or consent. The aftermath of WW I brought about many restrictions upon Germany, some of which were, objectively speaking, unfair and excessive. It was also the case with the Kiel Canal. The Versailles Peace Treaty of 1919 provided for in art. 380 that:

The Canal and its accesses are kept constantly accessible and open to the warships and merchant ships of all nations that coexist with Germany in peace on the basis of complete equality.⁴⁰⁷

However, the article brought no noticeable change to the regime of the passage of merchant ships, for it was mainly envisioned for granting foreign warships the freedom of passage through the Canal that had not existed before. It is noteworthy that the provisions were included in an international treaty. The Canal started, at any rate, its process of internalization upon the coming into effect of the Versailles Peace Treaty on 10 January 1920. But the real beginning of the internationalization of the Canal was marked by the *Wimbledon* case 1923. In this case, the PCIJ concluded that Germany might not refuse the passage of the cargo ship under French flag transporting weapons. Furthermore, the Court even declared

October to December 1956. For the details see Shehada, *ibid.*, at 135 ff.; Kunz, *The economic Diplomacy of the Suez Crisis* (1991), 71 ff.

⁴⁰² President Nasser, Denouncement of the Proposal for a Canal Users' Association, 15 September 1956, available at: <<http://www.fordham.edu/halsall/mod/1956Nasser-Suez1.html>> (last visited: April 18, 2002).

⁴⁰³ Kunz, *The economic Diplomacy of the Suez Crisis* (1991), 187.

⁴⁰⁴ *Ibid.*, at 186.

⁴⁰⁵ Lagoni, 'Der Nord-Ostsee-Kanal im Staats- und Völkerrecht' in Lagoni (ed.), *Nord-Ostsee-Kanal 1895-1995* (1995), 232.

⁴⁰⁶ Cited as Lagoni, *ibid.*, at 232; § 2 *Kanalbetriebsordnung von 1895*; English text is translated by the author.

⁴⁰⁷ Cited after Lagoni, *ibid.*, at 235; RGBI. 1919, 700.

unnecessarily but influentially the Kiel Canal as “an international waterway”.⁴⁰⁸ The internationalization of the Canal ended in 1936, when the then German Government denounced the relevant provisions of the Versailles Peace Treaty concerning waterways in Germany.⁴⁰⁹ The denouncement appears to have been accepted or, at least, acquiesced in by the international community in general, considering the mild reaction from the signatories of the Treaty on the one hand and State practice after WW II on the other. Therefore, one can conclude that the Kiel Canal is *de facto* and *de jure* a national canal which is exclusively governed by German domestic laws and regulations.⁴¹⁰

The above three canals have much in common. They have all witnessed internationalization, for a longer or shorter time. Right now they are all under the full sovereignty of the host States. The canals are called by some scholars “international canals” for, basically, there is a right of passage for at least foreign merchant ships through them.⁴¹¹ Nonetheless, it would be more correct and acceptable to call them “international canals” in a geographical sense rather than in a legal sense. Moreover, while the Suez Canal and the Panama Canal can narrowly be taken as international canals⁴¹² on account of their histories of building and operation as well as the background of international law,⁴¹³ it is doubtful if one can call the Kiel Canal an international canal or even further to claim that the Canal has been internationalized and remains as such in the sense of international law. Actually the Kiel Canal differs from the other two canals in many aspects. First, it was built solely by Germany and has been operated by German authority all the time. Secondly, the Kiel Canal has constantly remained under the sovereignty of Germany, though restricted from 1920 to 1936. However, the other two canal zones had once virtually become the enclaves of the US and the UK.⁴¹⁴ Third, from the historical point of view, the internationalization of the

⁴⁰⁸ For the details of the case, see Lagoni, *ibid.*, at 241 ff.

⁴⁰⁹ The denunciation, however, retained the right of passage by foreign merchant ships on the condition of reciprocity. Lagoni, *ibid.*, at 44 ff.

⁴¹⁰ *Ibid.*, at 258; German *SeeSchStrO* with the version of 15 April 1987, BGBl. 1987 I, 1266.

⁴¹¹ For more information, see Lagoni, ‘Der Nord-Ostsee-Kanal im Staates- und Völkerrecht’ in Lagoni (ed.), *Nord-Ostsee-Kanal 1895-1995* (1995), 228.

⁴¹² The term implies in international law that there exists a right of passage for ships of all States.

⁴¹³ The 1888 Constantinople Convention laid the cornerstone for the regime of the Suez Canal, whereas the US-Panama Treaty Concerning the Permanent Neutrality and the Operation of the Panama Canal in 1977 set out cardinal principles for the Panama Canal.

⁴¹⁴ Former US president Ronald Reagan saw the Panama Canal Zone as “sovereign United States territory just the same as Alaska is and the part of Texas that came out of the Gadsden Purchase and the States that were carved out of the Louisiana Purchase”, see LaFeber, *The Panama Canal: the Crisis in Historical Perspective* (1989), 148 f.; the existence of the Suez Canal Company was regarded as “the most glaring symbol of Anglo-French colonialism” in Egypt, Kunz, *The economic Diplomacy of the Suez Crisis* (1991), 69.

Kiel Canal, if one may call it that, under the Versailles Treaty rarely reflected the will of Germany, whereas in the other two cases the host States showed their willingness in establishing or accepting the regime of the canals. Fourthly, unlike the Suez Canal and the Panama Canal,⁴¹⁵ the operation of the Kiel Canal is only governed by German laws and regulations. Finally, under the present regime, free passage through the Kiel Canal is solely confined to merchant ships.⁴¹⁶ This is yet not the case in the other two canals.

Therefore, it seems safe to conclude that the Kiel Canal is a national canal *stricto sensu*, in which there is generally no subjective right of passage for foreign merchant ships under international law. The right of passage through the Canal, if any, rests merely upon a unilateral grant by Germany embodied in its domestic laws without any international obligation in general.⁴¹⁷ This right of passage may not be identified with the right of passage through the Suez Canal and the Panama Canal. The latter right is basically meant in the sense of customary international law shored up by the related international treaties and long-standing practice.

However, in some cases, such a subjective right of passage through the Kiel Canal is found to exist for foreign ships. The first source of the right are the bilateral treaties entered into by Germany. The right of navigation and the treatment of foreign ships in its "*Hoheitsgewässer*"⁴¹⁸ are believed to be likewise applied in the Canal.⁴¹⁹ The second source of the said right may lie in European law. As discussed earlier,⁴²⁰ liberalization of maritime transport services within the EU has established, no doubt, the right of passage through the Kiel Canal for all ships under the flags of the Member States.⁴²¹ The right is a precondition for

⁴¹⁵ The two canals are supposed still to submit to existing international treaties with regard to the status and operation of the canals as earlier elaborated.

⁴¹⁶ Under the relevant stipulation of *SeeSchStrO*, passage through the Canal by foreign warships is subject to diplomatic clearance in advance. See Lagoni, 'Der Nord-Ostsee-Kanal im Staates- und Völkerrecht' in Lagoni (ed.), *Nord-Ostsee-Kanal 1895-1995* (1995), 256 f.

⁴¹⁷ Lagoni, *ibid.*, at 228, 260; in another article, Lagoni held that, while the note of 14 November 1936 provides a basis in international law for the free passage through the Canal of ships of all nations without discrimination conditioned on reciprocity, a customary international right of free passage through the Kiel Canal does not exist. See Lagoni, 'Kiel Canal' in Bernhardt (ed.), *EPIL* (1997), vol. III, 86; However, some other writers argued, on the contrary, that free passage of foreign merchant ships through the Canal has long been an established rule in customary international law. See Böhmer, 'One Hundred Years: The Kiel Canal in International Law' [1995] 38 *GYIL* 340 ff; Lampe, *Die völkerrechtliche Situation des Kieler Kanals gestern und heute* (1985), 156 ff; Gelberg, *Rechtsprobleme der Ostsee* (1979), 44.

⁴¹⁸ Internal waters and territorial sea are to be understood under this concept.

⁴¹⁹ Art. 3 of the Sino-German Treaty on Maritime Transport of 1995, German BGBl. 1996 II, 1051.

⁴²⁰ See *supra*, 64 ff.

⁴²¹ The liberalization was underscored particularly by the "maritime package" of the EEC Council on 22 December 1986 and the 1992 Council Regulation on maritime cabotage.

exercising the freedom to provide maritime transport services between the North Sea and the Baltic Sea or along the German coasts.

V. Innocent Passage in Historic Waters

Nobody can successfully challenge the argument that historic waters fall within the scope of internal waters, as long as the historic titles therein can be established by the claiming States. Consequently, there is in principle no right of innocent passage in historic waters or historic bays.

However, a multi-State historic bay could take on a different dimension if it is claimed jointly by its neighbouring States as such. The ICJ pointed out as early as 1982 that "... general international law ... does not provide for a single 'regime' for 'historic waters' or 'historic bays', but only for a particular regime for each of the concrete recognised cases of 'historic waters' or 'historic bays'".⁴²² In the case of *Land, Island and Maritime Frontier Dispute 1992*, the ICJ repeated the above submission⁴²³ and declared that "... rights of innocent passage are not inconsistent with a regime of historic waters..." It echoed the opinion of the Central American Court of Justice that a right of innocent passage exists in the Gulf of Fonseca,⁴²⁴ which is a historic bay held in *condominium* by El Salvador, Honduras and Nicaragua.

It is not clear, nonetheless, whether such a right exists in other multi-State historic bays, such as the Gulf of Thailand⁴²⁵ or Riga Bay. Indeed, the ICJ judgment of the case *Land, Island and Maritime Frontier Dispute* in 1992 may well serve as an enlightening starting point for addressing the issue of navigation in historic waters. As the judgment of a specific case, it has not, however, acquired the authority of a general rule in international law. Legally, it is binding solely upon the three parties of the case, notwithstanding its persuasive effect on similar issues. Therefore, the prevailing view appears to be that there is no right of passage of foreign merchant ships in historic bays or historic waters unless otherwise agreed upon or adjudicated.

⁴²² *The Tunisian-Libyan Continental Shelf case*, [1982] *ICJ Reports* 74.

⁴²³ [1992] *ICJ Reports* 589.

⁴²⁴ *Ibid.*, at 593; Brown, *The International Law of the Sea* (1994), vol. I, 40.

⁴²⁵ On 7 July 1982, Vietnam and Cambodia concluded an agreement claiming the waters between them in the Gulf of Thailand as historic waters. The biggest shore-holder of the Gulf, Thailand, has however kept silent on this subject. Park, 'Vietnam, Kampuchea and the Law of the Sea' in Park *et al.* (ed.), *The Law of the Sea: Problems from the East Asia Perspective* (1987), 446.

VI. Bilateral Agreements on the Right of Passage through Internal Waters

The right of passage in internal waters can be regulated in bilateral agreements, whereby the nature of the right, the precondition of the right, the exercise of and restriction to it, etc. are spelled out. Such an agreement was reached between Germany and Poland on 17 February 1993.⁴²⁶ In accordance with art. 5(1) of the agreement, the passage by the ships of one party through the internal waters of the other is subject to the same conditions as those laid down for the exercise of innocent passage in the territorial sea. The main restriction on the right of passage may be that both States are entitled to require the prior notification of the passage and the furnishing of information requested.⁴²⁷

E. Legal Status of Foreign Ships in Ports⁴²⁸ or Other Internal Waters

As discussed already, coastal States enjoy full and complete territorial jurisdiction over internal waters. Therefore, foreign ships in ports or other parts of internal waters are, without question, subject to the jurisdiction of coastal States. Still, the jurisdiction is not free of the demands of the general rules of international law like non-discrimination and the prohibition of abuse of right.

I. Complete Jurisdiction of Coastal States over Foreign Ships

A foreign merchant ship which voluntarily enters a port or other internal waters of a coastal State puts itself fully under the territorial jurisdiction of the State on the ground of the temporary allegiance that the ship owes to the territorial sovereignty,⁴²⁹ unless otherwise regulated by treaty between the coastal State and the flag State.⁴³⁰ Therefore, the coastal State may not only prescribe rules but also enforce them by executive or adjudicative means against foreign merchant ships as well as the crew members, passengers and goods aboard. Foreign ships are

⁴²⁶ Agreement on the Passage of Ships through the Internal Waters in the Area of the Island Usedom of 17 February 1993, German BGBl. 1993 II, 1207.

⁴²⁷ Peters, *Innere Gewässer im neuen Seerecht* (1999), 88.

⁴²⁸ The "ports" here used do not include deepwater ports that lie outside the internal waters.

⁴²⁹ Churchill/Lowe, *The Law of the Sea* (1983), 49; Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 85; Lagoni, 'Internal Waters, Seagoing Vessels' in Bernhardt (ed.), *EPIL* (1989), vol. 11, 156; Lagoni, 'Der Hamburger Hafen, die internationale Handels-schiffahrt und das Völkerrecht' [1988] 26 *AVR* 331; Hasselmann, *Die Freiheit der Handelsschiffahrt* (1987), 359.

⁴³⁰ See *supra* C.IV.3 of Part 1, 39; art. 32 of the German-British Consular Treaty of 1956, German BGBl. 1957 II, 284, BGBl. 1976 II, 1848.

required to comply, in particular, with the laws and regulations of the coastal States with regard to customs, safety, health, navigation and port administration in ports and other parts of internal waters.

On the other hand, a coastal State may certainly, out of consideration for its foreign policy or diplomatic manoeuvres, exercise its jurisdiction in a restrictive way or even leave some matters to the authorities of the flag State. It lies solely in the discretion of the coastal state. Commonly, as prevalent State practice shows, coastal States exert their jurisdiction only in cases in which their own interests, such as the peace, good order and dignity of the States or the tranquillity of ports, are involved.⁴³¹ The restraint demonstrated in State practice can be explained in two ways. Firstly, international navigation and trade which is as free as possible is in the best interests of every country. Secondly, the rule of courtesy among countries still remains one of the most respected rules in international law. However, the unpleasant truth is that restraint in coastal State jurisdiction appears to have diminished, if not yet totally evaporated. The reason may be that the scope of the matters concerning the interests of coastal States has been expanding considerably in the last two decades, ranging from environmental protection, safety of navigation, social standards, smuggling prevention, immigration control to newly boosted antiterrorism.

While coastal States are seized of the full and complete jurisdiction over foreign merchant ships, jurisdiction is yet not exclusive. Foreign ships are, at the same time, also subject to the jurisdiction of the flag States wherever they are.⁴³² The existence of concurrent jurisdiction makes it necessary to reach agreement on the avoidance of double taxation on the shipping industry between a coastal State and a flag State.⁴³³

The question of the legal status of foreign ships in internal waters always mirrors the subtle relationship between coastal and flag States. In 1977, the former Soviet Union put forward a proposal at the conference of the IMCO for forging a "International Convention on the Regime of Vessels in Foreign Ports". But the proposal failed to gain enough support.⁴³⁴ A similar initiative was launched within the UNCTAD to agree a new convention to replace the 1923 Geneva Statute on Maritime Ports. No substantial steps have, however, been taken by the UNCTAD

⁴³¹ Churchill/Lowe, *The Law of the Sea* (1983), 49; Sohn/Gustafson, *The Law of the Sea in A Nutshell* (1984), 86.

⁴³² Brownlie, *Principles of Public International Law* (1998), 320; Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 335; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 360; art. 217(4) UNCLOS; art. 4 of German *StGB* of 1871, *RGBl.* 127, in the version of 13 November 1998, *BGBI.* I, 3322; art. 6(2) of the Criminal Code of China, available at: <<http://law.people.com.cn/bike/viewnews.html?id=44925>>.

⁴³³ Art. 7 of the Sino-German Treaty on Maritime Transport of 1995.

⁴³⁴ Peters, *Innere Gewässer im neuen Seerecht* (1999), 124; IMCO Doc. C/XXXIII/14/1.

in this direction.⁴³⁵ Nonetheless, one can expect that the Doha round of trade talks under the framework of the WTO, which was started in November 2001, may produce some new ideas with respect to the jurisdiction and treatment of foreign merchant ships in ports and other internal waters.

As has been discussed, coastal States may normally exercise their territorial jurisdiction over foreign ships in the ports or other internal waters. However, this reasoning does not apply to ships forced into internal waters by distress or *force majeure*. Accordingly the ships can be exempt from liabilities that arise inevitably from their urgent entry into the ports or other parts of internal waters under distress.⁴³⁶ Apart from that, ships in distress are still expected to abide by some laws and regulations of coastal States in internal waters, so long as the ships are in the position to do so without causing any damage to the ships including persons and goods on board. Moreover, as an exceptional rule, immunity from coastal State jurisdiction in the case of distress or *force majeure* is to be interpreted in a restrictive way. Consequently, if the emergency of a ship was intentionally provoked by the crew, or a ship in distress had intended to commit an unlawful act against the coastal State, the ship may lose its immunity from local jurisdiction.

II. Non-discrimination Among Foreign Ships

It is widely held that foreign merchant ships in ports are to be treated on the basis of non-discrimination.⁴³⁷ The proposition is always founded upon the provisions of art. I of GATT and art. 2 of the 1923 Geneva Statute on Maritime Ports. Nevertheless, the establishment of the customary rule of non-discrimination in ports may be attributed more to broad and long-standing State practice than to the two celebrated legal documents, although they certainly have exerted a positive impact on the process. First, a close look at art. I of GATT would convince us that the article deals with MFNT solely for products (goods) and thus ships as well as services like shipping are not covered thereunder. The case in which foreign ships enjoy MFNT exists only in traffic in transit.⁴³⁸ Secondly, the provisions of art. 2 of the 1923 Geneva Statute are binding merely upon the 40 Contracting States,⁴³⁹ which can hardly dominate State practice as a whole.

Anyhow, the rule has been reflected in judicial practice. To this end, it is necessary to mention the case of *Mary Poppins* 1976.⁴⁴⁰ In this case, the boycott of a French trade union prevented a ferry service between St. Malo and

⁴³⁵ Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 360 f; UNCTAD Doc. TD/B/C.4/136, para. 115, 9 September 1975; the Report of UNCTAD Secretariat, UNCTAD Doc. TD/B/C.4/275, 1 October 1984, part I.

⁴³⁶ Churchill/Lowe, *The Law of the Sea* (1983), 50; Hasselmann, *ibid.*, at 359.

⁴³⁷ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 849; Lagoni, 'Internal Waters' in *EPIL* (1989), vol. 11, 157; Hasselmann, *ibid.*, at 360.

⁴³⁸ Art. V(5) GATT.

⁴³⁹ For the Contracting States.

⁴⁴⁰ See the *Mary Poppins* case, [1976] 19 *GYIL* 139.

Southampton provided by a German shipping company from operating despite governmental approval. The Administrative Tribunal of Rennes found that the ships of the German company had the right of free entry into St. Malo on a non-discriminatory basis, and that the boycott had amounted to a breach of the obligation of non-discrimination. Therefore the company might claim compensation from the French State.⁴⁴¹

Furthermore, non-discrimination has become a general rule in conventional international law, at least in the following two constellations. One refers to the ships of land-locked States,⁴⁴² the other lies in the field of protection and preservation of the marine environment.⁴⁴³ Even in these two cases, a coastal State still seems entitled to refuse or restrict access to and the use of its ports by nuclear-powered ships or ships carrying highly dangerous goods.⁴⁴⁴ Therefore, what is actually prohibited by international law is discrimination without any justifiable ground against foreign ships.

Under non-discrimination against foreign ships one can find three forms of treatment, to wit, national treatment, MFNT and the combination of the former two treatments.

1. National treatment

As far as the thesis is concerned, national treatment purports that a State is supposed to accord foreign ships, their cargoes and passengers treatment no less favorable than that accorded to the like ships of its own in respect of all laws, regulations, formalities, requirements, any rights, privileges, advantages, liberties, conveniences, facilities and immunities as regards access to and the use of ports, allocation of berths, loading and unloading, levying of any tax, duty, dues and charges, access to services like pilotage and towage, bunkering and supply of vital necessities, etc. Pursuant to art. 2(1) of the 1923 Geneva Statute on Maritime Ports, a Contracting State may choose to grant foreign ships national treatment to meet the requirement of non-discrimination. Besides, national treatment often appears in bilateral agreements.⁴⁴⁵ Yet it always comes out in a restrictive form: namely, foreign ships normally may not claim national treatment in any navigable area and in any aspect. Rather, the treatment is always confined to certain areas, for example, the ports and waterways open to international shipping, and to certain

⁴⁴¹ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 850.

⁴⁴² Art. 131 UNCLOS.

⁴⁴³ Art. 227 UNCLOS.

⁴⁴⁴ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 316 ff; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 357.

⁴⁴⁵ For instance, art. XIV(1) of the Treaty on Establishment and Navigation between Germany and France of 27 October 1956, BGBl. 1957 II, 1661; art. 4(1) of the Treaty on Maritime Transport between Germany and Brazil of 4 April 1979, BGBl. 1980 II, 6970.

specified matters such as harbour dues and trans-shipment charges. National treatment can be seen as the inward-directed prohibition of discrimination.

2. MFNT

The MFNT clause which is modelled on art. I of GATT is one of the most frequently used clauses in maritime transport treaties. Compared with national treatment, MFNT is regarded as the outward-directed instrument of non-discrimination.

In the context of this thesis, MFNT means that a State shall grant the ships of another State treatment that is not less favourable than any treatment that it has ever granted to the like ships of any third State under the same or similar conditions. Like national treatment, MFNT has also a very broad application scope as far as the shipping industry is concerned. The MFNT clause may ensure that any third States acquire the most favourable treatment automatically whenever a State party accords it to another. In bilateral treaties, the MFNT clause sometimes stands alone.⁴⁴⁶ According to art. 2(1) of the 1923 Geneva Statute, a Contracting State may grant MFNT, as an alternative to national treatment, to the ships of other Contracting States.

3. Combination of national treatment and MFNT

In treaty practice, national treatment and MFNT are always combined to ensure better treatment. In some cases, both treatments are introduced but they are applicable to different matters.⁴⁴⁷ Under the Treaty of Commerce, Establishment and Navigation between the UK and Japan of 1962, the ships of either Party are entitled to enjoy equality of treatment in the form of either national treatment or MFNT in the coastal waters and ports of the other Party, whichever is more preferential.⁴⁴⁸ This combined treatment is virtually the most favourable treatment.

III. Shipping/Trade Embargo

Traditionally embargo referred to the temporary detention of ships under a certain foreign flag in ports in the time of peace by way of reprisal. A shipping embargo

⁴⁴⁶ Art. I(2) of the German-Iraqi Trade Agreement of 7 October 1951, BGBl. 1953 II, 543; art. 18 of the German-Dominican Treaty on Friendship, Trade and Navigation of 23 December 1957, BGBl. 1959 II, 1468.

⁴⁴⁷ E.g. while art. 3(1) of the Sino-German Treaty on Maritime Transport of 1995 deals with MFNT in a wide range of matters, art. 3(2) of the Treaty turns to national treatment with regard to harbor dues and transshipment charges. German BGBl. 1996 II, 1451.

⁴⁴⁸ Art. 20(2) of the Treaty, subject to exceptions set out in art. 20(5). 478 *UNTS* 6934; Brown, *The International Law of the Sea*, (1994), vol. I, 39.

was mainly used in State practice in the 17th, 18th and 19th centuries.⁴⁴⁹ Since 1930s the concept of an embargo has been developed to also describe unilateral or collective restrictions on trade in goods and services to or from a specific State or a group of States for political, economic or security reasons, i.e. trade embargo. A shipping embargo directly gives rise to international disputes between States concerned, whereas a trade embargo is mainly directed at both natural and legal persons of the imposing State as its foreign trade policy.

Regardless of which form it takes, an embargo usually has a direct impact on the legal status and operations of the ships concerned, for about 85% of world trade volume in weight is carried by sea.⁴⁵⁰

An embargo may bring about serious limitations on free trade and shipping. Therefore, its use is normally limited to the cases of sanctions within the framework of the UN or of reprisals.⁴⁵¹ However, embargoes are frequently used on the international stage as a strong but not always effective lever. In 1975, Spain imposed a shipping embargo against three Danish merchant ships, as a reprisal for the boycott forged by a Danish transport union against Spanish ships.⁴⁵² As another example of a shipping embargo, the Nigerian government detained the Italian ship *Piave* in the port of Lagos for six weeks in 1988.⁴⁵³

With regard to the category of trade embargo, there is a long list to look into. In 1947, the US imposed its export embargo on strategic goods for the east block. The effort was joined by 14 other western countries afterwards and was guided by a Co-ordinating Committee in Paris, which is dominated by the US.⁴⁵⁴ After the regime changed in 1949, the US began to carry out a very tough embargo on China, which remained in place until the normalization of diplomatic relations in 1978.⁴⁵⁵ It is conceivable how a Chinese ship would be handled in the port of New York during that time. In connection with the six-day war, Arabian oil producers decided to implement their first oil embargo against the US, the UK and Germany in 1967.⁴⁵⁶

After all, the most notorious embargo appears to be the comprehensive US embargo against Cuba that has lasted for more than 40 years. The embargo was established as early as October 1960, as a reaction to the expropriation of American property by the new Cuban government and its alignment with the then USSR. However, the US, at that time, still recognized the newly inaugurated provisional government in Cuba headed by *Fidel Castro*.⁴⁵⁷ The embargo was

⁴⁴⁹ Kausch, 'Embargo' in Bernhardt (ed.), *EPIL* (1995), vol. II, 58.

⁴⁵⁰ Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 1.

⁴⁵¹ Kausch, 'Embargo' in Bernhardt (ed.), *EPIL* (1995), vol. II, 59.

⁴⁵² Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 269.

⁴⁵³ *Ibid.*

⁴⁵⁴ Kausch, 'Embargo' in Bernhardt (ed.), *EPIL* (1995), vol. II, 59.

⁴⁵⁵ Available at: <<http://www.fimprc.gov.cn/chn/6522.html>> (last visited: May 2, 2002).

⁴⁵⁶ Kausch, 'Embargo' in Bernhardt (ed.), *EPIL* (1995), vol. II, 60.

⁴⁵⁷ The US recognized the new Cuban government on 7 January 1959 and broke off diplomatic relations with Cuba two years later, before the incursion into the Bay of Pigs

institutionalised through the Cuban Assets Control Regulations issued by the US Government on 8 July 1963.⁴⁵⁸ The goal of the embargo is to isolate and stifle Cuba economically. Since the collapse of the USSR, the US has adopted a more aggressive policy towards Cuba. In April 1992, the US strengthened its embargo against Cuba by prohibiting ships engaged in commercial transport to or from Cuba the use of US port facilities.⁴⁵⁹ In 1996 the trade embargo was further corroborated and codified into law by the *Helms-Burton Act*. Under the Act, even foreign shipping companies may be punished if they have commercial relations with Cuba.⁴⁶⁰ Despite numerous resolutions of the UN General Assembly in recent years that have called for the termination of the embargo and the similar urgings made by the Pope in Cuba in 1998, it is feared that the embargo will not be lifted in the near future.

An embargo or sanctions imposed by international organizations are believed theoretically more powerful than that by individual States, especially when such decisions are taken within the framework of the UN. According to art. 41 of the UN Charter, the Security Council may decide on an embargo or sanctions against a country, including the severance of maritime transport relations.⁴⁶¹ Since the end of the Cold War, the UN Security Council has frequently used the mandate to impose embargoes against certain States to exert collective political pressure. For example, in August 1990, the Security Council imposed a strict economic and financial embargo on Iraq (Security Council Res. 661(1990)). Consequently, a foreign ship would be under no protection of international law if it visited an Iraqi port to load or unload contraband goods. In the case of conflict between an obligation resulting from an embargo decision under said art. 41 and another obligation under any other international treaties, the obligation under the Charter shall prevail.⁴⁶² In May 1992 a similar embargo was imposed against Yugoslavia.⁴⁶³

Embargoes and sanctions certainly impair free trade and navigation, and are not, at first sight, compatible with the principle of non-discrimination in inter-

was launched in April 1961; available at: <<http://www.state.gov/mnv/regimes/what/cuba/policy.html>> (last visited: May 3, 2002).

⁴⁵⁸ Available at: <<http://www.la.mvla.k12.ca.us/LC/Cubapoli/cuba-7>> (last visited: May 3, 2002).

⁴⁵⁹ Kausch, 'Embargo' in Bernhardt (ed.), *EPIL* (1995), vol. II, 63.

⁴⁶⁰ The Act is also called Cuba Liberty and Democratic Solidarity Act and is aimed at strengthening international sanctions against the *Castro* regime. However, the Act has provoked vehement criticism from other States on account of its extraterritorial nature. Pursuant to the Act, criminal penalties for violating sanctions range up to 10 years' imprisonment and fines may amount to \$ 1,000,000 for corporations and \$ 250,000 for individuals.

⁴⁶¹ Art. 41 of the UN Charter reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, ..."

⁴⁶² Art. 103 of the UN Charter.

⁴⁶³ Kausch, 'Embargo' in Bernhardt (ed.), *EPIL* (1995), vol. II, 64.

national affairs as consecrated in art. 2(7) UN Charter. Therefore, it might be reasonable to cast doubts on their legality. Nonetheless, as a frequently used means in State practice, an embargo is generally considered as having the blessing of international law if a State carries it out in its domestic competence in order to secure its vital economic or political interests. Anyway, no embargo is exempt from the requirements of customary law, including presence of justifiable ground, exercise of restraint, proportionality, no extritoriality and due notification.

F. Criminal and Civil Jurisdiction

Coastal States are always reluctant to exercise their criminal and civil jurisdiction over foreign ships in internal waters, unless their significant interests are involved. Nevertheless, coastal States have basically not only complete prescriptive but also adjudicative jurisdiction over criminal and civil matters in internal waters. In comparison to the passage of a foreign ship through the territorial sea, the presence of the foreign ship in internal waters including ports may affect the interests of coastal States more directly and more probably.⁴⁶⁴

I. Jurisdiction over Matters with External or Internal Effects

Varying in details as individual State practice may be, it is general practice that coastal States commonly assume their criminal or civil jurisdiction in cases where their own interests are at stake, and leave other matters, particularly those relating solely to the internal affairs of a foreign ship, to the flag State. There are different explanations for the prevalence of this practice. Among them the most notable are the Anglo-American position and French jurisprudence.⁴⁶⁵ According to the former school of thought, the jurisdiction of a coastal State is complete over foreign merchant ships lying in its internal waters and over persons and cargoes on board. But the State may, out of consideration for public policy, choose to forgo the exertion of its jurisdiction. The rule was established by the US Supreme Court in the famous *Wildenhus* case in 1887⁴⁶⁶ and reaffirmed by the same court in

⁴⁶⁴ Similar position by Colombos, *The International Law of the Sea* (1967), 319.

⁴⁶⁵ Brownlie, *Principles of Public International Law* (1998), 321; Churchill/Lowe, *The Law of the Sea* (1983), 49.

⁴⁶⁶ The court stated: "if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment if the local tribunals see fit to assert their authority." So the court took the view that the assault of one crew member by another, both Belgian nationals, on board a Belgian steamship in a US port *ipso facto* disturbed the peace in port. See *Wildenhus* case, 120 US 1(1887); Colombos, *The International Law of the Sea* (1967), 323 f; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 941.

many other subsequent cases.⁴⁶⁷ The Anglo-American position was also well summarised by the UK during the preparatory work of the Hague Codification Conference in 1930.⁴⁶⁸

French jurisprudence in this respect, on the other hand, derived from the opinions of the *Conseil d'État* in the cases of *the Sally* and *the Newton* in 1806,⁴⁶⁹ on which the practice of France and many other continental States was modelled. According to the French view, a coastal State can only exercise its jurisdiction in matters endangering its essential interests that would affect the peace and good order of the port. As a result, the State has in law no jurisdiction over purely "internal economy", such as the murder of one crewman by another, aboard foreign ships in its ports.⁴⁷⁰

However, local jurisdiction is, under both schools of jurisprudence, supposed to apply if it is invoked by the master of a foreign ship or by the consular officer of the flag State. In the context of contemporary law of the sea, the Anglo-American position seems to have gained more ground. Despite any theoretical variances between different views on this issue, State practice as a whole is fairly consistent. The assertion of jurisdiction over a foreign ship in port or other parts of internal waters may well turn on whether the consequences of an act on board in view are confined within the ship or go beyond. Therefore, one can put the matters on board into two categories, namely, matters with external effects and those merely with internal effects.

Matters with external effects refer to the matters of a ship that affect the peace and good order of the coastal State or the tranquillity of the port where the ship finds itself. They may include, but not be limited to, collision, salvage, environmental pollution by illegal dumping, discharge and even sinking, damage to navigational aids, business fraud, smuggling, drug traffic, illegal immigration, subversion attempts against the coastal State and acts involving a non-crew member. Coastal States will normally assert their jurisdiction over these matters.

In contrast, matters with internal effects point to all matters solely related to internal discipline, internal legal relations and all things done on board which affect only the ship, its crew and interior economy and do not compromise the peace and dignity of the State or the tranquillity of the port. Under this category fall, for example, the enforcement of internal discipline, implementation and interpretation of employment contracts, issues of labour protection and insurance,

⁴⁶⁷ E.g. in the case of *McCulloch* in 1963, Justice Clark declared the "well-established rule of international law that the law of the flag State ordinarily governs the internal affairs of a ship". Brownlie, *Principles of Public International Law* (1998), 323; O'Connell/Shearer, *ibid.*, at 941.

⁴⁶⁸ "... the State is entitled to exercise jurisdiction over a foreign merchant vessel lying in its ports... In every case it is for the authorities of the State to judge whether or not to intervene." Brownlie, *ibid.*, at 321.

⁴⁶⁹ In the cases, it was held that two inter-crew assaults were within the sole jurisdiction of the flag State. For more information of the cases, see O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 946 f; Brownlie, *ibid.*, at 321.

⁴⁷⁰ Colombos, *The International Law of the Sea* (1967), 319 f; Brownlie, *ibid.*, at 321.

and other matters with regard to internal business administration, including the keeping of ship stores and backlog and the maintenance of operation records. Coastal States commonly decline to assume their jurisdiction over such matters with internal effects, but leave them to the ship itself and to the authority of the flag State, whether as a matter of international comity and usage or as a legal duty.⁴⁷¹

It has to be pointed out that, with the development of the law of the sea, the scope of matters with internal effects has shrunk considerably. In the *Wildenhus* case in 1887, an inter-crew murder was not seen as a purely internal affair on board, unlike in the *Sally* and the *Newton* cases in 1806.⁴⁷² Since 1970s, requirements respecting environmental protection,⁴⁷³ navigation safety, social standards⁴⁷⁴ and even competition between domestic and foreign carriers⁴⁷⁵ have remarkably encroached the domain of what had previously been held as the internal affairs of ship operation. Moreover, it is predicable that, as the fight against terrorism around the world intensifies, the “internal economy” on board will be interfered with to an unprecedented extent by being required to disclose, in advance, information with respect to cargoes, passenger list, destination, consignee, way of payment and other items of “terms and conditions” of carriage contract.

⁴⁷¹ Anglo-American courts regard the restraint as international courtesy and usage, while French courts see it as a duty in international law. Colombos, *ibid.*, at 326 f; Núñez-Müller expressed his doubt on the status of the restraint in customary international law. See Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 98.

⁴⁷² Even French jurisprudence has already adopted the view that the assault of a fellow crew member endangers the good order of the port. Brownlie, *Principles of Public International Law* (1998), 322.

⁴⁷³ See the Council Directive (93/75/EEC) of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, O.J. 1993 L 247/19; under the Marine Environmental Protection Law of China, any movement of hazardous wastes is forbidden (art. 39), and the entry into and exit from the port of dangerous goods are subject to the approval of the competent authority (art. 67); in OPA 1990 of the US, there is the compulsory prescription of double-hull tankers which navigate in “navigable waters” of the US. Schmuck, *Der US-Oil Pollution Act 1990* (1996), 58.

⁴⁷⁴ The safety of shipping and the social standards on board are the main concerns of many international conventions, such as SOLAS 1974, STCW 1978 and ILO 147. Through port State control provided for in these conventions, coastal States have their hands in these matters.

⁴⁷⁵ The US Federal Maritime Commission decided to ask European shipping companies to disclose the information of the revenues of ships entering US ports and the amount of shipping space not used in 1964. The decision met however with strong protests and proved barely successful. Colombos, *The International Law of the Sea* (1967), 329.

II. Criminal Jurisdiction

A coastal State may, under international law, extend its criminal law to anywhere under its territorial jurisdiction. It follows therefore that the State is competent to extend criminal law to foreign merchant ships in its internal waters. Still, the question may well arise: how to coordinate the territorial jurisdiction of the coastal State and the jurisdiction of the flag State, keeping in mind that the latter remains applicable to ships regardless of where they are.⁴⁷⁶ Basically, international law tends to yield an elastic guideline in this regard. That is to say, it allows a coastal State to include foreign ships in internal waters in the scope of application of its penal code on the one hand, while on the other it leaves the question of enforcement to the coastal State,⁴⁷⁷ namely, whether and, if so, how far criminal law can be enforced against foreign ships. State practice, in comparison, gives us a much clearer picture. It shows that almost all criminal legislation of States covers foreign ships in ports and other internal waters, but that States enforce them against foreign ships very seldom or in a restrictive way.

The German Criminal Code (*Strafgesetzbuch* (StGB)) prescribes that German penal law is applicable to all crimes that are committed in *Inland*.⁴⁷⁸ The concept of *Inland* here should be construed as roughly synonymous with “home territory”, which includes internal waters and the territorial sea. Nonetheless, the conclusion that internal waters, including ports, belong to *Inland* cannot necessarily lead to the presumption that all offences on board foreign merchant ships there will be virtually subject to the StGB. As far as enforcement jurisdiction is concerned, the *Legalitätsprinzip* is underlined in art. 152 of the Criminal Procedural Law (*Strafprozessordnung* (StPO)). According to this principle, all criminal acts on board foreign ships in *Inland* should be duly prosecuted and punished, so long as there exist enough factual clues.⁴⁷⁹ Nonetheless, art. 153c(1)2 of the same law stipulates that the public prosecutor may refrain from prosecuting criminal acts, when they are committed in *Inland* by a foreigner aboard a foreign ship or aircraft.⁴⁸⁰ As *Lagoni* pertinently pointed out, in these cases the *Opportunitätsprinzip* replaces the *Legalitätsprinzip* and judicial jurisdiction may be waived. It is

⁴⁷⁶ See art. 4 of the German StGB in the version of 13 November 1998, BGBl. I, 3322, available at: <<http://www.redmark.de/redmark/f/FSStGB1.html>> (last visited: May 10, 2002); arts. 6(2), 6(3) of the Criminal Code of China in the version of 14 March 1997, available at: <<http://law.people.com.cn/bike/note.html?!d>> (last visited: May 10, 2002).

⁴⁷⁷ O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 919.

⁴⁷⁸ Art. 3 of the StGB, “*Das deutsche Strafrecht gilt für Taten, die im Inland begangen werden.*” “*Inland*” is the antonym for “*Ausland*” (foreign country) in German.

⁴⁷⁹ Art. 152 of the StPO with the version of 7 April 1987, BGBl. I, 1074, as last amended through the law of 18 May 2001, BGBl. I, 904, available at: <http://www.gesetze-XXL.de/gesetze/_StPO.html> (last visited: May 10, 2002).

⁴⁸⁰ “§ 153c (nicht Verfolgung von Auslandstaten) (1) Die Staatsanwaltschaft kann von der Verfolgung von Straftaten absehen,

1. ...

2. die ein Ausländer im Inland auf einem ausländischen Schiff oder Luftfahrzeug begangen hat.”

then expected that the flag State or the home State of the offenders would proceed with the appropriate prosecution as their laws require.⁴⁸¹

In spite of the decision of the French *Conseil d'État* in the cases of *the Sally* and *the Newton* in 1806, the regulations promulgated in the second half of the 19th century established much wider jurisdiction for French courts. The Maritime Circular of 24 June 1856, for example, prescribed that the competence of police, supervision and control was absolute "over all foreign merchant ships in French ports and does not depend in any way on the previous authorization of the foreign consuls".⁴⁸² A similar rule was also found in the subsequent circular of 29 July 1899.⁴⁸³

Pursuant to Section 272 of the US Criminal Code of 1909, many crimes committed in the coastal waters within the Admiralty and maritime jurisdiction of the US are punishable.⁴⁸⁴ The statutory provisions are believed to have derived from the previous long-standing practice of case law.

China's Criminal Code is, in principle, also applicable to offences on board foreign merchant ships in internal waters.⁴⁸⁵ However, no enforcement by public prosecutors and proper courts has ever been heard.

As for criminal jurisdiction over foreign merchant ships in internal waters, the basic rule has remained unchanged since it was expressed in the *Wildenhus* case in 1887. It is that local jurisdiction should not be enforced unless the matters with external effects disturbing the peace, good order and tranquillity of the coastal State are at issue or assistance is requested. But the coastal State is, no doubt, entitled to enact criminal laws to regulate criminal matters on board foreign merchant ships in its internal waters.⁴⁸⁶ A question here is how to define peace, good order and tranquillity. Obviously, an answer to the question has to be left to the judicial authorities, which have pretty wide discretion in this regard. Notwithstanding the ambiguity of the notions of peace and good order, those matters in internal waters tend to be most likely susceptible to the criminal jurisdiction of the coastal State, such as environmental pollution,⁴⁸⁷ illegal immigration,

⁴⁸¹ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 337.

⁴⁸² Colombos, *The International Law of the Sea* (1967), 319 f.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*, at 323.

⁴⁸⁵ Art. 6(1) of the Criminal Code in the version of 14 March 1997 states that: "The Code applies to all crimes committed within the territory of China, except otherwise regulated by law." Available at: <<http://law.people.com.cn/bike/note.html?d=44925>> (last visited: May 10, 2002).

⁴⁸⁶ "Disorders which disturb only the peace of the ship ... are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction." 120 US 1(1887), 18; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 942.

⁴⁸⁷ In many States, including Germany and China, grave environmental pollution has been listed as a crime under the penal codes. See 29. *Abschnitt* of the StGB; art. 338 of the Criminal Code of China.

smuggling, espionage and terrorism. Additionally, it is to be noted that the coastal State is normally supposed to have jurisdiction over both the foreign ships and the related matters in question if it chooses to exercise its criminal jurisdiction.⁴⁸⁸

III. Civil Jurisdiction

As in the case of criminal jurisdiction, while foreign merchant ships voluntarily navigate or stay in internal waters of a coastal State, they subject themselves to the civil jurisdiction of the State in the sense of both regulation and application, unless otherwise agreed by treaty between the coastal State and the flag State. The proposition does not, however, automatically lead to the claim that the coastal State is thus seized of the civil jurisdiction on all civil disputes with regard to these ships. Moreover, in some cases, the coastal State cannot assume civil jurisdiction notwithstanding the fact that its domestic law may, as one alternative, attribute jurisdiction to its proper courts.

A court of a coastal State can assume civil jurisdiction over disputes pertaining to foreign ships on the basis either of the agreement of parties concerned⁴⁸⁹ or of the nexuses in accordance with the rules of conflict of laws, such as location of the ship, place of contract making or breaching, port of loading or unloading, place of accident or tort, and place of service provision. Therefore, unlike criminal jurisdiction, the exercise of which depends to a great extent upon the discretion of the court concerned, the exercise of civil jurisdiction rests largely on the will of the parties or at least of the plaintiff, even though the coastal State is potentially entitled *per se* to exercise its civil jurisdiction on the matters concerning a foreign merchant ship staying in its internal waters. Furthermore, a court exercising criminal jurisdiction seldom applies other laws than its own, whereas in civil cases the court does not necessarily apply its own statutes.⁴⁹⁰

There could exist several fora in different countries that all theoretically have civil jurisdiction on the same dispute concerning a merchant ship by references to the connecting points under private international law. But it is not always the case. Some special cases are commonly reserved for the exclusive civil jurisdiction of coastal States. In its Special Procedural Law on Maritime Actions, for instance, China retains exclusive jurisdiction for its maritime courts on the civil disputes

⁴⁸⁸ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 331.

⁴⁸⁹ See art. 38 *Zulässige Gerichtsstandsvereinbarung* of the Civil Procedural Law of Germany – *Zivilprozessordnung* (ZPO) in the version of 12 September 1950, BGBl. I, 455, available at: <<http://www.redmark.de/redmard/f/FZPO1.html>> (last visited: May 12, 2002); art. 8 of the Special Procedural Law on Maritime Actions of China, *infra* note 492; art. 269 of the Maritime Code of China of 7 November 1992, available at: <<http://law.people.com.cn/bike/viewnews.html?!d=4965>> (last visited: May 12, 2002).

⁴⁹⁰ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 859.

arising from port operations, marine environmental pollution, and offshore oil exploration and exploitation in coastal waters.⁴⁹¹

Civil jurisdiction can also be established under international conventions. In accordance with the 1999 International Convention on Arrest of Ships, which has not yet come into force, any foreign merchant ships may be arrested by courts of a State Party to secure maritime claims specified by the convention within the jurisdiction of the State concerned,⁴⁹² irrespective of where the torts were committed. An arrest of a foreign ship is normally effected at the request of the claimant in a maritime case. The convention is seen as the update of the International Convention Relating to the Arrest of Seagoing Ships of 10 May 1952.⁴⁹³ In comparison with the latter, the new convention on the one hand extends the ships susceptible of arrest also to those not flying the flag of a State Party⁴⁹⁴ if only the arresting State has not otherwise reserved the right to exclude the application of the convention to those ships according to art. 10(1) of the convention. On the other hand, the scope of ships to be arrested shrinks. Under the new regime, except the ships directly involved in the maritime claim, basically only those sister ships may be arrested which are owned by the person liable for the maritime claim. The person could be either the owner of the ship in respect of which the maritime claim arose, or the demise charterer, time charterer or voyage charterer of the same ship. However, the arrest of sister ships is not permissible in the case of disputes over the ownership and possession of a ship.⁴⁹⁵

The arrest of a foreign ship itself demonstrates the assumption of civil jurisdiction of a coastal State. Nonetheless, it is confined to the sense of procedure, but not of substance. Pursuant to the UN Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), "an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law."⁴⁹⁶ In addition, attention should be likewise paid to the 1952 International Convention on Certain Rules Concerning

⁴⁹¹ See art. 7 of the Special Procedural Law on Maritime Actions of 25 December 1999, available at: <<http://law.people.com.cn/bike/viewnews.html?!d=4980>> (last visited: May 13, 2002).

⁴⁹² Art. 1(2) of the convention reads: "'Arrest' means any detention or restriction or removal of a ship by order of a court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument." art. 8(3) mentions "within their jurisdiction". Available at: <<http://www.unctad.org/enIdocs/imo99d6.pdf>> (last visited: May 12, 2002).

⁴⁹³ 439 UNTS 193.

⁴⁹⁴ See art. 8(1) of the convention.

⁴⁹⁵ Art. 3(2) of the Convention, as previous note.

⁴⁹⁶ Art. 21(2)(a) of the UN Convention on the Carriage of Goods by Sea 1978, in Lüddecke/Johnson, *The Hamburg Rules: from Hague to Hamburg via Visby* (1995), 35 f.

Civil Jurisdiction in Matters of Collision,⁴⁹⁷ the 1968 Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters.⁴⁹⁸

Subject to the obligations imposed by bilateral and multilateral treaties, a court of a coastal State may generally hear the cases resulting from shipboard torts, collision, salvage and towage, so long as the accident or services extended took place within the internal waters of the State and the parties have no other agreements to the contrary.⁴⁹⁹ In the case of disputes over general average, maritime insurance, charter party and transport of cargoes and passengers, the courts of the coastal State also have the opportunity to hear them when the accident concerned happened in internal waters, or the ship in dispute or the insured objects damaged stay there.

However, coastal States tend to leave the internal affairs of a foreign ship and minor civil matters on board with little external effects to the flag State, despite the ship's presence in ports or other parts of internal waters. Similarly, in the case of *McCulloch v. Sociedad Nacional de Marineros de Honduras*, the US Supreme Court held that the National Labour Relations Act had no application to the operation of foreign merchant ships with alien crews. The court highlighted the "well-established rule of international law that the law of the flag State ordinarily governs the internal affairs of a ship".⁵⁰⁰

G. Port State Control

I. Introduction: A Complement to the Flag State Control

Port State control has become increasingly familiar to the public with the advent of the Paris Memorandum of Understanding on Port State Control in 1982 (Paris MOU 1982).⁵⁰¹ Nevertheless, it was not a new idea. Previous to the Paris MOU 1982, the maritime authorities of the Member States of LL 1966, MARPOL 73/78, and SOLAS 1974 were already entitled to exercise port State control. Port State control is a regime designed to help ensure, by inspection and detention in ports where necessary, that foreign merchant ships comply with international standards in respect of ship safety, environmental protection and labour conditions mainly

⁴⁹⁷ 439 UNTS 217.

⁴⁹⁸ *Ibid.*, XXII.

⁴⁹⁹ 372 US 10(1963), 21; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 874 ff.

⁵⁰⁰ Brownlie, *Principles of Public International Law* (1998), 322 f; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 864 ff.

⁵⁰¹ [1982] 21 *ILM* 1; for the latest version with 24 amendments, see <http://www.parismou.org/PDF/24_amend.pdf> (last visited: May 12, 2002); Paris MOU 1982 has 19 Member States and a cooperating Member, Slovenia.

laid down by the IMO and the ILO. As stated by many scholars,⁵⁰² in an ideal world there would be no room for port State control. The reality is, however, that the discharge of the control duties by other players, most notably by flag States, has proven ineffective in detecting and removing substandard ships from sea-borne trading. Anyway, port State control can only be a complement to and never be a substitute for the sound exercise of flag State jurisdiction and control.⁵⁰³ Under the contemporary law of the sea, the enforcement of international rules and standards is primarily the responsibility of flag States.

Port State control is seen as the last hole of the global maritime safety net comprising international conventions, flag State control, classification societies, marine insurance industry and port State control.⁵⁰⁴ Nonetheless, the incident of *Erika* appears to show that even the last means yields no guarantee and can be slipped through as well by substandard ships.⁵⁰⁵

A close look may be needed at the inclusion of ships of non-parties in the domain of port State control. According to general international law, an international convention establishes no obligation for a third State to apply it unless the State has accepted it expressly in written form.⁵⁰⁶ However, it can rarely be submitted that the extension of port State control to non-parties' ships by port States would necessarily amount to an imposition of obligations under international conventions on non-parties or to the factual application of relevant conventions by them. Port States carry out port State control on their own initiative based on the domestic legal context, following their ratification of or accession to the conventions. The power of port States to conduct control of foreign merchant ships springs ultimately not from international conventions, but from their territorial jurisdiction over the ships in their ports.⁵⁰⁷ In this sense, even a non-party to a global convention can enforce the provisions of the convention, by transferring them into national statutes, against foreign ships in its ports. Besides, the sorting out of ships of non-parties from port State control would inevitably distort competition between ports. It would also have a negative impact on what the conventions are envisaged to achieve and create discrimination between the

⁵⁰² Peters, *Innere Gewässer im neuen Seerecht* (1999), 128; Özçayır, *Port State Control* (2001), 10.

⁵⁰³ Similar views by Plaza, 'The Future for Flag State Implementation and Port State Control' in Nordquist (ed.), *Current Maritime Issues and the International Maritime Organization* (1999), 208; Wolfrum, 'IMO Interface with the Law of the Sea Convention' in *ibid.*, at 233.

⁵⁰⁴ Özçayır, *Port State Control* (2001), 93; Peters, *Innere Gewässer im neuen Seerecht* (1999), 128.

⁵⁰⁵ William O'Neil, IMO's Secretary General, stated, shortly after the incident, that: "The *Erika* was under class and had been inspected by port State control and industry inspectors several times, yet none of these surveys showed that the ship was about to split in two. We are all bound to ask why not." 'IMO: building maritime partners' [2000] 3 *IMO News* 16.

⁵⁰⁶ Arts. 34, 35 of the Vienna Convention on the Law of Treaties; [1969] 8 *ILM* 680.

⁵⁰⁷ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 342.

ships of parties and those of non-parties. That scenario would contradict and compromise the purpose of international legislation in this regard. On these grounds, a number of the IMO conventions provide for parties to apply the requirements of the conventions to the ships of non-parties, as may be necessary to ensure that *no more favourable treatment* is given to such ships.⁵⁰⁸

Under the inspiring sway of the Paris MOU 1982, port State control has rapidly taken its shape in several regional MOUs in a more organized and substantial way. Port State control has proved to be the most effective instrument for combatting substandard ships in the last two decades. It probably represents one of the most important developments in international maritime law after the conclusion of UNCLOS.⁵⁰⁹

II. Enforcement of Port State Control Against Foreign Ships

Apart from the necessary domestic legislation aimed at implementing port State control, such as the Merchant Shipping (port State control) Regulations 1995 of the UK,⁵¹⁰ the enforcement of port State control is largely based on the provisions of the relevant conventions and respective regional MOUs on port State control.

1. Provisions in the IMO conventions with respect to port State control

a) LL 1966

The convention⁵¹¹ is intended to set uniform rules and standards on the limits to which a ship engaged in international trading is allowed to load cargoes or passengers in order to secure safe navigation at sea. Pursuant to arts. 3 and 12 of the convention, all ships falling under the convention can proceed to sea only after they have been surveyed, marked and provided with an International Load Line Certificate or an Exemption Certificate.

Under art. 21 of the convention, ships holding a certificate issued under art. 16 or 17 are subject to control by officers duly authorized by other Contracting Governments in their ports. The basic task of control is to verify whether there is on board a valid certificate, and, if so, its correspondence with practical conditions. If a ship is found in such a state that it should not sail because of potential danger, intervention measures can be taken, including withholding the ship from leaving until the problem found is removed. In that case, however, the officer

⁵⁰⁸ Art. 5(4) MARPOL 73/78, *MARPOL 73/78 Consolidated Edition*, IMO (1997), 4; art. I(3) SOLAS 1974 Protocol 1988, *SOLAS Consolidated Edition*, IMO (2001), 11; art. X(5) STCW 1978, *1993 Edition*, IMO (1993), 7.

⁵⁰⁹ Lagoni spoke of "the origin of a transnational maritime management law" as early as in 1988, 345.

⁵¹⁰ Statutory Instrument 1995, No. 3128; Özçayır, *Port State Control* (2001), 471.

⁵¹¹ 640 UNTS 133.

carrying out the control is required to inform the flag State of the control result without delay.

b) MARPOL 73/78

The convention⁵¹² covers almost all aspects of pollution from ships, ranging from pollution by oil (Annex I), noxious liquid substances (Annex II), harmful substances carried by sea in packaged form (Annex III), sewage from ships (Annex IV, not yet in force), garbage from ships (Annex V) to air pollution from ships (Annex VI). Dumping and pollution from sea-bed activities are yet excluded.

Arts. 5 and 6 of the convention deal generally with port State control, while some specific regulations address the issue further in Annexes.⁵¹³ As per art. 5, a ship required to hold a certificate is subject to inspection by proper officers in the ports or offshore terminals of a Party. In principle, such an inspection should be confined to verifying that there is a valid certificate on board, unless there are clear grounds showing that the condition of the ship or its equipment does not correspond substantially with the description of the certificate. In the case of the absence of a valid certificate or of substantial discrepancy, the authority of the port State control shall prevent the ship from sailing. However, the ship may leave for the nearest appropriate repair yard when necessary. Under the circumstances of further steps being taken or of entry refusal for a foreign ship, the notification duty is underlined again.

Art. 6 regulates detection of violations and enforcement, according to which a Party may inspect a ship in its ports or offshore terminals to verify whether the ship has discharged any harmful substances in violation of the convention. If so, the Party shall report and furnish evidence to the flag State. Upon receiving such evidence, the flag State shall investigate the matter and, if the case requires, institute proceedings for the alleged violation under its law. The port State in view shall be kept informed of the action taken. A Party can also, but is not obliged to, inspect a ship on request from any Party for the alleged discharges in any place.

c) SOLAS 1974

This convention⁵¹⁴ can be traced back to the “Titanic Convention”, the first convention in the field – the SOLAS 1914, and the SOLAS 1929 in which stipulation on port control had already existed. SOLAS 1974 covers a wide range of measures required to improve the safety of navigation. It contains 13 articles and a quite substantial annex. The convention has been further supplemented by two protocols of 1978 and 1988. The provisions on port State control lie mainly in Regulation 19 of Chapter I of the Annex to SOLAS 1974.⁵¹⁵ Under the regulation, the officers in charge of port State control are entitled to control foreign ships

⁵¹² MARPOL 73/78, 3.

⁵¹³ I.e. Regulation 8A “Port State Control on Operational Requirements” of Annex I; Regulation 15 of Annex II; Regulation 8 of Annex III and Regulation 8 of Annex V.

⁵¹⁴ *SOLAS Consolidated Edition 2001*, IMO (2001), 5.

⁵¹⁵ Consolidated Text of the Annex to SOLAS 1974 Convention, op. cit. as previous note, 34.

calling at their ports to find out whether they have valid certificates on board as required by the convention. If it is not the case or there is an obvious discrepancy between the certificates and the conditions of a ship or of its equipment, further actions can be taken, including detention, until the ship can sail without danger. In such cases, the circumstances shall be reported to the flag State and the IMO. Notably, this regulation embraces some special provisions in favour of the shipping industry. Pursuant to the provisions, a ship unduly detained or delayed shall be entitled to compensation for any loss or damage suffered. However, it is feared that the probability of a successful claim is quite slim.

Besides, Regulation 6 of Chapter IX also concerns port State control on operational requirements with respect to the ISM Code.⁵¹⁶ Regulation 4 of Chapter XI refers to port State control as well.

d) STCW 1978

The convention⁵¹⁷ is designed to establish internationally uniform minimum standards of qualification and competence for seafarers on board sea-going merchant ships. All such seafarers are required to hold a certificate issued in a uniform manner. Some basic principles to be observed are also spelled out in the convention in respect of keeping deck and engine watches and special requirements for personnel on board the tankers carrying oil, chemicals and liquefied gas.

In accordance with art. X of the convention, the duly authorized officers have the power to verify that all seafarers serving aboard are so certified as the convention requires or hold an appropriate dispensation. In the event that any deficiencies are found, proper action may be taken, and the master of the ship, the flag State and the IMO in some cases should be informed. Moreover, where the deficiencies posing a danger to the ship are not corrected, the port State shall take steps to make sure that the danger will eventually be removed. The steps obviously include detention of the ship. Art. X also contains a liability clause in the case of wrongful detention or delay.

Apart from that, Regulation I/4 of the Annex to the convention sets out some basic rules on "Control Procedures" to be followed during the assertion of port State control under the convention.

In addition to the above-mentioned conventions, the International Convention on Tonnage Measurement of Ships 1969 (TONNAGE 1969) and the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREG 1972) also have a bearing on port State control.⁵¹⁸

⁵¹⁶ The International Safety Management Code, adopted by the IMO in 1993.

⁵¹⁷ I.e. the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers 1978, *STCW 1978, 1993 Edition*, IMO (1993).

⁵¹⁸ Art. 12 of TONNAGE 1969 deals with the confirmation of the Tonnage Certificate; COLREG 1972 contains no provisions of port State control, yet the inspection respecting the violations of navigational regulations is underlined in the convention. See Núñez-Müller, *Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht* (1994), 255.

2. Provisions in the Convention Concerning Minimum Standards in Merchant Ships (ILO 147)

The convention⁵¹⁹ was concluded under the aegis of the International Labor Organization (ILO) in 1976 with a view to establishing minimum standards with respect to safety, working and labor conditions. Art. 4 of the convention deals with port State control. Under the article, if a Member State receives a complaint or obtains evidence that a ship does not conform to the standards of this Convention, it may prepare a report addressed to the flag State and the ILO. The State may further “take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health”. In taking such measures, the port State in question is required to notify the flag State of the measures taken.

3. Regional arrangements

As pointed out earlier, port State control is not a novelty to international maritime law and has been provided for in many international maritime conventions. However, the relevant provisions had been poorly applied in practice. In the first place, port State control is stipulated not as an obligation but as a power or right in these conventions.⁵²⁰ Therefore, many countries preferred to abstain from enforcing port State control lest it could frighten away foreign ships planning to call at their ports. Furthermore, despite the fact that some States are really ahead in the implementation of port State control, different standards and procedures have inevitably increased the burden of operation upon ships with good quality on the one hand. On the other, substandard ships could still sail in a region by selecting the ports without strict control. Now that it is impossible to build a world-wide net for the time being, regional coordination has proved to be a practicable option in order to eliminate substandard ships at regional level.

Since the adoption of the Paris MOU 1982, seven more regional arrangements, which are substantially modelled on the Paris MOU 1982, have already been put into operation. They are: the Viña del Mar Agreement in 1992 with twelve members in South America,⁵²¹ the Tokyo MOU in 1993 joined by 18 authorities in the Asia-Pacific region,⁵²² the Caribbean MOU in 1996 boasting 23 members,⁵²³ the Mediterranean MOU in 1997 joined by eleven countries,⁵²⁴ the Indian Ocean

⁵¹⁹ [1976] 15 *ILM* 1288.

⁵²⁰ The wording of “a ship/ships... is/are subject to control/inspection...” is used in art. 21 of LL 1966, art. 5 of MARPOL 73/78, Regulation 19 of SOLAS 1974 and art. X of STCW 1978, while in art. 4 of ILO 147 the expression “may take measures necessary...” is employed.

⁵²¹ Available at: <http://www.prefectura naval.gov.ar/organismos/dpsn/erp/est_rec_pto.ingles.htm> (last visited: May 11, 2002).

⁵²² Available at: <<http://www.tokyo-mou.org/memorand.PDF>> (last visited: May 21, 2002).

⁵²³ Available at: <<http://www.medmou.org/caribbean.html>> (last visited: May 22, 2002).

⁵²⁴ Available at: <http://www.medmou.org/Med_Mou_Text.html> (last visited: May 22, 2002).

MOU in 1998 with 18 member States,⁵²⁵ the West and Central African MOU in 1999 covering 16 States and the Black Sea MOU in 2000 with six members.⁵²⁶ The US Coast Guard enforces port State control independently in American ports. Considering the limitation of space in this thesis and the substantial similarity in structure and content among these MOUs or agreements, further elaborations will have to be confined to the Paris MOU and Tokyo MOU.

a) Paris MOU 1982

The origin of the Paris MOU 1982 can be traced back to the Memorandum of Understanding between Certain Maritime Authorities on the Maintenance of Standards on Merchant Ships, which was signed by eight North Sea States at the Hague on 2 March 1978.⁵²⁷ The Hague MOU dealt mainly with the enforcement of shipboard labor conditions as required by the ILO 147. However, just as it was about to take effect, the *Amoco Cadiz* incident occurred off the coast of French Brittany on 17 March of the same year. The disaster caused a strong political and public outcry in Europe for much more stringent regulations concerning safe shipping.⁵²⁸ The Hague MOU obviously could not meet these needs any more. Subsequently, a new and more effective instrument, later known as the Paris MOU 1982, was adopted in January 1982 and came into force on 1 July of the same year. The Paris MOU 1982 was signed initially by 14 west European countries and afterwards joined by five more States including Canada.

Since its original adoption in 1982, the Paris MOU 1982 has undergone many modifications to accommodate new safety and marine environmental requirements arising from the IMO conventions as well as other significant developments, such as several EEC/EC Directives with regard to port State control. At present, the Paris MOU 1982⁵²⁹ is composed of eight sections ranging from commitments, relevant instruments, inspection procedure, provision of information, operational violations, organization, amendments to the miscellaneous. Furthermore, it has been supplemented by seven annexes aimed at regulating port State control procedures, exchange of messages in region, report of inspections, information systems and minimum requirements for port State control officers.

The Paris MOU 1982 identifies seven conventions⁵³⁰ as its relevant instruments, namely, LL 1966, MARPOL 73/78, SOLAS 1974, COLREG 1972,⁵³¹

⁵²⁵ Available at: <http://www.medmou.org/India_Ocean.html> (last visited: May 22, 2002).

⁵²⁶ For a comparative analysis, see Özçayır, Appendix B3 – Port State Control Agreements: Comparative Table, in *Port State Control* (2001), 463 ff.

⁵²⁷ See Section 8.3 of the Paris MOU 1982, German Bundesarbeitsblatt, 1978, 315; Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 341; Lindemann, *Untersuchung, Festhalten und sofortige Freigabe ausländischer Seehandelsschiffe* (1997), 161.

⁵²⁸ *Ibid.*

⁵²⁹ See website in *supra* note 501.

⁵³⁰ Section 2.1. of the Paris MOU 1982.

⁵³¹ [1973] 12 *ILM* 734.

STCW 1978, TONNAGE 1969 and ILO 147. The intention of port State control is not to enforce any requirement which goes beyond that of international conventions. Similarly, the Paris MOU 1982 neither sets any new standards nor extends the scope of port State control so far as to exceed the provisions of the above seven conventions. It basically aims to make sure that all ships operating in the region comply with the standards set out in the relevant instruments. To this end, the Paris MOU 1982 also contains a “no more favourable treatment” clause in Section 2.4.

Under the Paris MOU 1982, each authority commits itself to the enforcement endeavours, such as implementing the MOU and its annexes, annually carrying out inspections on 25% of all individual foreign merchant ships visiting its ports, reporting on its inspections and compliance with requirements on inspection procedures, rectification and detention. Based on long-standing practice, uniform port State control procedures have been established in the region.

In accordance with the Paris MOU 1982, a port State control committee was appointed as its executive body. In addition, a secretariat was built up within the Netherlands’ Ministry of Transport and Public Works in the Hague, and an information center was put into operation in Saint Malo, France.

The Paris MOU 1982 has turned out to be an effective instrument for fighting against substandard ships in Europe. According to the Paris MOU Annual Report 2003,⁵³² 20,309 inspections were carried out in the region in 2003 on 12,382 foreign merchant ships registered in 105 flag States, showing a slight rise (2.7%) compared with 2002. The overall inspection rate in the region was 30.1% in 2003, while the rate stood at 28.9 in 2002 and 28.8% in 2001. In 2003, 1,428 detentions were made with a detention rate of 7.05%, indicating a small decrease in comparison to 2002. A total of 71,928 deficiencies were recorded during port State control in the year, an increase (4.1%) on the number of 69,079 recorded in 2002. In the category of very high risk, Albania, Sao Tome and Principe, North Korea, Tonga, Bolivia, Comoros, Lebanon, Honduras, Algeria, Georgia, Cambodia, Turkey and Syria stood on the “Black List” in 2003. A newcomer to the “Black List” was Iran. It is noticeable that general dry cargo ships and bulk carriers still accounted for over 77% of all detentions.

In 2003, Germany carried out 1,761 inspections among 6,770 estimated ship calls with an inspection rate of 26.02%. During inspections, 70 detentions were undertaken with a detention rate of 3.98%. Deficiencies were detected at a rate of 46.11% of all inspections. German inspections accounted for 8.56% of the total of the Paris MOU 1982 in the year 2003.⁵³³

Despite the fact that the name of the Paris MOU itself may suggest that it is not an international convention⁵³⁴ in a narrow sense, it is, no doubt, an international administrative agreement between the maritime authorities of Member States, under which the relevant authorities have committed themselves to the

⁵³² Paris MOU Annual Report 2003, available at: <<http://www.parismou.org/>> (last visited: February 25, 2005).

⁵³³ *Ibid.*

⁵³⁴ Özpayır sees a MOU as no international convention, in *Port State Control* (2001), 116.

enforcement as provided therein. In this broad sense, the Paris MOU 1982 falls therefore under the type of international convention as well. The adoption of the form as a MOU was intended to avoid the lengthy procedures of ratification, accession or amendment. As the first regional MOU on port State control, the Paris MOU 1982 has proved itself as a milestone in the development of port State control and exerted enormous influence on the establishment of other regional MOUs. It also plays an important role in the process towards a global regime in this regard.

b) Tokyo MOU 1993

Inspired by the success of the Paris MOU 1982, the maritime authorities in the Asia-Pacific region began to explore ways to build up a coordination system on port State control in the region in 1992. During the fourth preparatory meeting in Tokyo, the Memorandum of Understanding on Port State Control in the Asia-Pacific Region, or in short the Tokyo MOU 1993, was concluded and signed on 1 December 1993 and went into force on 1 April 1994.⁵³⁵ So far the Tokyo MOU 1993 boasts 18 members, including almost all significant players in the region.

The main objective of the MOU, as that of the Paris MOU 1982, is to establish an effective port State control regime in the Asia-Pacific region to promote maritime safety, protect the marine environment, safeguard labour conditions on board and finally root out the operation of substandard ships in the region.

The Tokyo MOU 1993 has basically the same relevant instruments as the Paris MOU 1982. Nonetheless, Section 5 of the Tokyo MOU 1993 deals with training, whereas Section 5 of the Paris MOU 1982 is about operational violations. Unlike the Paris MOU 1982, the Tokyo MOU 1993 has only one annex, which sets out "criteria for Members and Observers of the Memorandum". However, both MOUs agree in adopting the clause of "no more favourable treatment".⁵³⁶

With respect to organization, apart from a port State control committee, the Tokyo MOU 1993 has its secretariat in Tokyo. The Asia-Pacific Computerized Information System (APCIS) was originally located in Ottawa, Canada, but relocated to Vladivostok, Russia, in 1999.⁵³⁷

Under the Tokyo MOU 1993, the target annual inspection rate in the region was set at 50% by the year 2000. The target rate was achieved for the first time in 1996.⁵³⁸ The inspection rate was 65% in 2000.⁵³⁹ According to the Tokyo MOU Annual Report 2003,⁵⁴⁰ 20,124 inspections were carried out on ships registered in 98 countries and thus the inspection rate rose to 77% in 2003, given the background that the annual number of individual ship calls in the region is estimated to

⁵³⁵ *Ibid.*, at 155.

⁵³⁶ Section 2.5 of the Tokyo MOU 1993.

⁵³⁷ Özçayır, *Port State Control* (2001), 156.

⁵³⁸ *Ibid.*, at 157.

⁵³⁹ Annual Report on Port State Control in the Asia-Pacific Region 2000, available at: <<http://www.tokyo-mou.org/ann00.pdf>> (last visited: May 21, 2002).

⁵⁴⁰ Annual Report on Port State Control in the Asia-Pacific Region 2003, available at: <<http://www.tokyo-mou.org/ann03.pdf>> (last visited: February 25, 2005).

have amounted to 26,142. In the year, 1,709 detentions were carried out on ships registered in 67 countries due to serious deficiencies found on board. The detention rate was 8.49%. The flags with the highest detention rates belonged to North Korea, Mongolia, Bolivia, Cambodia, Indonesia, Belize, Vietnam, Honduras and Bangladesh. The detention rate of general dry cargo ships (15.38%) and refrigerated cargo carriers (12.43%) is much higher than that of other ship types.

As a Member to the Tokyo MOU 1993, China conducted 3,789 inspections in 2003 with an inspection rate of 35.14%. As a result of the inspections, 173 detentions were made because of grave problems aboard, with the detention rate being 4.57%. China's contribution to the total inspections in the region was 18.83%.⁵⁴¹

In practice, the Tokyo MOU 1993 has demonstrated its full vitality as a proper regime to contain and eliminate the operation of substandard ships in the region. It is noteworthy that the MOU has achieved the highest regional inspection rate among eight existing regional MOUs. Nevertheless, the enforcement of port State control as per the Tokyo MOU 1993 among 18 Members is far from being homogeneous.

4. Port State control in the EU

Maritime transport is of vital importance to the European economy. It is believed that 30% of the internal trade of the EC and nearly 90% of its external trade is carried by sea.⁵⁴² However, not until 1993 did the EC/EEC make any progress in the field of maritime safety. The grounding of the oil tanker *Braer* off the Scottish Shetland Islands⁵⁴³ precipitated the meeting of the Council on Transport and the Environment in Brussels in January 1993. Following this meeting, the Commission submitted a policy document on "common policy on safe seas" on which a Council resolution was in turn adopted in June 1993.⁵⁴⁴ According to the resolution, one objective of the Community's future action on shipping safety should be to tighten up ship inspections and to withdraw substandard ships from the Community. For that purpose, the Commission was urged to submit formal proposals concerning criteria for the inspection of ships, including the harmonization of detention rules.⁵⁴⁵ Against this background, the Council Directive on

⁵⁴¹ The data are drawn from the Tokyo MOU Annual Report 2003, website as in previous note.

⁵⁴² Özçayir, *Port State Control* (2001), 209.

⁵⁴³ The American-owned tanker registered in Liberia ran aground on 5 January 1993 and leaked the crude oil as much as 130,000 tons. Available at: <<http://www.soton.ac.uk/~engenvir/environment/water7oil.braer.html>> and <<http://www.american.edu/TED/SHETLAND.HTM>> (last visited: May 24, 2002).

⁵⁴⁴ Available at: <http://www.europa.eu.int/comm/transport/themes/maritime/english/safety/background_summary.htm> (last visited: May 24, 2002); O.J. 1993 C 271/1.

⁵⁴⁵ *Ibid.*

port State control was adopted on 19 June 1995 at the proposal of the Commission.⁵⁴⁶

The Directive is aimed at strengthening the enforcement of international standards for ship safety, pollution prevention and life on board ship, as well as working conditions in respect of ships using or anchored off Community ports or off-shore installations. It has been fully operational since July 1996 and forms the cornerstone of EU policy on port State control. Although some other Directives⁵⁴⁷ touch upon the subject as well, the Directive is the first comprehensive response of the EU specifically to the issue of port State control. The adoption and implementation of this Directive have greatly strengthened the enforcement of port State control in the EU, and also promoted the further development of the Paris MOU 1982 since the advent of the Directive has led to several amendments to the latter.

However, considering the existence of the Paris MOU 1982 in Europe and the similarity in content, the necessity might be doubted for a Directive on the same subject with the same goal. Therefore it is desirable to dwell on the distinctions between the two instruments. Firstly and probably also most importantly, while the Paris MOU 1982, like other MOUs, has changed the *power of port State control* stipulated in the relevant instruments into the *commitments of maritime authorities to enforce port State control*,⁵⁴⁸ the Directive has made port State control mandatory for the Member States of the EU.⁵⁴⁹ In other words, under the Directive, it is a legal obligation for a Member State to carry out port State control. Otherwise, judicial proceedings can be sought to force the State to live up to this legal obligation. This happened in the case *Commission of the European Communities v. Italian Republic 1998* before the European Court of Justice (ECJ).⁵⁵⁰ The Court concluded in the case that, by not adopting the laws, regulations and administrative provisions necessary to implement the Directive 95/21/EC, Italy had failed to fulfil its obligations under that Directive and under the EC Treaty. Needless to say, Italy is supposed to come up with its proper implementation as soon as possible. Under the Paris MOU 1982, the conduct of port State control still depends considerably on the discretion of the Members. Secondly, the Paris MOU 1982 is effective only for the maritime authorities concerned, whereas the Directive is legally binding upon each Member State as a whole. Thirdly, the Directive introduces a positive targeting system to reward the ships with high quality. It reflects a new trend in port State control and is the reply to a call from the shipping industry.

Apart from the Directive on port State control in 1995, there came later three EU legal instruments concerning port State control, which deal largely with the

⁵⁴⁶ Council Directive 95/21/EC of 19 June 1995, O.J. 1995 L 157/1.

⁵⁴⁷ For instance, art. 12(1)(a) of the Directive 94/57/EC of 22 November 1994, O.J. 1994 L 319/20; art. 10 of the Directive 94/58/EC of 22 November 1994, O.J. 1994 L 319/28.

⁵⁴⁸ Thereby the auxiliary verb "will" is used. See Section 1.1.-1.4. of the Paris MOU 1982.

⁵⁴⁹ Here the legal obligation is imposed by using the word "shall". See arts. 4 *et seq.* of the said Directive.

⁵⁵⁰ Case C-315/98, ECJ.

amendments to the original Directive based on new developments in the relevant conventions. The three instruments are the Council Directive 98/25/EC of 27 April 1998,⁵⁵¹ the Commission Directive 98/42/EC of 19 June 1998⁵⁵² and the Commission Directive 99/97/EC of 13 December 1999.⁵⁵³ In addition, a comprehensive amendment proposal to the Directive 95/21 put forward by the Commission is now under discussion. The proposal is ambitious and covers a wide range of issues from banning manifestly substandard ships from European waters, making the inspection of high-risk ships mandatory, introducing a financial guarantee system, informing the flag State and classification society concerned and ensuring the transparency of information on port State control, to the compulsory using of “black boxes” to monitor the behavior of ships.⁵⁵⁴

III. Development Trend of Port State Control

Since the advent of the Paris MOU 1982, port State control has played an irreplaceable role in the campaign against substandard ships. It is inspiring that a global port State control network, composed of several regional MOUs, is emerging. However, while the significance of port State control is widely recognized, it is not free of concerns. Port State control still needs to be improved in many aspects, for instance, the lack of positive targeting for the well-run ships, inconsistencies in inspection even within the same region, incompatibility among the different port State control regimes. These concerns demand more coordination among regional MOUs as well as among authorities within a region. As a competent international organization in this area, the IMO is definitely in a special position to facilitate harmonization of procedures, inter-regional cooperation and exchange of information. While having been proactive in preparing the regional MOUs aimed at ensuring the common lines at the very start, the IMO adopted Resolution A.787(19) at its 19th Assembly in 1997. The resolution was published as a booklet titled “IMO Procedures for Port State Control” in the same year.⁵⁵⁵ It is intended to provide basic guidance on the procedures of port State control and thus help ensure consistency in the conduct of ship inspections. This instrument was revised by Resolution A.882(21) at the 21th Assembly of the IMO in November 1999.⁵⁵⁶

As a step to promote cooperation and harmonization on port State control globally, the IMO convened a workshop for regional MOU secretaries and directors of information centers in the US Coast Guard in June 2000. At the workshop, a Contact Group of Information Exchange (CIE) was established to

⁵⁵¹ O.J. 1998 L 133/19.

⁵⁵² O.J. 1998 L 184/40.

⁵⁵³ O.J. 1999 L 331/67.

⁵⁵⁴ Özçayır, *Port State Control* (2001), 225 ff.

⁵⁵⁵ *Ibid.*, at 100 ff.

⁵⁵⁶ *Ibid.*, at 102.

further study inter-regional information exchange and to explore the possibility of unifying the coding systems of port State control.⁵⁵⁷

Apart from that, cooperation between regional MOUs tends to be increasingly frequent and important. Since the Joint Declaration on Interregional Action to eliminate substandard shipping by the Members of both the Paris MOU 1982 and the Tokyo MOU 1993 in March 1998,⁵⁵⁸ the two regional MOUs have jointly launched several concentrated inspection campaigns, focusing on International Safety Management Code (ISM Code) or large bulk carriers. The interregional data exchange between the information centers of the two regional MOUs was first accomplished in 2001.⁵⁵⁹ Cooperation with/between other regions still remains to be developed.

Besides the harmonization of various regimes, it should be stressed that the emphasis in port State control should be shifted from developing new regulations to implementing the existing ones, and from mainly inspecting ship conditions to paying more attention to human factors on board.

H. Jurisdiction in Environment Protection

I. Port State Special Jurisdiction

A port State is always a coastal State as well, except for the case of a port in a land-locked State, such as Basel. There is complete agreement that a port State enjoys full jurisdiction over any violations of its duly promulgated laws and regulations in respect of marine environmental protection in its ports by a foreign ship voluntarily staying there. Without touching upon this indisputable principle, UNCLOS vests port States with additional jurisdiction in art. 218 that can be called port State special jurisdiction. This jurisdiction goes beyond the limit of traditional doctrines on jurisdiction in international law and rewrites the landscape of jurisdiction over foreign ships.

It should be pointed out that port State special jurisdiction as prescribed in art. 218 of UNCLOS basically deals with the jurisdiction to enforce, which, in turn, is based upon the jurisdiction to prescribe embodied or implied mainly in art. 211(3). In pursuance of art. 211(3), a port State may establish rules and requirements for the purpose of environmental protection as a condition for the entry of foreign ships into its ports. There seems no other limitation to the rules and requirements, as long as they fall within the blessing of general international

⁵⁵⁷ Annual Report of the Tokyo MOU.

⁵⁵⁸ Peters, *Innere Gewässer im neuen Seerecht* (1999), 131.

⁵⁵⁹ Press Release of the Tokyo MOU, available at: <<http://www.tokyo-mou.org/psc10prs.PDF>> (last visited: May 25, 2002).

law and do not run against the treaty obligations accepted by the port State. That constitutes the prescriptive basis for port State enforcement here.

Under the new regime of UNCLOS, a port State is authorized to undertake investigations and institute proceedings in respect of any discharge on the high seas which is in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference (Art. 218(1)) from a foreign ship⁵⁶⁰ which is voluntarily within a port or at an off-shore terminal. Apparently port State jurisdiction is extending into the field that was left exclusively to the flag State before. However, no definitions have been given here as regards discharge and applicable international rules and standards. Therefore, resort can be made to art. 2 of MARPOL 73/78 for the specific connotation of the term "discharge".⁵⁶¹ As for the applicable international rules and standards, there exists a general consensus that they are basically those enshrined in the IMO conventions, whereas there is still debate over "applicable". One writer has argued that "'applicable' means that by its very substance the respective rules govern the issue at stake and are in this respect not challenged".⁵⁶² However, this interpretation seems to have gone too far. In general, applicability depends not only on the matters to which the rules and standards are to apply, but also on the whereabouts. It can hardly be imagined that a port State which has not accepted an international convention on whatever ground would be willing to enforce the provisions of the same convention in its internal waters. Consequently, "applicable" may well mean that the port State is a party to the conventions that embrace the relevant rules and standards, or that the port State somehow gives effect to the conventions.⁵⁶³ As a result, the application of them is binding upon the port State. Otherwise, they are inapplicable in ports of the State.⁵⁶⁴ Besides, while these rules and standards may be transformed into national norms, the discharge violation here is meant principally against the international rules and

⁵⁶⁰ The term "vessel" is employed in arts. 218-220 without any specification. Given the background of the context, it refers, apparently, to all foreign ships regardless of whether the State of ship registration is party or non-party to the conventions containing the relevant international rules and standards. Cf. Lagoni, 'Internal Waters, Seagoing Vessels' in *EPIL* (1989), vol. 11, 158; Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 260.

⁵⁶¹ Discharge means, in relation to harmful substances or effluents containing such substances, any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying. Discharge does not include dumping, release of harmful substances directly from sea-bed activities and from legitimate scientific research into pollution fighting. See art. 2(3) MARPOL 73/78, *MARPOL 73/78 Consolidated Edition*, IMO (1997), 4.

⁵⁶² Wolfrum, 'IMO Interface with the Law of the Sea Convention' in Nordquist (ed.), *Current Maritime Issues and the International Maritime Organization* (1999), 231 f.

⁵⁶³ For more elaboration thereon see *infra* 227 f.

⁵⁶⁴ Cf. Lagoni, 'Die Abwehr von Gefahren für die marine Umwelt' in Kunig/Lang/Lagoni, *Umweltsschutz in Völkerrecht und Kollisionsrecht* (1992), 135 ff.

standards *per se*.⁵⁶⁵ National norms, if any, should not be more stringent than those international rules and standards.

In the case of a discharge violation in the maritime zones of another State, proceedings may only be instituted when it is so requested by that State, the flag State or a State damaged or threatened by the discharge, or the violation has caused or is likely to cause pollution in the maritime zones of the port State (art. 218(2)). Upon the request of the relevant States, the port State is under an obligation to undertake an investigation, but the obligation is watered down by the condition "as far as practicable" (Art. 218(3)). The proceedings launched by the port State on the basis of such an investigation may be suspended and transferred to the coastal State or the flag State. Of course, the port State may go on with the proceedings in some special cases.⁵⁶⁶

Investigations and proceedings may, no doubt, entail great expense for the port State. Therefore, where an investigation or proceedings are initiated at the request of other State(s), the expense incurred should be recovered from the requesting State(s) pursuant to the principle "who instructs, pays". According to the predominant view, proceedings in art. 218 refer to both administrative and judicial proceedings.⁵⁶⁷ Nonetheless, it is said that only criminal proceedings were meant by the word "proceedings" in the light of the consensus at UNCLOS III.⁵⁶⁸

As earlier mentioned, art. 218 grants port States the special jurisdiction that was unimaginable prior to UNCLOS. In other words, a discharge violation tends to be subject to universal jurisdiction, irrespective of where it occurred. The underlying justification for this innovation may lie in the belief that marine environmental pollution is considered not only a local but rather a global problem, and that any discharge violation is thus against the interests of the international community as a whole.⁵⁶⁹ Nevertheless, the port State special jurisdiction is still at its inchoate stage. The exercise of jurisdiction is not yet obligatory for port States but largely left to their discretion. Most States appear to prefer to refrain from asserting the newly invested jurisdiction, if not fully ignore it. Therefore, it would be premature to say that art. 218 has already become a part of customary international law.⁵⁷⁰

⁵⁶⁵ Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 218.9(e), 272.

⁵⁶⁶ Arts. 218(4), 228 UNCLOS.

⁵⁶⁷ Lagoni, 'Die Abwehr von Gefahren für die marine Umwelt' in Kunig/Lang/Lagoni, *Umweltsschutz in Völkerrecht und Kollisionsrecht* (1992), 142 ff; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 428 f.

⁵⁶⁸ Hasselmann, *ibid.*, at 429.

⁵⁶⁹ Similar views by Lagoni, 'Die Abwehr von Gefahren für die marine Umwelt' in Kunig/Lang/Lagoni, *Umweltsschutz in Völkerrecht und Kollisionsrecht* (1992), 144 f; Wolfrum, 'IMO Interface with the Law of the Sea Convention', in Nordquist (ed.), *Current Maritime Issues and the International Maritime Organization* (1999), 232; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 430.

⁵⁷⁰ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *AVR* 334; Germany introduced the jurisdiction into its legislation in

Finally, it should be noted that Section 7 Safeguards in Part XII of UNCLOS are applicable to enforcement by port States as provided in the Convention.

II. Coastal State Jurisdiction

Compared with port State special jurisdiction, which is somewhat extraterritorial in nature, the coastal State jurisdiction provided in art. 220 is founded completely upon the territorial jurisdiction or the like of the coastal State in its maritime territories and the EEZ. Furthermore, the subject matters under coastal State jurisdiction here are not limited only to a discharge violation by ships against applicable international rules and standards, but also include any violation in any form of both its laws and regulations adopted as per UNCLOS and the above-mentioned international rules and standards.⁵⁷¹ In addition, it needs to be kept in mind that the provisions in art. 220 are virtually envisaged only for the jurisdiction to enforce as the title of the article reveals, whereas the according jurisdiction to regulate is stipulated in arts. 211(3)-(7).

Under art. 220, the enforcement of coastal State jurisdiction is dependent on two factors, namely, *locus delicti* and the ship's location at the moment of the enforcement. As far as internal waters are concerned, focus should be placed on art. 220(1), in which the most powerful enforcement is accorded to coastal States. In accordance with art. 220(1), a coastal State may institute proceedings in respect of any violation of national laws, regulations enacted on the basis of UNCLOS or applicable international rules and standards committed either within the territorial sea or within the EEZ of the State, when a foreign ship voluntarily stays in a port or at an off-shore terminal of the same State. Where necessary, an investigation, as the less strong measure in comparison with proceedings, might be implied in the provisions. The laws and regulations adopted by coastal States are believed to include those specified in art. 21(1)(f). Therefore, art. 220(1) is of particular significance for the enforcement of marine environmental laws and regulations with regard to the innocent passage of foreign ships, which constitutes the main concern in the next part of the dissertation.

The article does not pronounce on the case where a violation has occurred within internal waters including ports, or where a foreign ship stays in internal waters other than ports after committing a violation in the territorial sea or the EEZ of the coastal State. However, in such a case, the general understanding is that the coastal State would meet with no legal obstacle to exercise its full jurisdiction over the foreign ship in question. That may be the reason why such omissions have been made.⁵⁷²

1994, but no case has been reported as yet. See *Gesetz zur Änderung von Rechtsvorschriften auf dem Gebiet der Seeschifffahrt*, BGBl. 1994 I, 1554.

⁵⁷¹ Art. 220(1) UNCLOS.

⁵⁷² Cf. Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 220.11(b), 299.

The remaining paragraphs of the article largely concern jurisdiction in the territorial sea and are thus reserved for Part Four of the thesis for further discussion.

III. Measures Relating to Seaworthiness of Foreign Ships

Apart from port State special jurisdiction in art. 218 and coastal State jurisdiction in art. 220, the Convention imposes an obligation upon States to take administrative measures to prevent foreign ships from sailing, when the ships within their ports or at their off-shore terminals are found to be in a state of unseaworthiness pursuant to applicable international rules and standards. As the general requirement of seaworthiness of ships in the enforcement provisions of the Convention, art. 219 is seen as a complementary provision to both port State special jurisdiction and coastal State jurisdiction, while primarily supplementing the provisions on the former as embodied in art. 218.⁵⁷³ Under art. 219, the measure of inspection on board commonly employed in port State control is actually authorized implicitly, considering that inspection is the normal means of discerning non-conformity with the relevant rules and standards.⁵⁷⁴

Art. 219 reminds us of port State control, that likewise centers on administrative measures and applies to all foreign ships including those seeking refuge in ports. The obvious distinction, if any, may be that port State control is generally based on the permissive prescriptions in relevant conventions dealing with different issues and therefore it is not necessarily limited to the competence as enshrined in art. 219. Secondly, while port State control normally comes out as a right in the relevant conventions or commitments in the regional MOUs,⁵⁷⁵ taking measures under art. 219 is converted into an obligation for States which are Parties to the Convention, although it is diluted by the expression "as far as practicable".⁵⁷⁶ Anyhow, it may be said that art. 219 reflects some development momentum in port State control, which has actually gathered pace rapidly only after the conclusion of UNCLOS, in State practice at the time of the text finalization of the Convention.

Seaworthiness is a basic requirement both in private law⁵⁷⁷ and public law, relating to ship safety, environmental protection and labor conditions. Generally, it means that a ship is in a reasonably safe and sound condition, and fit to undertake

⁵⁷³ Rosenne/Yankov, *ibid.*, at 219.1, 274; the drafting history of the article also sheds light on the point, *ibid.*, at 274 ff.

⁵⁷⁴ "States which, upon request or on their own initiative, have ascertained that ...", art. 219 UNCLOS.

⁵⁷⁵ However, port State control tends to grow as a legal obligation especially since the EC Council Directive 95/21, O.J. 1995 L 157/1.

⁵⁷⁶ At the sixth session (1977), "shall" was substituted for "may" in the draft text upon a French proposal. Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 219.6, 276.

⁵⁷⁷ Art. III(1)a of the Hague/Visby Rules.

a specific sea voyage and to confront the perils of the sea. The international rules and standards pertinent to seaworthiness referred to in the article are mainly found in LL 1966, MARPOL 73/78, SOLAS 1974 and STCW 1978.

Worthy of note is that under art. 219 the power of the States is limited to the taking of administrative measures that obviously rule out the initiation of any proceedings as stipulated in arts. 218 and 220. Such administrative measures may be detention, custody, withholding clearance of exit, order to remove the existing problems or to repair in the nearest appropriate shipyard. Under these circumstances, the obligation of notifying the flag State⁵⁷⁸ should be read into art. 219 on account of the reference to Section 7 Safeguards in the article. The refusal of ship release would lead to the start of the procedure for release of the ship in accordance with Part XV of the Convention.⁵⁷⁹

⁵⁷⁸ Art. 226(1)(c) UNCLOS.

⁵⁷⁹ See art. 226(1)(c) UNCLOS. It can also be the case during exercising port State special jurisdiction in art. 218 or coastal State jurisdiction in art. 220 of the same Convention.

Part 3: Right of Innocent Passage in the Territorial Sea

A. Introduction

The term “territorial sea”⁵⁸⁰ refers to the maritime waters stretching seaward from the baselines. Under UNCLOS and customary international law, every State is entitled to establish the breadth of its territorial sea up to twelve nautical miles (nm) measured from the baselines.⁵⁸¹ Furthermore, the sovereignty of a coastal State extends to the territorial sea.⁵⁸² Nevertheless, this recognition is not an easy accomplishment from a historical perspective. Not until the 1930 Hague Codification Conference had the principle of coastal sovereignty over the territorial sea been generally accepted in international law,⁵⁸³ whereas the general consensus on the extent of the territorial sea was first achieved at UNCLOS III. The exercise of the sovereignty of the coastal State over its territorial sea is subject to the right of innocent passage.⁵⁸⁴ The right is regarded as the main restriction imposed by international law upon the sovereignty of the coastal State over its territorial sea. The legal regime of the territorial sea reflects, to a great extent, the reconciliation of two different interactive *desiderata* from coastal sovereignty and the freedom of navigation respectively, that always coexist in a seesaw game. Therefore, for a better understanding of the right of innocent passage, it is necessary to dwell on some basic questions about the territorial sea, such as its legal status and breadth.

⁵⁸⁰ The term of territorial sea was first consecrated at the Hague Codification Conference in 1930 and has retained its authority since then. League of Nations, Doc. C.228.M.115.1930.v., 15. Before that, several other terms had been used such as territorial waters, coastal waters, littoral sea, marginal waters and maritime belt. However, the expression “territorial waters” was still used in a series of resolutions adopted by the UN General Assembly between 1949 and 1970, such as Res. 2750C (XXV) of 17 December 1970. Nandan/Rosenne, *The United Nation’s Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 56 f.

⁵⁸¹ Art. 3 UNCLOS.

⁵⁸² Art. 2(1) UNCLOS.

⁵⁸³ Cf. Churchill/Lowe, *The Law of the Sea* (1983), 56.

⁵⁸⁴ Arts. 17-28, Sec. 3, Part II, UNCLOS.

B. Legal Status of Territorial Sea: Restricted Sovereignty

I. Origin of Territorial Sea and Its Juridical Nature prior to the Hague Codification Conference

It is believed that the conception of the territorial sea regime took root in the 14th century, when the idea began to take shape that a coastal State could assume some power beyond its land territory over the adjacent seas.⁵⁸⁵ At that time, classical Roman law indicated the growth of the belief that the Emperor, King or State possessed some kind of nascent proprietary rights in the adjacent seas.⁵⁸⁶ Following the replacement of the Holy Roman Empire by a cluster of independent sovereign States, the above incipient idea was further developed and strengthened in the 16th century.⁵⁸⁷ During the great debates in the 17th century between *mare liberum* and *mare clausum*, the thought of territorial sea did not lose its ground either. Even the proponents of the freedom of the seas did not go so far as to claim that all the seas whatsoever were open to use by all and absolutely not susceptible of being put under the control of coastal States.⁵⁸⁸ On the contrary, *Grotius* himself was of the contention that there existed certain power without property rights in coastal waters which could be effectively controlled from the shore.⁵⁸⁹

Consequently, by the start of the 18th century, the idea was already well established that there was a simple distinction between high seas, free and open to all, and coastal waters, susceptible of appropriation by the adjoining State.⁵⁹⁰

⁵⁸⁵ Fenn, 'Origins of the Theory of Territorial Waters' [1926] 20 *AJIL* 467; Fulton, *The Sovereignty of the Sea* (1911), 134, 538 f; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 10.

⁵⁸⁶ Fenn, *ibid.*, at 467.

⁵⁸⁷ Churchill/Lowe, *The Law of the Sea* (1983), 53.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ "It has been a fairly easy matter to extend sovereignty only over a part of the sea without involving the right of ownership; and I do not think that any hindrance is put in the way of this by the universal customary law of which I have spoken. It seems clear, moreover, that sovereignty over a part of the sea is acquired in the same way as sovereignty elsewhere, that is, as we have explained above, through the instrumentality of persons and of territory. It is gained through the instrumentality of persons if, for example, a fleet, which is an army afloat, is stationed at some point of the sea; by means of territory, in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself." *De Jure Belli ac Pacis* (1646) lib. II, cap. 3, Translation of the 1646 edition by Kelsey, in Scott (ed.), *The Classics of International Law* (1925), vol. II, 212 ff; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 14.

⁵⁹⁰ E.g. the influential work of Bynkershoek in 1702, *De domonio maris dissertatio*, was grounded upon the twin pillars, namely, the freedom of the high seas and the

Despite the fact that the coastal State had long since exercised its power or jurisdiction over the coastal waters for the purpose of various matters, the plain dictates for effective exercise and operability of the power had helped aggregate these various powers into the single regime of territorial sea. That is to say, the amalgamation and optimisation of coastal State powers over the coastal waters have brought about the establishment of the territorial sea regime in international law that is believed to have been finally completed in the 1840s.⁵⁹¹

As for the juridical nature of the territorial sea, there exists a long history of controversy. In the earlier times till the end of the 17th century, territorial sea was largely taken as the property of the coastal State. Accordingly, the rights of the State there were proprietary rights (*dominium*), despite the fact that the theory of *imperium*, i.e. the rights only to control rather than to own, occasionally attained prominence.⁵⁹² In addition, the preeminent scholar *Gentili*, for the first time, labelled "the adjacent part of a sea" as "*territorium*" in his work published in 1612.⁵⁹³ He contended that coastal waters were an integral part of the territory of the State whose shores they wash.⁵⁹⁴ Needless to say, the concept "territory" then exhibited no more than patrimonial features of the feudal system in the sense that it was the property of the Emperor, King or Prince who were vested with supreme authority.⁵⁹⁵ Since then the territorial sea has started a long journey to attain its territoriality faced with the strong opposition mainly of many French writers, whose clout persisted well into the last century. By the end of the 17th century, *dominium* and *imperium* fused in the newly born doctrine of jurisdiction that dominated the discussion on the juridical nature of the territorial sea for the next one and a half centuries.⁵⁹⁶ Under the doctrine, *dominium* and *imperium* could exist only in conjunction. In other words, the concept of jurisdiction could not be disengaged from that of territory. So jurisdiction then was no jurisdiction in its modern sense. This jurisdiction theory had not been updated until about the 1840s, when the growing principle of innocent passage gained its ground and caused an obvious difficulty for the theory. In the renovation of the jurisdiction theory that began in Germany, the concept of jurisdiction was separated from that of territory. According to the new theory, a coastal State enjoys only jurisdictional rights over the territorial sea without relying on the notion of property or territory to justify it.⁵⁹⁷ That is why the International Law Association (ILA) chose to rest the conception of territorial sea simply on "a right of jurisdiction" in its draft

"sovereignty" of the coastal State over its adjacent sea. Churchill/Lowe, *The Law of the Sea* (1983), 53 f.

⁵⁹¹ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 19.

⁵⁹² *Ibid.*, at 60 f.

⁵⁹³ Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 13, note 47 at 33.

⁵⁹⁴ Fenn, 'Origins of the Theory of Territorial Waters' [1926] 20 *AJIL* 481.

⁵⁹⁵ Cf. Verzijl, *International Law in Historical Perspective, Part III State Territory* (1970), 1.

⁵⁹⁶ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 15.

⁵⁹⁷ *Ibid.*, at 61.

convention in 1924.⁵⁹⁸ Besides, it is also worth mentioning the servitude theory put forward by the French professor *Pradelle*.⁵⁹⁹ Pursuant to his opinions, the coastal State is neither the owner nor the sovereign of the territorial sea, but enjoys only a "bundle of servitudes" over the belt of waters, permitting it to exercise some jurisdiction for the protection of its interests.⁶⁰⁰ Conspicuously, the theory is not substantially distinct from the updated jurisdiction doctrine as discussed above.

Among various schools concerning the juridical nature of the territorial sea, the sovereignty doctrine is the most persistent one. It has eventually been adopted in conventional international law. The claim to absolute sovereignty over the adjacent sea was first made by *Bartolus* in the 16th century.⁶⁰¹ Basically it had been closely connected with the concept of territory.⁶⁰² The sovereignty doctrine had met with only limited objections and been widely accepted even by the advocates of the free seas.⁶⁰³ The Institute of International Law (IDI) came to an interesting conclusion at its Paris Conference in 1894 that a State did not enjoy "an ownership", but only "a right of sovereignty over its territorial waters",⁶⁰⁴ whereas its Stockholm Conference in 1928 eventually adopted the resolution stating that "States enjoy the sovereignty of their territorial waters".⁶⁰⁵ Similarly, in 1926 the American Institute of International Law (AIIL) came up with its major thrust that the American Republics enjoyed "the right of sovereignty over territorial waters".⁶⁰⁶ After 1900 the debate about the juridical nature of the territorial sea ebbed. Meanwhile, the majority of the writers tended to support the sovereignty doctrine.⁶⁰⁷ Notwithstanding that State practice yielded no uniform or predominant model on the issue, the doctrine seemed to have increasingly gained the support of the international community. The consensus in favour of the coastal

⁵⁹⁸ ILA, Report of the 33rd Conference, arts. 2, 5, 9, 101; O'Connell/Shearer, *ibid.*, at 75.

⁵⁹⁹ Colombos, *The International Law of the Sea* (1967), 89; O'Connell/Shearer, *ibid.*, at 61 f.

⁶⁰⁰ Colombos, *ibid.*; Churchill/Lowe, *The Law of the Sea* (1983), 54; O'Connell/Shearer, *ibid.*, at 68 ff; Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 17 ff.

⁶⁰¹ Colombos, *ibid.*, at 89.

⁶⁰² Gentili strongly supported the view of Bartolus and went on to state that: "coastal waters are part of the territory of the State whose shores they wash. It follows that the territorial rights of sovereignty which exist in the Head of a State are extended *in toto* over the sea adjacent to his coasts." Fenn, 'Origins of the Theory of Territorial Waters' [1926] 20 *AJIL* 481.

⁶⁰³ See *supra* note 589.

⁶⁰⁴ *Annuaire*, vol. 13, 329; Colombos, *The International Law of the Sea* (1967), 90; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 67; Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 21. The ambiguous combination of "a right of sovereignty" is used, as believed, to restrict the power of coastal States in the territorial sea.

⁶⁰⁵ *Annuaire*, vol. 35, 755; Colombos, *ibid.*, at 90.

⁶⁰⁶ Colombos, *ibid.*

⁶⁰⁷ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 71 f.

State's sovereignty over the territorial sea was reflected in the Paris Air Navigation Convention of 1919.⁶⁰⁸ At any rate, it has to be stated that deference to the sovereignty principle was growing.

It would be necessary to point out that, in the long history of the doctrine, the denotation of sovereignty over the territorial sea varied at different times. History has witnessed the evolution of sovereignty, from its original form as a collection of specified sovereign rights in the feudal sense to its modern form as an indissoluble and all-embracing notional unity in the 19th century.⁶⁰⁹

Finally, the rationale of the territorial sea should also be briefly mentioned. Roughly speaking, in earlier times the territorial sea was declared mainly by the reason of suppressing piracy, punishing smuggling, levying taxes on passing foreign ships and safeguarding neutrality and defence.⁶¹⁰ The establishment of the territorial sea in modern times is basically prompted, on the one hand, by the necessity of security, including the prevention of foreign espionage and incursions at sea, the protection of coastal navigation and maintenance of good order. On the other hand, it is also motivated by economic, political and environmental considerations, ranging from preserving fishery resources and reserving fishing rights for the nationals, cracking down on smuggling, regulating various sea users, enforcing local laws and regulations, supervising shipping operations, preventing illegal immigration, to protecting the marine environment.

II. Territorial Sea at the Hague Codification Conference of 1930

From the elaboration in the previous section, it is clear that State practice and codification efforts in the 1920s appear to affirm the trend towards the recognition of coastal State sovereignty over the territorial sea. However, the debate on the legal status of the territorial sea still remained unsettled. Accordingly, as Schücking⁶¹¹ prepared the Draft Convention for the Hague Conference in 1927, he cautiously employed the pretty nebulous expression "sovereign rights" to address the character of the territorial sea.⁶¹² In the Schedule of Points approved by the

⁶⁰⁸ Churchill/Lowe, *The Law of the Sea* (1983), 56; O'Connell/Shearer, *ibid.*, at 74; Colombos, *The International Law of the Sea* (1967), 89.

⁶⁰⁹ Verzijl, *International Law in Historical Perspective, Part III State Territory* (1970), 5 ff., 54.

⁶¹⁰ Cf. Verzijl, *ibid.*, at 52 f; Colombos, *The International Law of the Sea* (1967), 87; Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 12 f; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 5.

⁶¹¹ He was the Rapporteur of the Committee of Experts for the Progressive Codification of International Law, which was convened under the League of Nations Resolution adopted on 22 September 1924 calling for "the progressive codification of international law". Rosenne (ed.), *League of Nations Conference for the Codification of International law [1930]* (1975), vol. II, xiii.

⁶¹² "Article I: The State possesses sovereign rights over the zone which washes its coast ..." Rosenne, *ibid.*, at 411; LON Doc. C.196.M.70.1927.V.

Preparatory Committee in February 1928 and sent to many governments as a questionnaire, the term “sovereignty” was finally used in Point I, but in a tentative way.⁶¹³ Among 29 governments who furnished their replies to the questionnaire, 25 commented on Point I and 19 expressed their support for the use of “sovereignty”.⁶¹⁴ France was the only State that cast doubt on the expression by stating that the nature of the State’s rights over its territorial waters was a theoretical question and not definitely settled by existing laws. From the other five replies, no clear-cut view could be extracted. Notably, several States like the Netherlands stressed in replies that the territorial sea is part of the State’s territory. Therefore, the observation can reasonably be drawn that, based upon these replies, “governments agree in considering that a State has sovereignty over a belt of sea round its coast”.⁶¹⁵ Consequently the Preparatory Committee drafted its Basis of Discussion – No.1 as “A State possesses Sovereignty over a belt of sea round its coasts; this belt constitutes its territorial waters”.⁶¹⁶

Following the preparation of several years, the Hague Conference was ultimately held from 13 March to 12 April 1930, having been attended by delegates from 43 States.⁶¹⁷ Without attempting to look into the complete proceedings of the Conference, we intend only to highlight that the sovereignty doctrine survived the debates at the Conference. Despite the fact that a handful of States – France, Poland, Greece and Czechoslovakia – voiced their reluctance to use the word “sovereignty”,⁶¹⁸ it was largely recognized that international law attributes sovereignty over the territorial sea to each coastal State and this must be regarded as essential for safeguarding the legitimate interests of the State.⁶¹⁹ Accordingly, the related draft, which was forwarded to the Conference by the Second Committee and embodied in the Final Act of the Conference in the end, read:

The territory of a State includes a belt of sea described in this Convention as the territorial sea.

⁶¹³ “It would seem possible to take as the point of departure the proposition that the State possesses sovereignty over a belt of sea around its coasts. This involves possession by the State in the belt of the totality of those rights which constitute sovereignty ...” Schedule of Points, LON Doc. C.44. M.21.1928.V; Rosenne, *ibid.*, at 322. The Preparatory Committee was established in October 1927 by the League of Nations according to its Resolution adopted on 27 September 1927 stating that “systematic preparation can be made for a first Codification Conference”. Rosenne, *ibid.*, at ix, xiii ff.

⁶¹⁴ Bases of Discussion, LON Doc. C.74.M.39.1929.v., 12 ff; Rosenne, *ibid.*, at 230 ff.

⁶¹⁵ Bases of Discussion, *ibid.*, at 17; Rosenne, *ibid.*, at 235.

⁶¹⁶ *Ibid.*

⁶¹⁷ Colombos, *The International Law of the Sea* (1967), 103; Final Act of the Hague Conference, LON Doc. C.228.M.115.1930.V.

⁶¹⁸ Churchill/Lowe, *The Law of the Sea* (1983), 56; O’Connell/Shearer, *The International Law of the Sea* (1984), vol. 1, 77.

⁶¹⁹ Report of the Second Committee, LON Doc. C.230.M.117.1930.V., 3.

Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and other rules of international law.⁶²⁰

At first, the term "territorial sea" was preferred to "territorial waters" on the ground that the latter may indicate internal waters as well. Here Para. 1 was intended to serve the purpose of completely assimilating the territorial sea with the land territory. The assimilation is also the basis for the retention of the term "sovereignty". Arguably, the exercise of sovereignty over the territorial sea, compared with that over the land domain, is subject to more limitations imposed by international law. Besides, no convention could be expected to exhaust these limitations. Therefore, it was not thought superfluous to lay down the general qualifications for exercising sovereignty over the territorial sea.⁶²¹

As a matter of fact, despite the use of the term "sovereignty", the restrictions set forth for its exercise in other articles of the draft render it tantamount to "a right of sovereignty" or little more than "authority" or "jurisdiction". Nevertheless, it is believed that the formula of qualified sovereignty was designed to accommodate a variety of views, although the sovereignty doctrine had gained the majority opinion at the Conference.

At any rate, the draft on "The Legal Status of the Territorial Sea" had proved to be an important document in the history of international law and a landmark in the long process of codification,⁶²² notwithstanding the fact that the Hague Conference failed to achieve its original goal. The same could be said about art. I in the draft so long as the legal nature of the territorial sea is under discussion. The draftsmanship of the Hague Conference exerted enormous influence upon learned circles and State practice. Since then, the principle of coastal State sovereignty has become the predominant view among jurists, and more and more States have associated themselves with this principle in practice.⁶²³ All this can be seen as an auspicious prelude to the success of UNCLOS I.

III. Territorial Sea in the Geneva Convention 1958

The unfinished task at the Hague Conference was transferred to the International Law Commission (ILC) in 1950, as it proved possible to further the codification of the law of the sea subsequent to the founding of the UN. In July 1956, the ILC drew up its final report⁶²⁴ on the territorial sea and submitted it two years later to UNCLOS I, which was held in Geneva in April 1958.⁶²⁵ The substantial part of the report is a draft text on the territorial sea consisting of 25 articles. Article 1 of

⁶²⁰ Art. I, The Legal Status of the Territorial Sea, Report of the Second Committee, as in previous note, 6; Final Act of the Conference, 15.

⁶²¹ Observations of art. I, The Legal Status of the Territorial Sea, 6.

⁶²² Reeves, 'The Codification of the Law of Territorial Waters' [1930] 24 *AJIL* 486; Colombos, *The International Law of the Sea* (1967), 105.

⁶²³ Churchill/Lowe, *The Law of the Sea* (1983), 56.

⁶²⁴ Report of the ILC Covering the Work of Its Eighth Session, [1956] II *YBILC* 253 *et seq.*

⁶²⁵ UNCLOS I, Official Records, vol. I, 1.

the draft was designed to cope with the juridical status of the territorial sea. It ran as follows:

The sovereignty of a State extends to a belt of the sea adjacent to its coast, described as the territorial sea.

This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.⁶²⁶

The principal enunciation of coastal State sovereignty is found in Paras. (1), (3) and (4) of the ILC's commentary on art. 1 of the draft.⁶²⁷ It varied hardly from the observations made by the Second Committee in its report at the Hague Conference. At UNCLOS I, however, the ILC draft was challenged by the UK, contending that the draft failed to clearly draw the distinction in nature between the rights exercised by a coastal State over its territorial sea and that exercised by the same State over its land territory. As a result, the UK came up with an amended text which read:

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.

This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

The above redrafted text was finally adopted unanimously at UNCLOS I as art. 1 of the Geneva Convention, namely, the Convention on the Territorial Sea and the

⁶²⁶ *Supra* note 624, 256 ff.

⁶²⁷ "(1) Paragraph 1 mentions the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory. There is an essential difference between the regime of the territorial sea and that of the high sea since the latter is based on the principle of free use by all nations. The replies from governments in connexion with The Hague Codification Conference of 1930 and the report of the Conference's Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. It is also the principle underlying a number of multilateral conventions – such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944 – which treat the territorial sea in the same way as other parts of State territory.

(3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.

(4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles, which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially confined in the present draft for the purpose of their application to the territorial sea. That is why "other rules of international law" are mentioned in addition to the provisions contained in the present articles." Report of the ILC Covering the Work of Its Eighth Session, 265; see also in Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 72 f.

Contiguous Zone (CTS 1958).⁶²⁸ From the first paragraph, particularly the word “extends”, it may be deduced that the coastal State sovereignty over the territorial sea springs arguably from that over the land domain and thus is, compared with the latter, more restricted as the second paragraph indicates. The deduction becomes more credible when the article is read in conjunction with those articles with regard to the right of innocent passage in the territorial sea. Obviously, the denotation of “sovereignty” expressed here, as in the Final Act of the Hague Conference, is at variance with the doctrine of absolute sovereignty.⁶²⁹

However, the concept of coastal State sovereignty over the territorial sea was, for the first time, accepted in conventional international law eventually at UNCLOS I, even though the concept itself remained open to interpretation in State practice as well as in academic works.

IV. Territorial Sea in UNCLOS

At UNCLOS III, that started its nine-year journey in New York in December 1973,⁶³⁰ the juridical nature of the territorial sea was hardly a controversial topic. Although some new concepts, such as a 200-mile zone of maritime sovereignty, a national maritime zone or a national sea, were discussed at the Conference, they were really debates more on the limits than on the juridical character of the territorial sea. The majority of the 168 State delegations tended to subscribe to the model provided for in art. 1 of CTS 1958.⁶³¹

At the third session in 1975, a draft text was included in the Part II of the Informal Single Negotiating Text (ISNT) as art. 1, which read:

1. The sovereignty of a coastal State extends beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to the provisions of these articles and to other rules of international law.⁶³²

The text turned out to be substantially the merger of arts. 1 and 2 of CTS 1958. A notable novelty therein was the incorporation of new concepts – archipelagic State and archipelagic waters. At the fourth session in 1976, the text was repeated as art. 1 of the Revised Single Negotiating Text (RSNT). The article was renumbered later as art. 2 in the Informal Composite Negotiating Text (ICNT) at the sixth

⁶²⁸ [1958] 516 *UNTS* 205. The Convention entered into force on 22 November 1964. O’Connell/Shearer, *International Law of the Sea* (1984), vol. I, 82; UNCLOS I, Official Records, vol. III, 8.

⁶²⁹ Cf. Colombos, *International Law of the Sea* (1967), 107.

⁶³⁰ Final Act of UNCLOS III.

⁶³¹ Nandan/Rosenne, *The United Nation’s Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 67 ff.

⁶³² *Ibid.*, at 71 f.

session in 1977. In addition, two drafting changes were made, i.e. the substitution of “Legal status” for “Juridical status” in the heading and “this Convention” for “the provisions of these articles” in the third paragraph. The text was included in the Draft Convention that was finally adopted by UNCLOS III in April 1982.⁶³³

V. Conclusion

In spite of the disputes over the legal status of the territorial sea in the past, it can hardly be challenged, under the contemporary international law of the sea, that the territorial sea forms part of the territory of the coastal State which, in turn, enjoys sovereignty over the territorial sea. Furthermore, the sovereignty possessed by the State over the territorial sea differs in no way in nature from that over its land domain. Nonetheless, sovereignty over the territorial sea, compared with that over the land territory, is subject to more limitations laid down by international law.

C. Breadth of Territorial Sea

Besides the legal status, the breadth is another critical element of the territorial sea. Not until the Hague Codification Conference of 1930 did the international community attempt to identify or establish some general rules with regard to the breadth of the territorial sea. The process proved to be extraordinarily arduous. Neither the Hague Conference nor UNCLOS I and UNCLOS II could produce a formula on which the participants could agree. Eventually, art. 3 of UNCLOS seems to have solved this long-standing problem within the framework of a package deal. But in practice the diversity of the breadth of the territorial sea still exists.

I. Three-mile Limit

The question of the breadth of the territorial sea has been a matter of controversy going through its entire history. Even the great debate in the 17th century concerning *mare liberum* versus *mare clausum* revolved, to a large extent, around the outer limit of the adjacent seas up to which the coastal State might assume exclusive rights. The school of *mare liberum* did not oppose the acquirement of the “sovereignty over a part of the sea”.⁶³⁴ In early practice, especially in the 16th and 17th centuries, several quite flexible criteria were employed to determine the limits of the territorial sea, such as two days’ navigation extent, 60 miles or the

⁶³³ *Ibid.*, at 72.

⁶³⁴ See *supra* note 589.

range of visual horizon.⁶³⁵ As earlier mentioned, the major justification by *Grotius* of sovereignty over the territorial sea was founded on the principle of effective control from the shore.⁶³⁶ Starting from that, a distinguished Dutch Judge, *Cornelius van Bynkershoek*, put forward a maxim in 1702 which reads “the dominion of the land ends where the power of the arms ends”.⁶³⁷ Logically he went further and declared that the territorial dominion of a State extended so far as shots could be fired from a cannon on the shore. Probably owing to its practicality and certainty, the rule of cannon range proved, at least in its inception, to have prevailed over other criteria in diplomatic practice. When the rule was introduced in the 18th century, the range of cannon emplaced on the shore was approximately one marine league or three miles. That was the original basis for the prevalent rule of a three-mile limit.⁶³⁸

The three-mile rule gained rapid and widespread acceptance in international practice. This rule was, it is believed, first formally invoked in State practice by the US, when Secretary of State *Jefferson* addressed notes to his British and French counterparts on the maritime jurisdiction of the US on 8 November 1793.⁶³⁹ In the decision of the case *The Anna* (1805), Lord *Stowell* proposed translating the cannon-range rule into the three-mile limit, as the first application of the new rule in England.⁶⁴⁰ In 1876 the UK consolidated its Hovering Acts in order to confine its jurisdiction over foreign ships within the three-mile limit.⁶⁴¹ Since then, the US and the UK became two key advocates of the three-mile rule until the late 1980s. Germany, Japan and some others were consistent supporters

⁶³⁵ Colombos, *The International Law of the Sea* (1967), 92; O’Connell/Shearer, *International Law of the Sea* (1984), vol. I, 124; Churchill/Lowe, *The Law of the Sea* (1983), 59.

⁶³⁶ Colombos, *ibid.*, at 92.

⁶³⁷ He first used the language in Chapter 2 of his *De Dominio maris dissertatio* (1703). The same sentence showed up as well in Chapter VIII of his *Questiones Juris Publici* (1737). Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 5 f; Colombos, *ibid.*, at 92; O’Connell/Shearer, *International Law of the Sea* (1984), vol. I, 126 f. However, Verzijl held that the cannon shot rule was first formulated by Jeannin, the French Ambassador to the Republic of the United Netherlands in 1609. See Verzijl, *International Law in Historical Perspective, Part III State Territory* (1970), 61.

⁶³⁸ It was Galiani, an Italian jurist, who first asserted in 1782 that the sovereign could reasonably claim territorial rights to a distance of three nm that would be equivalent to the range of cannon shot then without, however, actually mounting batteries on the coast. Jessup, *ibid.*, at 6; O’Connell/Shearer, *International Law of the Sea* (1984), vol II, 130 f; Churchill/Lowe, *The Law of the Sea* (1983), 59.

⁶³⁹ In the following year, the US Congress accordingly adopted a statute which gave the district courts “cognizance of complaints, by whomsoever instituted, in cases of captures made within the water of the US or within a marine league of the coasts or shores thereof” (*emphasis added*). Jessup, *ibid.*, at 50 f. See also Colombos, *The International Law of the Sea* (1967), 96.

⁶⁴⁰ O’Connell/Shearer, *International Law of the Sea* (1984), vol II, 131 f; Churchill/Lowe, *The Law of the Sea* (1983), 59; Colombos, *ibid.*, at 92 f.

⁶⁴¹ Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 11.

of the rule. According to the statistics in Table 1, 24 (53.3%) of 45 States claimed three-mile territorial sea in 1953.

Table 1. Territorial Sea Claims (nm) from 1953 to 1997

	3	4	6	9	10	12	15	18	20	30	35	50	70	100	130	150	200
1953	24	3	10	2	5	-	-	-	-	-	-	-	-	-	-	-	1
1960	22	3	10	1	1	13	-	-	-	-	-	-	-	-	-	-	1
1969	28	3	13	1	1	42	-	-	-	-	-	-	-	-	1	-	5
1973	30	3	14	-	1	58	-	1	-	4	-	3	-	1	1	-	8
1978	32	5	8	-	1	65	1	-	1	3	-	4	-	1	1	1	13
1983	22	3	4	-	-	80	1	-	1	1	1	3	-	1	-	1	13
1986	15	2	4	-	-	101	1	-	1	2	1	2	1	-	-	-	13
1989	10	2	4	-	-	110	-	-	1	2	1	1	-	-	-	-	12
1993	5	2	3	-	-	119	-	-	1	2	1	1	-	-	-	-	11
1997	4	1	3	-	-	124	-	-	1	2	1	1	-	-	-	-	10

(LOSb No.34, 1997, pp.47 *et seq.*)

Interestingly, although the rule of the three-mile limit was derived from the cannon range, the distance remained unchanged for a long time despite the considerable increase in the projectile range afterwards. It is well explicable by the interests of the major naval powers, who were principal champions of the rule, in maintaining the maximum freedom of navigation. Beside that, the States found it a convenient compromise between conflicting interests that ought to be preserved. The variability of this limit is by no means desirable for the purpose of legal certainty. So it can be suggested that, after its birth, the rule of the three-mile limit lost its connexion with the original assumption, which had not held good for some time, and came to denote no more than the extent of coastal State jurisdiction over the territorial sea.

Notwithstanding the fact that the three-mile limit was preferred by most naval powers until the 1980s, it is not beyond doubt to state that the three-mile limit once stood as a rule of customary international law, because it was never generally accepted. While the Scandinavian States stuck consistently to the claims of four miles, some other countries like Spain, France, Greece, Italy, Russia, Portugal and Turkey either claimed a wider limit now and then or endeavoured to deny the binding effect of the three-mile rule.⁶⁴² Even the British themselves asserted different distances, from five miles up to eight leagues, in its Hovering Acts promulgated between 1736 and 1833.⁶⁴³ Meanwhile, there is no doubt that

⁶⁴² Jessup, *ibid.*, at 62 f; Churchill/Lowe, *The Law of the Sea* (1983), 59 f.

⁶⁴³ Jessup, *ibid.*, at 10; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 130.

prominent publicists were also divided on this subject, although the three-mile limit had once been a widespread view in the circle.

In 24 replies to the "Schedule of Points" drawn up by the Preparatory Committee for the Hague Conference, 13 States expressed their inclination to three nautical miles (nm), whereas others tended to prefer a wider or varying limit of the territorial sea, from four nm to 18 miles, as claimed by Portugal.⁶⁴⁴ Besides, some States⁶⁴⁵ favoured the idea in their replies that the limit of the territorial sea could be more than three miles on the ground of historic rights or peculiar geographical configuration or economic necessity. Under these circumstances, the Preparatory Committee suggested, as a basis of discussion, the following formula:

1. The breadth of the territorial sea is three nautical miles;
2. Recognition of the claim of certain specific States to a territorial sea of greater width;
3. Establishment of a contiguous zone on the high sea in which the Coastal State may exercise the control concerning customs or sanitary or security issues. Such a zone may not be extended beyond twelve miles from the coast.⁶⁴⁶

At the Hague Conference, the formula was intensively discussed. The Second Committee attempted to reach an agreement that would fix the breadth of the territorial sea but regretfully failed, faced with the unbridgeable differences of opinion among participants. On the one hand, some States opposed fixing the breadth at three miles, by maintaining that there was no rule of law to that effect and their national interests demanded the adoption of a wider belt. On the other hand, some other States were not ready to recognise various exceptions to the three-mile limit. The concept of a contiguous zone seemed to be acceptable to the majority.⁶⁴⁷ Nevertheless, it did not prove enough for the parties to strike a compromise on the core issue.⁶⁴⁸

Subsequently, this issue was addressed anew at UNCLOS I in 1958 without success. At UNCLOS II in 1960, the only substantive item on the agenda was the question of the breadth of the territorial sea beside the fishery limits in accordance with a UN resolution in December 1958. Nevertheless, a proposal for a six-mile territorial sea coupled with an additional six-mile fishery limit failed to receive the required majority for acceptance by lacking merely one vote at UNCLOS II.⁶⁴⁹

⁶⁴⁴ Rosenne (ed.), *League of Nations Conference for the Codification of International Law [1930]* (1975), vol. II, 240 ff, 413 ff; LON Doc. C. 74. M. 39. 1929.V., 22 ff.

⁶⁴⁵ Finland, France, Norway, Poland, Portugal, Sweden and Russia, *ibid.*

⁶⁴⁶ See Basis of Discussion No. 3, 4 and 5, Bases of Discussion for the Conference Drawn up by the Preparatory Committee, LON Doc. C. 74. M. 39. 1929.v., 33 f; Rosenne, *League of Nations Conference for the Codification of International Law [1930]* (1975), vol. II, 251 f.

⁶⁴⁷ However, the UK, Canada, Australia, South Africa, India, the US, Brazil, Japan and Sweden were opposed to the concept of any contiguous zone at the Conference. Colombos, *The International Law of the Sea* (1967), 104.

⁶⁴⁸ Report of the Second Committee, LON Doc. C. 230. M. 117, 1930.V., 3.

⁶⁴⁹ Churchill/Lowe, *The Law of the Sea* (1983), 60.

All this evidenced the growing dissatisfaction with the three-mile limit⁶⁵⁰ and, in the meantime, heralded a new era in the breadth of the territorial sea.

II. Twelve-mile Limit

The three-mile limit was once widely accepted in State practice and in academic works. However, acceptance was far from general or unanimous. There existed recurrent reluctance to recognise its effect as a rule. In learned circles, the reluctance and doubt towards the three-mile limit became much more evident in the last quarter of the 19th century and in the subsequent years until the 1950s.⁶⁵¹ As early as 1882, a six-mile limit was introduced in the debates of the IDI on the law of the sea.⁶⁵² In addition, the discontent with the three-mile limit in State practice kept growing with the constant economic development, rapid technological progress and increasing dependence on coastal fisheries. Against this background, Russia extended, in 1910 and 1911 respectively, its jurisdiction over customs and fishery matters in the Pacific Ocean to twelve miles, that parallels the standard range of twelve-inch shore batteries by 1910.⁶⁵³ Therefore, Russia can arguably be seen as the pioneer practitioner of the twelve-mile limit. However, the wide range control was not unfamiliar to many countries in their fight against smuggling at sea. So the twelve-mile limit is rooted in legal history, although it was not always directly connected to the regime of the territorial sea in a modern sense, which had not been fully established until the 1840s.

The claim for a twelve-mile limit of the territorial sea proper was believed to have come up in the 1950s. In its report of 1956, which contained 25 draft articles, the ILC addressed the question of the breadth of the territorial sea in art. 3 and in its commentary thereon. The ILC put draft art. 3 in the following way:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.
2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognise such a breadth when that of their own territorial sea is less.
4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.⁶⁵⁴

⁶⁵⁰ While a narrow majority supported the three-mile rule at the Hague Conference, only about 24% of the States claimed three-mile territorial sea just prior to UNCLOS III in 1973. See Table 1.

⁶⁵¹ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 153.

⁶⁵² *Ibid.*, at 154.

⁶⁵³ *Ibid.*, at 155.

⁶⁵⁴ Report of the ILC Covering the Work of Its Eighth Session, art. 3 and commentary. [1956] II YBILC 256, 265.

In its commentary, the ILC went on to state that the extension by a State of its territorial sea to a breadth of between three and twelve miles was not to be characterized as a breach of international law. Nevertheless, it tended, by a small majority, to stand for the right of other States not to recognize an expansion of the territorial sea beyond the three-mile limit.⁶⁵⁵

This draft article and the commentary might reflect the actual landscape of the law at that time. What is significant is that here the twelve-mile limit was, for the first time, largely recognized by such an influential and international learned body. However, draft art. 3, like some other proposals, failed to obtain the two-thirds majority necessary for its adoption at UNCLOS I. Thus there was no agreement in CTS 1958 on the breadth of the territorial sea. But still, some remnants can be found of the above scheme put forward by the ILC in 1956. art. 24 of CTS 1958 provided that the contiguous zone may not extend beyond twelve miles from the baselines.⁶⁵⁶ Therefore, it is arguable that, *a fortiori*, the width of the territorial sea may in no way exceed twelve miles, since the contiguous zone, by its definition, should be seaward adjacent to the territorial sea.⁶⁵⁷ The failed proposal furnished by the US and Canada at UNCLOS II for a six-mile territorial sea plus a six-mile fishery limit seems to have adumbrated as well the approach of the twelve-mile limit of the territorial sea. In 1960, there were 13 States claiming twelve-mile territorial sea, mainly driven by the consideration of fishery interests. This number rose quickly to 58 by the commencement of UNCLOS III in 1973, whereas 18 States even staked out their claims for a wider limit from 18 up to as much as 200 miles (see Table 1).

Under these circumstances, the need for a uniform limit of the territorial sea was, no doubt, again one of the major focuses at UNCLOS III. Based on the proposals submitted by many States on this topic and Provisions 22 of the Main Trends Working Paper, the following text was incorporated in the ISNT as its art. 2 at the third session in 1975:

Every State shall have the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines drawn in accordance with the provisions of the present Convention.⁶⁵⁸

At the fourth session, some drafting changes were made, *inter alia*, by using the more definitive term “has” rather than “shall have” and replacing “drawn” with the more restrictive word “determined”. The revised text was renumbered as art. 3 in the ICNT without any alteration at the sixth session in 1977.⁶⁵⁹ The article survived further discussions and has finally become art. 3 of UNCLOS, reading as:

⁶⁵⁵ *Ibid.*, at 266.

⁶⁵⁶ Art. 24(2) CTS 1958.

⁶⁵⁷ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 44.

⁶⁵⁸ *Ibid.*, at 80.

⁶⁵⁹ *Ibid.*, at 80 f.

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Art. 3 of UNCLOS first establishes the maximum breadth of the territorial sea at twelve nm in an international convention. This agreement is regarded as one of the most momentous breakthroughs achieved at UNCLOS III. Until then the arduous process which had been intended to find a solution to one of the most intractable questions of the law of the sea came to its successful end. It should, however, be pointed out that, as a part of a package deal,⁶⁶⁰ the agreement on the limit of the territorial sea has to be read together with other provisions, especially those on the navigational rights of foreign ships in the territorial sea and in the straits used for international navigation.

III. Diversity of the Breadth of Territorial Sea in State Practice

Diversity with regard to the breadth of the territorial sea appears to be an everlasting phenomenon, as shown in State practice in the past and nowadays. Actually art. 3 of UNCLOS does not prohibit the presence of diversity of breadths within a State, so long as they do not exceed the maximum limit of twelve nm.

The phenomenon of diverse breadths of the territorial sea has existed for a long time. At the Hague Codification Conference, for example, despite strong support given to the three-mile maxim by a majority, there were still 16 States asking for either six or four miles.⁶⁶¹ As a result, the three-mile limit was then not regarded as a uniform rule fixing the width of the territorial sea. It was also the case in the 1950s, as was confirmed by the ILC in its report of 1956⁶⁶² and reflected at UNCLOS I in 1958. Nevertheless, it can be induced from Table 1 that the extension of the territorial sea to more than three miles, particularly to twelve miles, gained ground in this period. While the three-mile limit still had a majority in 1953, the limit lost its dominance in 1960. This momentum has continued in the following decades. It is interesting to note that the 1970s witnessed the most heterogeneous claims to the territorial sea. There came to light as many as 16 claim variants, ranging from three miles up to 200 miles.⁶⁶³

This scenario crystallized, on the one hand, the anarchical chaos in State practice resulting from the uncertainty in international law on this subject. On the other, it reflected as well the desire mainly of developing countries, especially those newly independent, to exert their influence on the ongoing UNCLOS III with a view to placing a wider belt of the sea under national jurisdiction.

After the conclusion of UNCLOS, the claim to the territorial sea in State practice has showed a very strong trend towards the twelve-mile limit. The claims of 10, 15, 18, 70, 100, 130 and 150 miles had phased out at the end of 1980s. As

⁶⁶⁰ Brown, *The International Law of the Sea*, (1994), vol. I, 51.

⁶⁶¹ Colombos, *The International Law of the Sea* (1967), 104.

⁶⁶² *Ibid.*, at 125.

⁶⁶³ See *supra* Table 1.

regards those living claims, while the claims for other widths had decreased to varying degrees, the twelve-mile claims had soared from 80 in 1983 to 124 in 1997.⁶⁶⁴ Obviously, it is largely steered by the rule of the twelve-mile limit that has been enshrined in UNCLOS. Therefore it can fairly be stated that the breadth of the territorial sea in State practice has become much less diverse than that previous to UNCLOS.

However, present State practice is still by no means uniform.⁶⁶⁵ 17 States still cling to their claims of more than twelve nm. However, most of these States (11) have already ratified or acceded to UNCLOS. In addition, eight States go on to claim three, four or six nm for the territorial sea. But such a claim prompts no legal misgivings, for it lies fully in the discretion of a coastal State to set "the breadth of its territorial sea up to a limit not exceeding twelve nautical miles".⁶⁶⁶

Table 2. Territorial Sea Claims with Special References to the Breadth (nm) and Innocent Passage as at the End of 2002^a

(PA: *Prior Authorization*; PN: *Prior Notification*; PP: *Prior Permission*)

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS ^b
Albania	12	Unclear	1990	
Algeria	12	warships subject to PA	1963	11 Jun. 1996
Angola	20(mile)	for all ships	1975	5 Dec. 1990
Antigua and Barbuda	12	warship subject to PP	1982	2 Feb. 1989
Argentina	12	for all ships	1991	1 Dec. 1995
Australia	12	Unclear	1990	5 Oct. 1994
Bahamas	3	Unclear	1878	29 Jul. 1983
Bahrain	12	Unclear	1993	30 May 1985
Bangladesh	12	warships subject to PP	1974	27 Jul. 2001
Barbados	12	warships subject to PP	1977	12 Dec. 1993
Belgium	12	Unclear	1987	13 Nov. 1998
Belize	12/3	for all ships	1992	13 Aug. 1983
Benin	200	Unclear	1976	16 Oct. 1997
Brazil	12	for all ships	1993	22 Dec. 1988

⁶⁶⁴ Meanwhile, the claims for the three-mile limit had radically shrunk from 22 in 1983 to only 4 in 1997. See *supra* Table 1.

⁶⁶⁵ See Table 2: Territorial Sea Claims with Special References to the Breadth and Innocent Passage.

⁶⁶⁶ Art. 3 UNCLOS.

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS^b
Brunei	12	Unclear	1982	5 Nov. 1996
Bulgaria	12	for all ships	1987	15 May 1995
Cambodia	12	Unclear	1982	
Cameroon	50	Unclear	1974	19 Nov. 1985
Canada	12	Unclear	1970	
Cape Verde	12	for all ships	1992	10 Aug. 1987
Chile	12	Unclear	1986	25 Aug. 1997
China	12	warships subject to PP	1992	7 Jun. 1996
Colombia	12	for all ships	1978	
Comoros	12	for all ships	1982	21 Jun. 1994
Congo	200	Unclear	1977	
Cook Islands	12	Unclear	1977	15 Feb. 1995
Costa Rica	12(mile)	for all ships	1975	21 Sep. 1992
Côte d'Ivoire	12	Unclear	1977	26 Mar. 1984
Cuba	12	Unclear	1977	15 Aug. 1984
Cyprus	12(mile)	Unclear	1964	12 Dec. 1988
DPRK ^c	12	warships subject to PA	58/68/75	
Denmark	3	warships subject to PN or PP	1963	
Djibouti	12	Nuclear-powered ships subject to PN	1979	8 Oct. 1991
Dominica	12	for all ships	1981	24 Oct. 1991
Dominican Republic	6(mile)	Unclear	1977	
Ecuador	200	all ships subject to written authorization	1970	
Egypt	12	Unclear	1958	26 Aug. 1983
El Salvador	200	for all ships	1950	
Equatorial Guinea	12	for all ships	1984	21 Jul. 1997
Eritrea	12	for all ships	1953	

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS ^b
Estonia	12	government ships subject to PN/nuclear-powered ships to PA	1993	
Fiji	12(mile)	for all ships	1978	10 Dec. 1982
Finland	4	Unclear	1956	21 Jun. 1996
France	12	for all ships	1985	11 Apr. 1996
Gabon	12	Unclear	1984	11 Mar. 1998
Gambia	12	Unclear	1969	22 May 1984
Georgia				21 Mar. 1996
Germany	12 ^d	Unclear	1994	14 Oct. 1994
Ghana	12	Unclear	1986	7 Jun. 1983
Greece	6/10(mile)	Unclear	1931/36	21 Jul. 1995
Grenada	12	warships subject to PP	1978	25 Apr. 1991
Guatemala	12	for all ships	1976	11 Feb. 1997
Guinea	12	Unclear	1980	6 Sep. 1985
Guinea-Bissau	12	Unclear	1985	25 Aug. 1986
Guyana	12(mile)	warships subject to PN	1977	16 Nov. 1993
Haiti	12	Unclear	1977	31 Jul. 1996
Honduras	12	Subject to reciprocity	1982	5 Oct. 1993
Iceland	12	Unclear	1979	21 Jun. 1985
India	12	warships subject to PN	1976	29 Jun. 1995
Indonesia	12	for all ships	1960	3 Feb. 1986
Iran	12	warships and dangerous ships PA	1993	
Iraq	12	for all ships	1958	30 Jul. 1985
Ireland	12	Unclear	1988	21 Jun. 1996
Israel	12	Unclear	1990	
Italy	12	Unclear	1974	13 Jan. 1995
Jamaica	12(mile)	for all ships	1996	21 Mar. 1983
Japan	12/3 ^e	Unclear	1977	20 Jun. 1996

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS ^b
Jordan	3	Unclear	1943	27 Nov. 1995
Kenya	12	Unclear	1977	2 Mar. 1989
Kiribati	12	for all ships	1983	
Kuwait	12	Unclear	1967	2 May 1986
Latvia	12	Unclear	1990	
Lebanon	12	Unclear	1983	5 Jan. 1995
Liberia	200	Unclear	1977	
Libya	12	Unclear	1959	
Lithuania	12(mile)	ships with nuclear weapons and weapons of mass destruction excluded, warships subject to intl. Agreement	1992	
Madagascar	12	Unclear	1985	22 Aug. 2001
Malaysia	12	Unclear	1969	14 Oct. 1996
Maldives	12(mile)	warships & fishery vessels PP	1975/6	7 Sep. 2000
Malta	12	warships PP and dangerous ships including nuclear ones PN	1981	20 May 1993
Marshall Islands	12	for all ships	1984	9 Aug. 1991
Mauritania	12	for all ships	1988	17 Jul. 1996
Mauritius	12	warships subject to PN	1977	4 Nov. 1994
Mexico	12	subject to reciprocity	1986	18 Mar. 1983
Micronesia	12	Unclear	1988	29 Apr. 1991
Monaco	12	Unclear	1973	20 Mar. 1996
Morocco	12	for all ships	1973	
Mozambique	12	Unclear	1976	13 Mar. 1997
Myanmar	12	warships subject to PP	1977	21 May 1996
Namibia	12	Unclear	1991	18 Apr. 1983
Nauru	12(mile)	Unclear	1971	23 Jan. 1996
Netherlands	12	Unclear	1985	28 Jun. 1996

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS ^b
New Zealand	12	Unclear	1977	19 Jul. 1996
Nicaragua	200	only for merchant ships	1979	3 May 2000
Nigeria	30	Unclear	1971	14 Aug. 1986
Norway	4/10 ^f	Unclear	1812/1932	24 Jun. 1996
Oman	12	warships, nuclear and dangerous ships subject to PP	1981	17 Aug. 1989
Pakistan	12	warships subject to PP, nuclear and hazardous ships to PN	1976	26 Feb. 1997
Panama	200	Unclear	1967	1 Jul. 1996
Papua New Guinea	12(mile)	Unclear	1977/8	14 Jan. 1997
Peru	200	for all ships	1993	
Philippines	varies up to 285	Unclear	1961	8 May 1984
Poland	12	for all ships	1991	13 Nov. 1998
Portugal	12	Unclear	1977	3 Nov. 1997
Qatar	12	for all ships	1992	
ROK	12/3	warships subject to PN	1977/8	29 Jan. 1996
Romania	12	nuclear-powered ships and ships with nuclear and mass destructive weapons excluded	1990	17 Dec. 1996
Russia	12	Unclear	1982	12 Mar. 1997
Saint Kitts and Nevis	12	for all ships	1984	7 Jan. 1993
Saint Lucia	12	for all ships	1984	27 Mar. 1985
S. Vincent and the Grenadines	12	warships subject to PP	1983	1 Oct. 1993
Samoa	12	Unclear	1971	14 Aug. 1995
Sao Tome and Principe	12	Unclear	1978	3 Nov. 1987
Saudi Arabia	12	Unclear	1958	24 Apr. 1996

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS^b
Senegal	12	for all ships	1985	25 Oct. 1984
Seychelles	12	warships subject to PN	1977	16 Sep. 1991
Sierra Leone	200	Unclear	1971	12 Dec. 1994
Singapore	3	Unclear	1878	17 Nov. 1994
Solomon Is.	12	for all ships	1978	23 Jun. 1997
Somalia	200	warships subject to PA	1972	24 Jul. 1989
South Africa	12	Unclear	1977	23 Dec. 1997
Spain	12	nuclear ships excluded	1977	15 Jan. 1997
Sri Lanka	12	warships subject to PP	1976/7	19 Jul. 1994
Sudan	12	warships subject to PP	1970	23 Jan. 1985
Suriname	12	Unclear	1978	9 Jul. 1998
Sweden	12	warships subject to PN	1979	25 Jun. 1996
Syria	35	warships subject to PP	1981	
Tanzania	12	Unclear	1989	30 Sep. 1985
Thailand	12	for all ships	1966	
Togo	30	Unclear	1977	16 Apr. 1985
Tonga	12	Unclear	1989	2 Aug. 1995
Trinidad Tobago	12	Unclear	1969	25 Apr. 1986
Tunisia	12	limited to the Channel of La Galite	1973	24 Apr. 1985
Turkey	6/12 ^g	Unclear	1982	
Tuvalu	12	for all ships	1983	
UK	12	Unclear	1987	25 Jul. 1997
Ukraine	12	Unclear	1991	26 Jul. 1999
United Arab Emirates	12	warships subject to PP	1993	
Uruguay	200	within 12 mile zone, reciprocity	1969	10 Dec. 1992
US	12	for all ships	1988	
Vanuatu	12	for all ships	1981	10 Aug. 1999
Venezuela	12	Unclear	1956	

State	Breadth	Innocent Passage	Year of Claim	Party to UNCLOS ^b
Viet Nam	12	Unclear	1977	25 Jul. 1994
Yemen	12	warships subject to PA, nuclear-powered ships or ships carrying nuclear substances subject to PN	1977	21 Jul. 1987
Yugoslavia	12	Unclear	1987	12 Mar. 2001
Total	144			116

- a. The Table is mainly based on the information in *The Law of the Sea: national legislation on the territorial sea, the right of innocent passage and the contiguous zone* (Law of the Sea Division, Legal Office, the UN, 1995) and the information on the website available at: <http://www.un.org/Depts/los/reference_files/status2002.pdf> (last visited: June 20, 2002).
- b. The column refers to the date either of ratification, accession, succession or formal confirmation as the case may be.
- c. The particulars given here are not official, but just presumed, taking into account the relevant declarations and diplomatic practice of the country concerned.
- d. The German territorial sea in the Baltic Sea has not been extended to twelve nm, but to a line determined by geographical co-ordinates to leave a shipping channel through the western Baltic Sea outside its territorial sea. See Lagoni, 'Case Study of Germany' in Franckx (ed.), *Vessel-source Pollution and Coastal State Jurisdiction* (2001), 256 f.
- e. Three nm is applied in five international straits and water channels. See Item two of Supplementary Provisions of the Territorial Sea Act of Japan of 2 May 1977 (Act No. 30).
- f. The breadth of ten nm applies insofar as customs matters are concerned.
- g. Six nm in the Aegean sea but twelve nm in the Black Sea and the Mediterranean Sea.

IV. Process to the Uniformity of Twelve-mile Limit

The twelve-mile limit has no doubt been accepted by an overwhelming majority of States, whether Parties to UNCLOS or not. However, it would be over-optimistic to take the view that the uniformity of the twelve-mile limit could be achieved swiftly in State practice. Here a distinction should be made between Parties and Non-parties to UNCLOS in the process.

1. Parties

For Parties to UNCLOS, it is clear that they are obliged to abide by the provisions of the Convention. In other words, the twelve-mile rule is binding on them. They may not establish, or further maintain, in case they have established, the breadth of their territorial seas beyond twelve nm. Those Parties still holding wider claims

are indeed bound to redress their claims and to bring them into line with the Convention as soon as possible. Regretfully, this obligation has not yet been fulfilled by a number of States. It is reasonably expected that these States Parties will do so in a couple of years. Otherwise these wider claims cannot survive any serious challenge from the international community. Arguably, they could only exist further between States making or otherwise recognizing such claims, e.g. between Uruguay and Panama.⁶⁶⁷

In contrast to the above, the lesser claims of several Parties that still stick to the claims of three, four or six nm are absolutely permissible under UNCLOS. A question which then arises is whether these States have the right not to recognize the claim of the twelve-mile limit of other States Parties.⁶⁶⁸ The answer tends to be negative in light of the legitimacy of the rule as well as the character of the “package deal” of the Convention.

2. Non-parties

Clearly, the twelve-mile limit is not binding, as a conventional rule, upon non-parties to UNCLOS. However, it might be binding upon them if it amounts to a rule in customary international law. So the first task is to find out whether the twelve-mile limit has become a customary rule.

The answer to the question may well turn on the status of present State practice. At present, there are 132 States that hold their breadth claims in line with the twelve-mile limit.⁶⁶⁹ That is to say, about 90% of all States have subscribed, whether as an obligation or voluntarily, to the twelve-mile rule. Apart from that, among 10% remaining States, some are under a legal obligation to harmonize their claims with the relevant provisions of UNCLOS. Keeping in mind the statistics, one could scarcely avoid the conclusion that the twelve-mile limit for the territorial sea stands now as a rule of customary international law. It would be false to submit that a customary rule requires the universal or unanimous assent of nations.⁶⁷⁰

Consequently, it can be maintained that Non-parties to UNCLOS are also required to keep their claims within the twelve-mile limit. For those Non-parties holding the claims in excess of twelve nm, it is fairly difficult to get their claims fully realized because of the strong protests from other States. It is to be expected that some of the States will move towards the twelve-mile rule on the basis of a trade-off of interests, while others will further rush headlong into the wider claims by reference to economic necessities or whatever reasons. At any rate, the wider claims can only be carried out in a fairly limited way, namely, only between States with similar claims.

An interesting question here may be whether other States may impose restrictions upon those States with wider claims. At first sight, the answer seems to be

⁶⁶⁷ Churchill/Lowe, *The Law of the Sea* (1983), 61.

⁶⁶⁸ Cf. Brown, *The International Law of the Sea*, (1994), vol. I, 45.

⁶⁶⁹ See *supra* Table 1.

⁶⁷⁰ Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/70), 8.

negative in light of the dictates of the non-discrimination rule in general international law. However, it can hardly be thought improper in State practice that other States take countermeasures against the wildcat States, so long as the measures are so proportionately envisaged as to set off the losses or inconveniences arising from the excessive claims of the latter. The countermeasures may be in the form of suspending the application of concessions and obligations under UNCLOS or under customary law against these States.

Nonetheless, those Non-parties which stand firm on their narrower claims do not appear to be in a position to object to the twelve-mile claim. As earlier suggested, the present situation is totally different from that in 1956 when the ILC finished its report to the UN.⁶⁷¹ The US even changed the breadth of its territorial sea from three to twelve nm in 1988.

D. Background of the Right of Innocent Passage

I. Genesis

It is believed that a general right of passage already existed, as an element, in public law at the time of the Holy Roman Empire,⁶⁷² although the right then was probably in its rough shape. *Gentili*, who was an opponent of the doctrine of the free seas, advocated nevertheless the peaceful passage of foreign ships that included the right to "enter and leave" the territorial sea.⁶⁷³ Later on, *Grotius* lent his support to innocent passage as well by asserting that:

It is certain that one who has occupied a part of the sea cannot hinder navigation which is without weapons and of innocent intent, when such a [*sic*] passage cannot be prevented by land, where it is generally less necessary and more productive of damage.⁶⁷⁴

⁶⁷¹ The ILC then tended to hold that other States enjoy the right not to recognize an expansion of the territorial sea beyond three-mile limit.

⁶⁷² O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 260.

⁶⁷³ Colombos, *The International Law of the Sea* (1967), 132.

⁶⁷⁴ *De Jure Belli ac Pacis* (1646), lib. II, cap. 3, 212. In cap. 2 of the same work (196 f.), he assimilated the passage regime through sea with that through lands or rivers by saying "... lands, rivers, and any part of the sea that has become subject to the ownership of a people ought to be open to those who, for legitimate reasons, have need to cross over them; as for instance, if a people ... desires to carry on commerce with a distant people... ownership was introduced with the reservation of such a use, which is of advantage to the one people and involves no detriment to the other. Consequently, it must be held that the originators of private property had such a reservation in view." Conspicuously, the kernel of the thought remains correct to date, despite that the shell thereof is considered obsolete. However, Grotius's support to the innocent passage

Presumably, the view was based upon the proposition that the right of passage was a *sine qua non* of the right to trade. The reasoning becomes more well-grounded when one takes a look at the observations made by one of *Selden's* most celebrated followers, Sir *Philip Medows*, in 1689:

As it is a way, it is common to the peaceable traders of all nations. And this is so far from being a damage to any, that it is highly beneficial to all, for as there is no man so self-sufficient as not to need the continual help of another, so neither is there any country which does not at some time or other need the growth and productions of another.⁶⁷⁵

Apart from that, a right of *transitus innoxium*⁶⁷⁶ in sovereign waters, which was frequently referred to by jurists in the 17th century, is considered also to have a bearing on the modern concept of innocent passage. Despite the fact that the jurists then based *transitus innoxium* on licence from the sovereign and that it originated in part from general theories of transit across land as per the law of nature, the right of *transitus innoxium* can largely be taken as the antecedent of the modern concept of innocent passage. The licence requirement might well be overridden later by the robust development of world trade. Further, it would be a small and natural step to stretch a land rule out to the sea. Therefore, it would rarely be convincing to conclude, as some scholars did,⁶⁷⁷ that there is no direct historical and doctrinal connection between the concepts of *transitus innoxium* and innocent passage. Legal rules cannot be observed without taking into account the historical backdrop against which they stood.

In spite of the momentum towards free seas after the great debate in the 17th century, innocent passage was regarded as a secondary claim, subject to the assent of the coastal State, in many works before the 19th century. No exception to that was the view of *Vattel*, who has often been held as the founder of the modern doctrine of innocent passage. He admitted *dominium* over marginal seas by States while saying that: "These marginal seas, thus subject to a Nation, are part of its territory and may not be navigated without its permission."⁶⁷⁸ However *Vattel* went further to declare in 1758, with respect to the right of innocent passage, that:

through the sea is self-evident in the text. Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), note 5, 64 and note 54, 33.

⁶⁷⁵ Quoted as Colombos, *The International Law of the Sea* (1967), 63. Even *Selden* himself admitted the existence of the principle that a State could not forbid the navigation of its seas by other people without omitting its humanitarian duties. *Mare Clausum*, lib. 1, cap. 20; Colombos, *ibid*.

⁶⁷⁶ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 260.

⁶⁷⁷ *Ibid*.

⁶⁷⁸ *Le droit des gens*, 248 ; translation of the 1758 edition by Charles G. Fenwick, in Scott (ed.), *The Classics of International Law* (1926), vol. III, 106 ff; Colombos, *The International Law of the Sea* (1967), 132 ; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 39.

Access may not lawfully be refused to vessels when their purpose is innocent and they are not under suspicion, since every owner is bound to grant free passage to strangers, even by land, when no harm or danger results from so doing.⁶⁷⁹

Now that innocent passage may not be frustrated, it would be logical to infer that there may exist a right of innocent passage through coastal waters, although subject to the nominal assent of the coastal State. Nevertheless, *Vattel's* view had been overshadowed by the then prevalent rule of cannon range and, as a result, not been widely spread in learned circles. In this period, the freedom of passage, if any in Europe, was considered as a matter of regional public law not susceptible of extension to colonial waters.⁶⁸⁰

Notwithstanding the recurrent calls by some authors, the doctrine of innocent passage remained ambiguous until the 1840s, when the regime of the territorial sea began to establish itself. From then onwards, however, the situation changed a lot with the evolution of free trade theory, the appearance of steamships and especially the "open door" policy in Latin America.⁶⁸¹ In the new situation, it was natural to attach more weight to the maintenance of free navigation than to safeguarding coastal State jurisdiction. Additionally, these new developments probably stimulated the idea that innocent passage was an independent right of foreign ships regardless of the disposition of the coastal State. The idea was considered the direct origin of the modern concept of innocent passage, which is believed to have begun to stand on its own feet in international law in the 1860s. It is interesting to note that, in this process, the concept of innocent passage became firmly linked to the regime of the territorial sea and became the reverse of the latter, if coastal State jurisdiction could be seen as the obverse. Since then the two sides of the territorial sea regime have developed in parallel, interacting with each other.⁶⁸²

The decision in the case of *R. v. Keyn* in 1876 declined the jurisdiction of a local court over a collision involving a British steamer and a German ship in the British territorial sea.⁶⁸³ Thus objectively, the decision gave full credit to the right of innocent passage. Surprised by the outcome of the case, the British parliament enacted the Territorial Waters Jurisdiction Act in 1878 to close the loophole revealed there. The Act was intended to grant British courts jurisdiction over all indictable offences committed aboard foreign ships by aliens in the British terri-

⁶⁷⁹ *Ibid.*

⁶⁸⁰ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 261.

⁶⁸¹ *Ibid.*, at 19, 61, 263.

⁶⁸² *Ibid.*, at 263.

⁶⁸³ "... the Admiral had no jurisdiction to try offenses by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England; ..." The case is also called *The Queen v. Keyn* (1876), Law Records, 2 *Exch. Div.* 63; Quoted as Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 124 f; also O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 264; Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 40.

torial sea.⁶⁸⁴ This unprecedented legislation gave rise to wide-ranging apprehension abroad, for the strengthening of local jurisdiction over foreign ships in the territorial sea means the weakening of the right of innocent passage.

In this context, some learned bodies endeavored to give the right of innocent passage legitimacy in international law in their respective codification efforts. The proposal presented by the IDI in 1894 inclined to the view that all foreign ships, without distinction, should enjoy the right of innocent passage through the territorial sea.⁶⁸⁵ Of course the formulation aroused debate on its compatibility with coastal State sovereignty. The ILA adopted its draft in 1926, the art. 10 of which stated that:

the ships of all countries have the right to pass freely through territorial waters, but are subject to the regulations enacted by the State through whose territorial waters they pass.⁶⁸⁶

A similar formula was worked out by the German Society of International Law (DGVR).⁶⁸⁷ Some other bodies also confirmed the right of innocent passage, at least for merchant ships, prior to the Hague Codification Conference.

While being broadly propagated among academic societies, the doctrine of innocent passage began to penetrate State practice as well at the end of the 19th century. The US formally acknowledged it in 1886 and claimed it *vis-à-vis* Spain in 1895 just at the dawn of the America-Spain War.⁶⁸⁸ In addition, art. 2 of the Barcelona Statute on Freedom of Transit in 1921 provides that:

... the Contracting States will allow transit in accordance with the customary condition and reserves across their territorial waters.⁶⁸⁹

To sum up, the confirmation of a right of innocent passage in various proposals or drafts of different bodies and its reflection, though sporadically, in State practice prior to the Hague Conference may show that some type of customary international law in this respect was emerging. Nonetheless, the process towards the establishment of the right of innocent passage as a customary rule in international law was, as shown, not consummated until the end of the Hague Conference.

⁶⁸⁴ Jessup, *ibid.*, at 130; O'Connell/Shearer, *ibid.*, at 936 f; Colombos, *The International Law of the Sea* (1967), 317.

⁶⁸⁵ O'Connell/Shearer, *ibid.*, at 266; Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 40.

⁶⁸⁶ Colombos, *The International Law of the Sea* (1967), 316; O'Connell/Shearer, *ibid.*, at 266.

⁶⁸⁷ *Mitteilungen der DGVR*, Heft 8, 1927, art. 4, 116.

⁶⁸⁸ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 265.

⁶⁸⁹ 7 *LNTS* 13, 27; the Statute has at present 48 Contracting States, German BGBl. 2000 II, *Fundstellennachweis B, Völkerrechtliche Vereinbarungen*, 213.

II. Right of Innocent Passage: A Rule of Customary International Law

Innocent passage was listed as an important issue, when the League of Nations launched its ambitious drive to codify international law with respect to the territorial waters in 1927. In the Draft Convention drawn up by *Schücking*, Rapporteur of the Committee of Experts for the Progressive Codification of International Law, the question of innocent passage was dealt with in art. 7 in the following way:

All vessels without distinction shall have the right of pacific passage through the territorial sea. In the case of submarine vessels, this right shall be subject to the condition of passage on the surface. The right of passage includes the right of sojourn in so far as the latter may be necessary for navigation. ...⁶⁹⁰

While the above reflected somehow the opinions of legal experts making no mention of the powers of the coastal State, the following observations made by the Preparatory Committee of the Hague Conference on the basis of the replies from governments may well be illustrative of State practice at that time:

The principle that merchant ships have a right of innocent passage is not contested. There is also agreement that there are complementary rules applying the principle to person and goods and permitting the ship to anchor within territorial waters where this is necessary for purposes of navigation.⁶⁹¹

That is to say, the principle was accepted or acquiesced in by all 24 States that addressed the issue in their replies to the Preparatory Committee. Nevertheless, the Committee held, after reviewing the replies that it was desirable to refer to coastal State jurisdiction. Accordingly, the Committee came out with a formula as the basis of discussion No. 19:

A Coastal State is bound to allow foreign merchant ships a right of innocent passage through its territorial waters; any police or navigation regulations with which such ships may be required to comply must be applied in such a manner as to respect the right of passage and without discrimination.

The right of innocent passage covers persons and goods.

The right of passage comprises the right of anchoring so far as is necessary for purposes of navigation.⁶⁹²

On these ideas there were no substantial differences of opinion among the delegations at the Hague Conference in 1930.⁶⁹³ The general consensus on the right of innocent passage through the territorial sea reveals the fact that freedom of navigation is of crucial significance to all States. Consequently, the Second Committee confirmed the consensus in art. 4 of its draft on the territorial sea. But

⁶⁹⁰ LON Doc. C. 196. M. 70. 1927.v. ; Rosenne (ed.), *League of Nations Conference for the Codification of International law* [1930], vol. II, 411 f; the issue was included in the Schedule of Points Concerning Territorial Waters as point IX (for merchant ships).

⁶⁹¹ LON Doc. C. 74. M. 39. 1929. V., 71 ; Rosenne (ed.), *ibid.*, at 289.

⁶⁹² *Ibid.*

⁶⁹³ Report of the Second Committee, LON Doc. C. 230. M.117. 1930.V., 3.

the Committee made the confirmation in a softer tone by stating that "A coastal State may put no obstacle in the way of the innocent passage of foreign vessels in the territorial sea."

Notwithstanding that the Hague Conference failed to forge a convention on the territorial sea, no one can successfully challenge the argument that, at the Conference, there did exist general agreement on the right of innocent passage of foreign merchant ships through the territorial sea. Besides, it has to be admitted that the replies of the governments were such, owing to the details they contained, as to define the then state of international law with greater clearness than ever before.⁶⁹⁴ Starting from that, one may confidently come to the conclusion that the right of innocent passage had become an established rule of customary international law, at the latest, by the close of the Hague Conference in 1930.⁶⁹⁵

Admittedly, there was, however, a division of opinion with regard to the right of innocent passage. The division revolved mainly around one point, so far as foreign merchant ships are concerned: to what extent the coastal State may exercise its jurisdiction over foreign merchant ships.⁶⁹⁶ In this respect, there was little express authority. However, it seems clear that no one could deny the existence of a bottom line. That is, an act of the coastal State to render the passage of merchant ships so onerous as to have the practical effect of frustrating passage would undoubtedly be confronted with prompt and wide protest from the international community. So the divergence of opinion should not have degraded the legal status of the right of innocent passage as a rule in customary law.

Probably, the *Corfu Channel* case⁶⁹⁷ would be invoked to argue that the right of innocent passage of foreign ships through the territorial sea might not have become a customary rule, since the ICJ did not confirm it in its judgment. The argument sounds plausible, but could not stand a close scrutiny. First, the ICJ might see no need to pronounce expressly on that topic, because the case centered on the navigational right in international straits. Secondly, the references to "international custom" and innocent passage in the judgment may give us some clues to the contrary.⁶⁹⁸ Lastly, if the ICJ had been asked to take a stand on the

⁶⁹⁴ Second Report submitted to the Council by the Preparatory Committee for the Codification Conference, 12 May 1929; Rosenne (ed.), *League of Nations Conference for Codification of International Law [1930]* (1975), vol. II, 225.

⁶⁹⁵ Jessup regarded the right of innocent passage as an established principle as early as 1927, when he asserted: "as a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law." In *The Law of Territorial Waters and Maritime Jurisdiction* (1927/70), 120; Colombos, similar views, in *The International Law of the Sea* (1967), 133; in contrast, Ngantcha cast doubts on the legal status of the right of innocent passage as a customary rule, in *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 38.

⁶⁹⁶ Jessup, *ibid.*, at 120.

⁶⁹⁷ The *Corfu Channel* case (Merits) (*UK v. Albania*), Judgment of 9 April 1949, [1949] ICJ Reports 28 *et seq.*

⁶⁹⁸ "It is the opinion of the Court, generally recognized and in accordance with international custom, that States in time of peace have a right to ... without the previous

right of innocent passage through the territorial sea, it would most probably have confirmed the rule in the light of the consensus at the Hague Conference, subsequent State practice and the prevailing opinions among authors at that time.

Subsequently, the right of innocent passage was adopted in CTS 1958 and UNCLOS,⁶⁹⁹ while certain qualifications for its exercise have been introduced to dilute the concerns of coastal States. Therefore, the right of innocent passage has thus become a conventional rule of international law as well. Here again a question that may be raised is whether the right of innocent passage through the territorial sea as defined basically in UNCLOS has become customary international law. The reply is affirmative insofar as merchant ships are concerned. However, the debate on the exercise of the right by warships remains unsettled as shown, at least, in State practice.⁷⁰⁰ It is true that there are a couple of States either conditioning the passage of merchant ships upon written permission or reciprocity,⁷⁰¹ or subjecting the passage of nuclear ships to prior notification or authorization.⁷⁰² Nonetheless, these States account for merely a negligible proportion in the family of nations, and currently very few nuclear-powered ships are being put into operation for commercial purpose. Furthermore, international practice seems to regard nuclear-powered ships or ships carrying nuclear materials or other highly hazardous substances⁷⁰³ as exceptional cases compared with ordinary merchant ships. Therefore, it may be maintained that the right of innocent passage of foreign merchant ships, as outlined in UNCLOS, has been accepted by an overwhelming majority of States and thus has, by and large, become a part of customary international law. It is binding upon all members of the international family. What is needed to acquire the authority as a rule in customary international law should not necessarily be universal consensus but qualified unanimity.⁷⁰⁴

III. Nature and Implication of the Right of Innocent Passage

It can be asserted that the right of innocent passage of foreign ships through the territorial sea is the result of an attempt to reconcile the navigational right of all other States with the sovereignty of the coastal State concerned. However, it

authorization of coastal States, provided that passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage ... in time of peace." *Ibid.*, at 28.

⁶⁹⁹ Arts. 14-17 CTS 1958; Section 3 of Part II UNCLOS.

⁷⁰⁰ Presently, about 31 States subject the passage of warships to prior notification or authorization, while the policy of 68 States in this regard is left unclear in legislation. See Table 2.

⁷⁰¹ E.g. Ecuador and Mexico respectively. See more details in the relevant national legislation in *National Legislation over Territorial sea, Innocent Passage and Contiguous Zone* (1995), Legal Office, the UN.

⁷⁰² Yemen, Djibouti, Malta, Pakistan and Romania. *Ibid.*

⁷⁰³ Those ships will be discussed in the next Part of the thesis.

⁷⁰⁴ "rule of customary international law may arise out of qualified unanimity." Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 8.

would be simplistic to state that the right of innocent passage is an exception to coastal State sovereignty or jurisdiction.⁷⁰⁵

There have existed many efforts attempting to clarify the nature and implication of innocent passage. Following the debate in the IDI in 1895, *Schücking* suggested that the reconciliation between the rights of passing ships and of coastal States could be achieved by introducing the concept of servitude to characterize the right of innocent passage.⁷⁰⁶ Under the suggestion, the right of innocent passage would be a right of way to pass through the territorial sea, which is believed to be an accessory right subordinate to the ownership of the sovereign in view. As a result, it invited criticism for resurrecting the out-dated property theory of the territorial sea. In the opinion of *Pradelle*, the coastal State is neither the owner nor the sovereign of the territorial sea, but solely possesses “a bundle of servitudes” over it.⁷⁰⁷ From this one can logically infer that the right of innocent passage would be no more than a servitude. Some other scholars explained innocent passage as the corollary of the freedom of the seas.⁷⁰⁸ But that view tends to disregard the jurisdiction of coastal States.

Contemporary international law recognizes a more extensive *jus communicationis*⁷⁰⁹ of which a significant part is the right of innocent passage through the territorial sea. Both CTS 1958 and UNCLOS underline the vital importance of the regime of innocent passage through the territorial sea. In the modern context, the right of innocent passage stands on its own feet in the international law of the sea. While its origin might lie in the ancient principle of free seas, it does not depend on this principle. Furthermore, the legal source of the right of innocent passage, unlike a servitude that relies on the legitimacy of ownership or sovereignty, is independent of the sovereignty of the coastal State. Of course, there exists constant interaction between innocent passage and coastal State jurisdiction.

Nevertheless, the right of innocent passage is on no account absolute. It must be exercised in accordance with the rules of international law mainly prescribed in UNCLOS, and with the national laws and regulations properly adopted by the coastal State. In the meantime, ships on innocent passage are required to comply with the measures, laws and regulations laid down by the flag State with regard to safety of navigation, protection of the marine environment and social matters.⁷¹⁰

⁷⁰⁵ Sohn/Gustafson held the right of innocent passage to be “an exception to the sovereignty of a coastal State over its territorial sea”. In *The Law of the Sea in A Nutshell* (1984), 97; same point expressed by Ngantcha, *Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 38 f.

⁷⁰⁶ O’Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 271.

⁷⁰⁷ Colombos, *The International Law of the Sea* (1967), 89.

⁷⁰⁸ Zorn, Oppenheim-Lauterpacht, Sauer and Dahm, as cited by O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 271.

⁷⁰⁹ A term used by the ICJ in the *Nicaragua* case, [1986] *ICJ Reports* 111-112; Anderson, ‘Funding and Managing International Partnerships for the Malacca and Singapore Straits, consonant with art. 43 of the UNCLOS’, available at: <<http://www.sils.org/seminar/1999-straits-15.pdf>> (last visited: July 19, 2002).

⁷¹⁰ Art. 94 UNCLOS.

At any rate, the right of innocent passage is not the freedom of innocent passage, let alone the freedom of navigation. It is virtually the specific embodiment of the navigational right of foreign ships in the territorial sea. It can be considered as the residue of the principle of the freedom of navigation in the territorial sea. Ships on innocent passage enjoy neither immunity nor indemnity. Any contravention of the laws and regulations of the coastal State would expose the ships to potential punishment by the same State.

Therefore, the right of innocent passage has not yet amounted to an exception to coastal State sovereignty or jurisdiction. Similarly, the former should not be elevated to such a high status as to override the latter. Rather, the right of innocent passage constitutes actually no more than a special restriction on coastal State jurisdiction, as will be seen later. Nonetheless, the exact connotation of the right of innocent passage still remains to be clarified in the forthcoming section.

E. Development of the Right of Innocent Passage

The regime of innocent passage is well-established in international law⁷¹¹ and appears also steady and stable. Maritime powers cherish it as the keel of the law of the sea on the one hand. On the other, no coastal State would dispute its nature as a typical limitation to coastal State jurisdiction laid down by the law of the sea. However, the regime of innocent passage in detail, at least on some issues, still remains open to interpretation, despite the fact that many efforts have been made to clarify it by the international community. Apart from that, the right of innocent passage in the territorial sea can never be taken as equivalent to the freedom of navigation in the EEZ or on the high seas, no matter how broad the interpretation of the former may be. While freedom of navigation is to be exercised by all States merely “with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area”,⁷¹² the right of innocent passage seems to call for more modification in its content and more circumscription in its extent.

I. Right of Innocent Passage in the Conventions

The right of innocent passage had been confirmed as a general rule in customary law at the Hague Codification Conference.⁷¹³ However, it is the CTS 1958 that expressly declared it for the first time in an international convention.⁷¹⁴

⁷¹¹ See art. 17 UNCLOS; art. 14(1) CTS 1958; and art. 4(1) of the draft articles concerning the legal status of the territorial sea at the 1930 Hague Conference, LON Doc. C. 230. M. 117. 1930.V.

⁷¹² Art. 87(2) UNCLOS; also art. 2(2) CHS 1958.

⁷¹³ Art. 4 of the draft articles on the Legal Status of the Territorial Sea read: “A Coastal State may put no obstacle in the way of the innocent passage of foreign vessels in the

Art. 17 of UNCLOS follows closely the language of CTS 1958 with several slight changes by stating that:

Subject to *this Convention*, ships of all States, whether coastal or *land-locked*, *enjoy* the right of innocent passage through the territorial sea. (emphases indicate the changes in comparison to CTS 1958.)

The replacement of the opening words by “Subject to this Convention” presumably seeks to recall and emphasize that the rules in the Convention bearing on innocent passage through the territorial sea exist not only in Section 3 of Part II but also elsewhere. For instance, Part XII of the Convention contains certain rules with direct regard to the right of innocent passage. Another change lies in the alteration from “shall enjoy”, a traditional prescriptive form to indicate a right, to the simply didactic form “enjoy” that may be all the more declaratory of an established rule in international law. The expression “whether coastal or land-locked” seems to be superfluous. But its retention, especially the stress on “land-locked”, can be attributed to the insistent efforts of land-locked States at UNCLOS III.⁷¹⁵

It should be made clear that “all States” here refers to Non-parties as well. The view becomes even clearer when taking into account the expression “whether coastal or land-locked”. Besides, it can be inferred from the *travaux préparatoires* that there was no intention of repudiating the entitlement of Non-parties to enjoy the right. Indeed any such attempt would run counter to the well-established rule of innocent passage in customary law.⁷¹⁶

Furthermore, even though no expression like “all ships” has been used in the Convention, the use of “ships of all States” is intended to include all ships that may be subject to the Convention, including merchant ships and warships. In addition, the preposition “of” here is not used in the sense of the ownership of a ship, but is rather linked to the nationality of the ship.⁷¹⁷

II. Meaning of Passage

Unlike the concept of “innocence”, the meaning of “passage” has not changed significantly since it was first defined at the 1930 Hague Conference. Based upon

territorial sea.” Report of the Second Committee, LON Doc. C.230. M.117. 1930.V., 7; Final Act of the Conference, LON Doc. C. 228. M. 115. 1930.V., 16;

⁷¹⁴ It provides in art. 14(1) that: “Subject to *the provisions of these articles*, ships of all States, whether coastal or *not*, *shall enjoy* the right of innocent passage through the territorial sea.”

⁷¹⁵ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 156.

⁷¹⁶ Brown, *The International Law of the Sea* (1994), vol. I, 53; while commenting on its draft article 15(1) on which art. 14(1) of CTS 1958 was based, the ILC noted that the provision “reiterates a principle recognized by international law and confirmed by the 1930 Codification Conference”. [1956] II *YBILC* 272.

⁷¹⁷ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 156.

the draft definition at the Hague Conference⁷¹⁸ and the related provisions of CTS 1958,⁷¹⁹ UNCLOS gives its definition of passage within the context of the right of innocent passage in art. 18 as follows:

1. Passage means navigation through the territorial sea for the purpose of: traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

In spite of some minor alterations, the basic components of “passage” remain unchanged. In other words, the passage under discussion breaks down into three types: lateral passage, passage to or from a call at a port facility either inside or outside internal waters, and stoppage and anchorage. Nonetheless, a fresh requirement on passage is set out in the Convention, namely, the continuousness and expeditiousness of passage. They will be analyzed below separately.

1. Lateral passage

The passage without entering internal waters is the typical and traditional type in the context of the right of innocent passage. In the Draft Convention drawn up by *Schücking* for the preparation for the Hague Conference, “passage” referred basically to lateral passage, whereas necessary sojourn during passage was also included therein.⁷²⁰ *Schücking*’s draft reflected, to a large extent, the uncertainty and division on “passage” in State practice and among jurists at that time. The division surfaced at the Hague Conference. The US and the UK, for example, tended to recognize only passage not proceeding to or from a port of a coastal State as such, so far as innocent passage was concerned.⁷²¹ According to the American customs laws in 1920s, foreign merchant ships bound for American ports were subject to examination within twelve miles of the shore, clearly within its territorial sea.⁷²² On the other hand, many other countries tended to regard

⁷¹⁸ Arts. 3(1) and (3) of the draft articles on the Legal Status of the Territorial Sea, 6.

⁷¹⁹ Arts. 14(2) and (3) CTS 1958.

⁷²⁰ Art. 7 of the Draft Convention.

⁷²¹ At the Conference, the US delegate asserted that “... the vessel of another State is not in innocent passage when it is approaching a port of that State through its marginal seas or when she is entering or leaving a port of that State”. LON Doc. C. 251(b). M. 145(b). 1930.V.; Rosenne (ed.), *League of Nations Conference for the Codification of International law [1930]* (1975), vol. II, 1260.

The British delegate echoed the American view by stating that “The right of innocent passage is the right of a foreign ship not proceeding either to or from a port of a coastal State to enter and navigate the territorial waters of that State for the purpose only of passing through them”. *Ibid.*, at 1264.

⁷²² Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/70), 121.

passage to and from internal waters as one type of passage. In the end, the second view became the majority view and was adopted in art. 3(1) of the draft articles on the territorial sea at the Conference.⁷²³

Art. 14(2) of CTS 1958 took over almost verbatim the content of the said draft art. 3(1). UNCLOS follows the same model in this regard. Meanwhile, a new refinement is added to the former concept of lateral passage. That is, lateral passage means traversing the territorial sea without calling at a roadstead or port facility outside internal waters, besides the traditional requirement of “without entering internal waters”. This addition in art. 18 of UNCLOS crystallizes the cognition of new developments in port infrastructure. Therefore, ongoing lateral passage would be broken in the situation where a foreign ship visits, for example, the German deepwater roadstead located west of Heligoland Island or the American *Louisiana Offshore Port*.

It should be noticed that the definition of passage in UNCLOS, as in draft articles at the Hague Conference and in CTS 1958, rests principally upon the purpose for which the passage is undertaken. As a result, the mere fact that a foreign ship crosses the territorial sea does not necessarily bring the crossing into line with passage as art. 18(1)(a) contemplates. Such a crossing can be motivated for other purposes than mere traverse, such as hunting for potential buyers of contraband. In practice, however, it is not easy to figure out the genuine purpose of a foreign ship on passage. Consequently, it may be advisable to presume a crossing through the territorial sea without intending to call at a port facility to be such lateral passage as legally envisaged, unless clear grounds or evidence shows otherwise. The similar presumption can also be applied in case of passage to or from a port facility that will be discussed below.

2. Passage to or from a port facility

As earlier indicated, the draft articles at the Hague Conference introduced a new component into the definition of passage by including navigation through the territorial sea to or from internal waters within the scope of the right of innocent passage. Previously it was not adopted in State practice.⁷²⁴ The inclusion could rarely be taken as reflecting the existence of some right or even freedom of access to ports in particular, or to internal waters in general, although some authors spared no effort to reason to the contrary.⁷²⁵ Rather, the inclusion might be

⁷²³ Art. 3(1) of the draft articles on the Legal Status of the Territorial Sea read as follows: “‘Passage’ means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.” See Report of the Second Committee, LON Doc. C. 230. M. 117. 1930.V., 6.

⁷²⁴ Cf. Churchill/Lowe, *The Law of the Sea* (1999), 82.

⁷²⁵ O’Connell/Shearer stated that: “the inclusion of passage to and from ports in internal waters is intended to reflect the supposition that there are rules of international law reflecting freedom of access to ports, ...” in *The International Law of the Sea* (1984), vol. I, 269.

aroused by the desire to facilitate international navigation and trade on the one hand, and correspondingly, to contain coastal State jurisdiction over such passage operations on the other. Apart from that, the legal implication of the draft provisions under discussion should be limited to the territorial sea proper. The provisions were, in no way, intended to frame the legal regime of internal waters or of the governance on port access.

The draft text concerning passage to or from internal waters has survived in CTS 1958 and UNCLOS respectively. In the latter Convention, the scope of passage of this type is extended so far as to include those voyages of ships proceeding to or from a port facility outside internal waters. The extension of the right of innocent passage to voyages to or from ports and the like, both within and without internal waters, was held by the ICJ in the *Nicaragua* case as reflecting a well-established rule in customary international law.⁷²⁶

However, in comparison to lateral passage, passage to or from a port facility is more vulnerable on account of two factors. In the first place, the practical significance of the right of innocent passage to or from a port facility within internal waters depends completely upon the permission or acquiescence by a coastal State for a foreign ship to enter or depart from its ports. In this sense, the right of passage concerned can hardly be considered an independent right. Therefore, the right of passage here is actually subordinate to the regime of access to internal waters, including ports, with which neither CTS 1958 nor UNCLOS is concerned. On the other hand, there is little authority yet about whether there exists freedom of access to a port facility outside internal waters. Secondly, passage to or from a port facility is more likely to be susceptible of the interference by the coastal State. This is even clearer when one takes a look at some relevant provisions in UNCLOS. According to arts. 25(2) and 211(3), the coastal State is entitled to take any necessary steps to prevent passage on the ground of any breach of the conditions for admission to a port facility, either within or without internal waters; under arts. 27, 28, a foreign ship passing through the territorial sea after leaving internal waters is fully subject to the criminal or civil jurisdiction of the coastal State.⁷²⁷ More elaborations on that will be given in the next Part.

⁷²⁶ The ICJ noted that art. 18(1)(b) of UNCLOS "does no more than codify international law". [1986] 13 *ICJ Reports* 111, para. 214; Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 - A Commentary* (1993), vol. II, 162; Churchill/Lowe, *The Law of the Sea* (1983), 82.

⁷²⁷ The origin of the above provisions can be found in arts. 5, 8 and 9 of the draft articles on the Legal Status of the Territorial Sea at the Hague Conference in 1930. See Report of the Second Committee, LON Doc. C. 230. M. 117. 1930.V., 7 ff.

3. Continuousness and expeditiousness of passage

Compared with the provisions in the Hague draft articles and CTS 1958,⁷²⁸ art. 18(2) of UNCLOS lays down a new requirement for passage. It is that "Passage shall be continuous and expeditious". Pursuant to this requirement, foreign ships are not allowed to hover or hang around in the territorial sea, regardless of whether their voyage is innocent or not. The addition of this component at the start of art. 18(2) crystallizes a change in emphasis, which has been envisaged to expel the concerns of coastal States.

The word "expeditious" deserves clarification. Although in the French version the term *rapide* and in the Spanish *rápido* are used in UNCLOS, an informal proposal seeking to replace "expeditious" by "rapid" was rejected at UNCLOS III, since the latter could be understood as requiring foreign ships to sail through at full speed in all cases.⁷²⁹ The interpretation of "expeditious" in good faith appears to be that foreign ships shall proceed ahead at their usual operational speed, taking account of specific circumstances including navigational and hydrographical conditions.

Noticeably, the requirement of continuousness and expeditiousness also stands in art. 38(2) and art. 53(3) of UNCLOS, which deal with the right of transit passage and that of archipelagic sea lanes passage respectively. However, so far as the right of innocent passage is concerned, there are exceptions to this requirement, namely, stoppage and anchorage in some special cases.

4. Stoppage and anchorage as components of passage

As exceptional cases to the rule of "continuous and expeditious", art. 18(2) of UNCLOS recognizes "stopping and anchoring" in certain cases as components of passage. Both the Hague draft articles and CTS 1958 sought to restrict the scope of exceptional cases by using a qualifying clause "but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress".⁷³⁰ But UNCLOS expressly extends the exceptions to cases where a ship seeks to render assistance to persons, ships or aircraft in danger or distress.⁷³¹ The extension conforms to the duty to render assistance at sea as provided for in art. 98 of the Convention. It also reflects the general tradition and practice of maritime law as well as humanitarian considerations.⁷³²

⁷²⁸ Art. 3(3) of the draft articles at the Hague Conference, as in previous note; art. 14(3) CTS 1958.

⁷²⁹ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 163.

⁷³⁰ See art. 14(3) of CTS 1958, which reproduced verbatim art. 3(3) of the Hague draft articles concerning the territorial sea.

⁷³¹ Art. 18(2) UNCLOS.

⁷³² Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 162.

Nonetheless, in practice, it is not always an easy task to ascertain if the stoppage and anchorage are incidental to ordinary navigation. Obviously, stopping and anchoring at a roadstead or a deepwater port outside internal waters, anchoring outside ports just waiting for a free berth or lying clear of a busy channel or waterway as required by Vessel Traffic Services (VTS) system may well fall under the category as conceived in art. 18(2). In other words, they are seen as "incidental to ordinary navigation". Under many other circumstances, however, stoppage and anchorage may be not so clear-cut as to be easily branded as being incidental to ordinary navigation. Therefore, if a foreign ship is found anchoring in the territorial sea, the passage may first be presumed broken and the foreign ship concerned may be regarded as within the territorial sea for purposes other than innocent passage,⁷³³ unless the anchorage could be otherwise justified.

In comparison, stoppage and anchorage necessitated by *force majeure* or distress can be discerned easily, for the existence of *force majeure* or distress is objectively provable. However, the seriousness and cause of distress may give rise to controversy as well. Firstly, how serious a distress should be to render necessary the stopping and anchoring of the ship that either is in distress or seeks to provide assistance to a third party in distress. It is hard to give a clear answer that fits in every case. But it seems true that not all incidents or difficulties aboard can amount to *force majeure* or distress and then yield justification for the stoppage and anchorage concerned. A minor machinery breakdown on board a ship, for example, does not require stoppage or anchorage. Secondly, if distress has been brought about wilfully by the crew just with a view to anchoring in the territorial sea for other purposes than traverse, the anchoring and stopping cannot be considered components of passage. The *mala fide* act of the ship constitutes the abuse of the right in international law. In this case, the ship would have to subject itself to the interference of the coastal State, or it can even be prevented from proceeding further after anchoring.

It is interesting to note that, on a strict reading of art. 18, entering the territorial sea merely for the purpose of rendering assistance seems not to be "passage" proper as contemplated by the drafters.⁷³⁴ However, this interpretation would hardly be compatible with the general object and purpose of the provision.

III. Innocence of Passage

In contrast to the term "passage", the connotation of the term "innocence" has witnessed significant changes since the 1930 Hague Codification Conference. Although UNCLOS enumerates twelve sorts of non-innocent activities aimed at

⁷³³ Cf. Comment on art. 14 of the Havard Draft Articles on the Law of the Sea, [1929] 23 *AJIL*(*Special Number*) 296; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 54.

⁷³⁴ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 162.

bringing more precision to the term “innocence”, it is still not easy to define innocence of passage.

1. Meaning of innocence

a) Innocence in the Hague draft and in the Corfu Channel case

For a long time, the term “innocence” lacked any clear definition within the context of innocent passage. To this end, art. 3(2) of the draft articles at the Hague Conference defined “innocence” in a negative way as follows:

Passage is not innocent when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.⁷³⁵

Here, apparently, the passage of a foreign ship would be considered non-innocent if the ship committed acts contrary to the stated interests of the coastal State. Furthermore, based upon the reasonable understanding of these provisions, mere passage without any such act, for whatever reason, may also fall within the category of non-innocence so long as it can be proven that the purpose of the passage is to carry out such acts. The Hague formulation gained some ground in State practice afterwards.⁷³⁶

The question of innocence was also fully debated before the ICJ in the *Corfu Channel* case (1949). Notwithstanding that the case revolved around the right of innocent passage of warships, it is noticeable that the Court turned to the manner of the passage concerned for the decisive test of innocence. The Court maintained that, as long as the passage was conducted in a manner which posed no threat to the coastal State, it was to be regarded as innocent.⁷³⁷ Besides, it was implied in the judgment that innocence represented a quality capable of objective determination and that an infraction of local laws and regulations would not *ipso facto* deprive passage of its innocent character.⁷³⁸

b) Innocence in the ILC draft of 1956

Prior to UNCLOS I in 1958, the question of what amounts to innocent passage triggered off intensive discussions within the ILC. Despite the judgment of the ICJ in the case of *Corfu Channel*, whereby the manner of passing, a more flexible approach, was highlighted, the majority of the ILC preferred to adhere to the formulation adopted in the Hague draft articles. However, some prominent scholars came out with dissenting opinions. *Fitzmaurice*, for example, suggested that passage could be non-innocent regardless of any act of the ship if only it

⁷³⁵ Report of the Second Committee, League of Nations Conference for the Codification of International Law; LON Doc. C. 230. M. 117. 1930.V., 6.

⁷³⁶ For example, the Bulgarian Decree Law of 25 August 1935 and the Japanese case of *Japan v. Kulikov* (1954), cited as Churchill/lowe, *The Law of the Sea* (1999), 83.

⁷³⁷ The *Corfu Channel* case, Judgment of 9 April 1949, [1949] *ICJ Reports* 28-32.

⁷³⁸ *Ibid.*, at 30 ff.

prejudices the security of the coastal State.⁷³⁹ On the other hand, *Lauterpacht* inclined to the view that mere violation of specific coastal State laws may strip passage of its innocent nature.⁷⁴⁰ Consequently, the final text of the ILC's draft constituted a compromise in this regard by stating:

Passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law.⁷⁴¹

Compared with the Hague formula, the ILC draft showed three changes. First, the definition of innocence was given in an affirmative way that has been preserved in CTS 1958 and UNCLOS. Secondly, the vital interests of the coastal State, known as security, public policy and fiscal interests in the Hague draft, were reduced to a general expression "security". The expression should be interpreted broadly to include a wide range of interests of the coastal State, as the commentary of the Commission made clear. Thirdly, in the ILC draft the innocence of passage was to be tested not only in terms of security, but also on whether passage was "contrary to the present rules, or to other rules of international law". Considering that "present rules" should comprise those requiring foreign ships to comply with coastal State legislation on certain matters during passage,⁷⁴² the conclusion could be logically deduced that a contravention, as an act, of local laws or regulations adopted in conformity with the relevant conventions may make the passage non-innocent.

By such a formulation, the draft made it possible to link innocence to the observance of local laws and regulations as well as relevant rules of international law. That would present a great threat to international navigation, because, theoretically, any violation of local legislation would deprive passage of its innocence, even such trivial ones as passing a buoy on the wrong side, or giving a wrong sound or light signal. It was feared that the draft would eliminate the essential distinction between the right of passage and the regulation with respect to the manner of passage.⁷⁴³

Following the Suez Canal crisis in 1956, the debate on innocent passage was put in the foreground in the meetings of the General Assembly of the UN in 1957. There were largely two main views in the debate: one representing the interests of coastal States headed by India, while the other standing for the interests of flag States with Italy as representative. According to the first view, innocence of passage depends upon several factors and is capable of subjective determination by a coastal State. Furthermore, the coastal State may prevent threats to its

⁷³⁹ Churchill/Lowe, *The Law of the Sea* (1983), 83.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Art. 15(3) of the ILC draft, [1956] II *YBILC* 258, 272.

⁷⁴² The duty of compliance was mainly dealt with in art. 18 of the ILC draft. [1956] II *YBILC* 273-274.

⁷⁴³ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 273.

security by interfering with passage in advance of overt action.⁷⁴⁴ The second view in the discussion, not surprisingly, was diametrically opposed to the first one. The first view is believed by one writer to stand closer to the draft of the ILC in 1956.⁷⁴⁵

c) Innocence in CTS 1958

The formula embodied in art. 15(3) of the ILC's draft was not accepted by the 1958 Geneva Conference. Rather, CTS 1958 came out with a quite different expression with regard to the innocence of passage, as can be seen in art. 14(4):

Passage is 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.

Clearly, a general criterion of innocence was laid down in the above provisions, whereas certain additional criteria concerning foreign fishing vessels and submarines, which constitute no major concerns of the thesis, were set out in the following two paragraphs. Nevertheless, the convention gave no clue to the specific circumstances under which passage might be deemed prejudicial to the peace, good order or security of the coastal State. Besides, there was no attempt in the convention to elucidate on the terms 'peace, good order or security'. Therefore one has to resort to the *travaux préparatoires* to obtain more parameters in respect of the innocence of passage in CTS 1958.

Among six proposals for amendment at UNCLOS I aimed at replacing the definition of "innocence" in the ILC draft in 1956, only the proposal of the US was of direct relevance insofar as the drafting history of art. 14(4) of CTS 1958 is under discussion. The US proposal consisted of two sentences stating that "Passage is innocent so long as it is not prejudicial to the security of the coastal State. Such passage shall take place in conformity with the present rules".⁷⁴⁶ As explained by the US representative, the proposal was purported to indicate that the sole test of the innocence of passage was whether it was prejudicial to the security of the coastal State.⁷⁴⁷ The word "security", pursuant to the report of a working group set up to examine the technical implication of various proposals pertaining to the definition of innocence,⁷⁴⁸ had no exact or precise meaning but it should be regarded as implying that there should be no military or other threats to the sovereignty of the coastal State. Furthermore, it could not be construed as bearing on economic or ideological security.⁷⁴⁹ It followed therefore that the threats to such order would not warrant meddling in innocent passage.

⁷⁴⁴ Cf. Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 44 f.

⁷⁴⁵ *Ibid.*, at 45.

⁷⁴⁶ The proposal was made in the First Committee of UNCLOS I. See Doc. A/CONF. 13/C. 1/L. 28/Rev. 1, UNCLOS I, Official Records, vol. III, 1958, 216.

⁷⁴⁷ *Ibid.*, at 83.

⁷⁴⁸ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 268.

⁷⁴⁹ UNCLOS I, Official Records, vol. III, 82 f.

However, the proposal met with broad objection at once from other States, basically on three major grounds. Firstly, the omission of the reference to acts of the passing ship in the proposal afforded too much discretion to the coastal State in the determination of innocence. It was thus contrary to existing international law.⁷⁵⁰ The proposed approach would, imaginably, enable a State to assert ongoing or even intended passage to be prejudicial to its security, without being required to justify its assertion on the basis of acts. Secondly, vital interests other than security of the coastal State merited protection as well. And finally, it was contended that other rules of international law should remain valid, so long as they were not at variance with the newly codified rules in the convention.⁷⁵¹

In response to the opposition, two small changes were made to the proposal. One change was found in the first sentence of the proposal by adding the expression "the peace, good order or" before the word "security", lest the term "security" alone would be so defined as to exclude the other two concepts.⁷⁵² The other change was achieved in the second sentence of the US proposal by replacing "the present rules" by "these articles and with other rules of international law".⁷⁵³ In the end, a compromise text was adopted as art. 14(4) of CTS 1958.

Unlike art. 15(3) of the ILC draft in 1956 that was criticized for permitting subjective determination of "innocence", art. 14(4) of CTS 1958 was aimed at eliminating any such uncertainties. However, it can hardly be said that the desired goal of objectivity in ascertaining innocence was really accomplished. The definition of innocence in art. 14(4) avoided the question of how the ship concerned conducts itself during its passage in the territorial sea. Therefore it may be maintained that this formula accorded the coastal State much more latitude to determine whether particular passage is non-innocent.⁷⁵⁴ The ship might commit no act prejudicial to the coastal State during passage, but its passage could well be judged as non-innocent on the ground that it was prejudicial anyway by virtue of something else.⁷⁵⁵ For instance, a coastal State could, under the provisions of art. 14(4), label the passage of nuclear-powered ships, ships carrying hazardous freight, supertankers, or simply any passage of ships to and from a hostile country as being *ipso facto* prejudicial to its peace, good order or security, although no act was actually performed during the passage.

⁷⁵⁰ Cf. Churchill/Lowe, *The Law of the Sea* (1983), 84; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 46.

⁷⁵¹ Opinions of Yugoslavia and Germany at the meeting of 25 March 1958, UNCLOS I, Official Records, vol. III, 75.

⁷⁵² The change was made relying basically on an Indian amendment proposal. *Ibid.*, at 84 f.

⁷⁵³ The proposal for amendment was reintroduced by Turkey and accepted at the Conference. *Ibid.*, at 98.

⁷⁵⁴ Brown, *The International Law of the Sea*, (1994), vol. I, 55.

⁷⁵⁵ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 273; here something else would be more than the laws and regulations of the coastal State, for passage could be interfered with even if there happened to be no specific domestic law and regulations under which the passage was illegal. Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea' [1959] 8 *ICLQ* 95.

Apart from that, the addition of “the peace, good order” of the coastal State as new criteria in assessing the innocence of passage would further weaken the “objectivity” of the same article. That gave the coastal State more plausible reasons for frustrating passage, even if the two concepts were interpreted in a narrow sense.⁷⁵⁶

On the other hand, the definition in the article concerned did not link innocence of passage directly to compliance with local laws and regulations or with related rules of international law, as the ILC draft in 1956 did. Therefore, the provisions in CTS 1958 did not require a violation of any law before innocence was lost. Nor could a violation of coastal State legislation *ipso facto* deprive a passage of its innocence. Of course, the observance of duly enacted local laws and regulations as well as general international law still remained an obligation for foreign ships engaged in passage. But the observance forms, in no way, the prerequisite for the passage to be innocent.

Consequently, if a foreign merchant ship violated such laws during passage, it could well be liable to a fine or whatever proper punishment. Nonetheless, the passage would not necessarily, merely on that account, cease to be innocent. This rule was, however, inapplicable to fishery cases, in which any breach of fishery laws and regulations of the coastal State, regardless of the degree of gravity, would make the passage of a foreign fishing vessel non-innocent.⁷⁵⁷

Nonetheless, some violations, except for the cases of fishing vessels, might be so flagrant as to strip passage of its innocence. Therefore, in practice, the real challenge would be to determine whether a violation of local laws and regulations or of relevant international law had amounted to prejudicing the peace, good order or security of the coastal State.

In spite of the acceptance of CTS 1958 by 46 States⁷⁵⁸ and the incorporation of the formula into some municipal legislation,⁷⁵⁹ the concept of innocence experienced substantial change in UNCLOS.

d) Innocence in UNCLOS

As far as the definition of “innocence” is concerned, art. 19(1) of UNCLOS retains the text of art. 14(4) of CTS 1958 with a minor replacement of “these articles” by “this Convention”. The latter expression is believed to have a broader denotation than the former. However, the similarity between the two conventions

⁷⁵⁶ “This introduces a *petitio principii* by making innocence and jurisdiction the reverse and the obverse of each other. Logically the way is open to enlarge the control exercised by the coastal State over passing shipping beyond that allowed in customary law.” O’Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 274.

⁷⁵⁷ The exceptional case of fishing vessels was regulated separately under art. 14(5) CTS 1958.

⁷⁵⁸ UN Doc. ST/LEG/SER.E/7, New York 1989, 729; Plazöder/Grunenberg (ed.), *Internationales Seerecht* (1990), 712 ff.

⁷⁵⁹ Such as the Territorial Sea and Maritime Zones Law 1977 of Myanmar, the Territorial Waters and Maritime Zones Act 1977 of Pakistan and the Yugoslav Law of 1965. Cited as Churchill/Lowe, *The Law of the Sea* (1999), 84.

disappears when art. 19(2) of UNCLOS goes on to enumerate twelve types of conduct which would be "prejudicial" to the peace, good order or security of the coastal State and thus render passage non-innocent.

The change of the definition of "innocence" crystallizes new developments in the law of the sea since UNCLOS I in 1958. At UNCLOS III, the right of innocent passage, especially the meaning of "innocence", was vehemently debated in the Second Committee. It should be pointed out that it appeared impossible, even from the beginning of the Conference, to reproduce the formula contained in CTS 1958. There were basically two reasons: first, the subjectivity of the formula had attracted wide criticism; secondly, the extension of the breadth of the territorial sea from three to twelve nm rendered it imperative to lay down objective criteria for the determination of "innocence", in order to dispel the concern of the international shipping industry that the expansion of coastal State jurisdiction would lead to an encroachment on the right of innocent passage.⁷⁶⁰

These considerations have been reflected in all three main proposals in this regard,⁷⁶¹ which served as the points of departure for discussion at the Conference. Without intending to go into the details of the three drafts, it should be noted that the first paragraph of either draft was just the same, which was taken from art. 14(4) of CTS 1958. In addition, each of them had a list of activities, longer or shorter. But none of them mentioned the consequences of pollution or fishing activities of foreign ships during passage through the territorial sea. With some additions and rewordings, art. 19 of UNCLOS came out relying mainly on the Fiji draft proposal.⁷⁶²

UNCLOS adopts the two-step method to define innocence of passage. As pointed out, Para. 1 of art. 19 of the Convention largely reproduces art. 14(4) of CTS 1958. This paragraph can be regarded as the definition of innocence in general terms from the perspective of the nature of passage. The Convention stops well short of stating what is meant by the terms "peace, good order or security", as CTS 1958 did. Further circumscription of the terms appears to be left to coastal States.⁷⁶³ In Para. 2 of the same article, the term "innocence" is further clarified by setting out the activities that would render passage of a foreign ship "prejudicial" in this context and thus non-innocent. So Para. 2 is, correspondingly, about the definition of innocence from the perspective of the conduct of foreign

⁷⁶⁰ For an analysis in detail, see Hasselmann, *Freiheit der Handelsschifffahrt* (1987), 248 f.

⁷⁶¹ Lagoni, 'Der Hamburger Hafen, die internationale Handelsschifffahrt und das Völkerrecht' [1988] 26 *A/R* 353. The three proposals were submitted by Fiji, the UK and a group of four States, namely, Malaysia, Morocco, Oman and Yemen. See Doc. A/AC.138/SC.II/L.42, reproduced in III SBC Report 1973, 91 f and Doc. A/CONF.62/C.2/L.19(Fiji); Doc. A/CONF.62/C.2/L.3(UK); Doc. A/CONF.62/C.2/L.16(4 States).

⁷⁶² For a drafting retrospect, see Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 167 ff.

⁷⁶³ *Ibid.*, at 167.

ships during passage. The value of this paragraph, nevertheless, lies not so much in what it includes as in what it excludes.⁷⁶⁴

The above two-step method was designed to meet the desire of the drafters at UNCLOS III to produce more objective criteria regarding innocence so as to accord coastal States less room for interpretation and, accordingly, less opportunity for abuse of their right to prevent non-innocent passage.⁷⁶⁵

It is, however, difficult to evaluate whether the desire has been accomplished in UNCLOS. On the one hand, as many distinguished authors believe,⁷⁶⁶ the enumeration of activities seems to link "innocence" to the conduct of foreign ships during passage and prevents coastal States from characterizing passage as non-innocent merely by reference to the character of the ship, the cargoes and persons on board or the elusive intention of the passage. Accordingly, under the new regime of UNCLOS, the mere presence or passage of a supertanker or a nuclear-powered ship could not be considered prejudicial to the coastal State, unless the ship engages in one of the listed activities. This would widen the domain of the right of innocent passage.

On the other hand, several elements contained in art. 19(2) of the Convention would suggest that the right of innocent passage appears to have been narrowed. First mentioned should be art. 19(2)(1) of the Convention, namely, "any other activity not having a direct bearing on passage". This catch-all clause is a stumbling block for those who insist that the list of proscribed activities is exhaustive. The elusive provision brings about some subjectivity in the appreciation of the passage's nature and thus considerably dilutes the significance of the paragraph concerned. Secondly, except in the case of "willful and serious pollution", other items listed in art. 19(2) are so general and loose, regardless of the degree of seriousness of violation, as to enable coastal States to interfere with foreign shipping for quite trivial infractions. Thirdly, in accordance with art. 19(2) of the Convention, commission of any of the listed acts would automatically render passage non-innocent, without it being necessary for coastal States to establish that such acts virtually cause or have caused prejudice to their peace, good order or security. The momentum in favor of coastal States is strengthened further by

⁷⁶⁴ Brown, *The International Law of the Sea* (1994), 57.

⁷⁶⁵ In an explanatory note accompanying its draft proposal in the Sea-Bed Committee, Fiji commented that: "The innocence of passage is still to be determined by relation to the peace, good order and security of the coastal State, but an objective test is sought to be applied in determining what acts are in fact considered to be prejudicial to the peace, good order and security of the coastal State." See Doc. A/AC.138/SCII/L.42. At UNCLOS III, Fiji further explained its draft by saying that "... the Fiji delegation sought to establish general rules of a more objective nature for the passage of ships through the territorial sea. In particular it attempted to elaborate a more precise definition of the concept of innocent passage..." Doc. A/CONF. 62/C. 2/L. 19; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 260; Nandan/Rosenne mentioned it also in general, 174.

⁷⁶⁶ Churchill/Lowe, *The Law of the Sea* (1999), 85; Brown, *The International Law of the Sea*, (1994), vol. I, 57; Hasselmann, *Freiheit der Handelsschifffahrt* (1987), 265.

using "any" in eight items and by introducing subjective judgment in items (c), (d), (h) and (k).⁷⁶⁷ Additionally, CTS 1958 prohibited, in principle, any interference with innocent passage of foreign ships by providing that "The coastal State must not hamper innocent passage through the territorial sea".⁷⁶⁸ UNCLOS modifies the requirement by adding to the above expression a tail of "except in accordance with this Convention".⁷⁶⁹ In other words, even innocent passage is subject to the interference of coastal States by reference, notably, to marine environmental pollution and any breach of the conditions of port admission.⁷⁷⁰ That inevitably waters down the practical importance of the requirement that the coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage.⁷⁷¹

The enumeration of the activities that would strip passage of its innocence shows up in UNCLOS as a novelty in comparison to the earlier codification efforts. So a question may be raised here: whether art. 19(2) exhausts all tests of innocence by listing activities that may render the passage of a foreign ship non-innocent.

As noted earlier, some distinguished writers take the view that, under UNCLOS, judgment on innocence of passage ought to be linked to the conduct of the ship concerned.⁷⁷² However, few tend to submit that art. 19(2) exhausts all activities rendering passage non-innocent, not to speak of the exhaustion of all tests of innocence.

In spite of that, a positive reply to the question is found in an agreement between the US and the former USSR in 1989 on Uniform Interpretation of Rules of International Law Governing Innocent Passage.⁷⁷³ With particular reference to art. 19, the two governments agreed in Para. 3 of the document as follows:

Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

Admittedly, in view of the weight of the two States as maritime powers and large coastal States, as well as their rare concurrence on international issues, the agreement is likely to prove quite influential in the interpretation of art. 19 of the Convention.

Nonetheless, the question still deserves some more attention, since a close scrutiny of it may unfold another perspective of the issue. Firstly, Para. 1 of art. 19 lays down a general and basic definition of innocence, while Para. 2 seeks to

⁷⁶⁷ "aimed at" and "willful". Hasselmann also adverted to the issue, *ibid.*, at 266.

⁷⁶⁸ Art. 15(1) CTS 1958.

⁷⁶⁹ Art. 24(1) UNCLOS.

⁷⁷⁰ Arts. 220(5) and (6), art. 25(2) UNCLOS.

⁷⁷¹ Art. 24(1)(a) UNCLOS.

⁷⁷² See *supra* note 766.

⁷⁷³ Reached and signed at Jackson Hole, Wyoming, on 23 September 1989. Russia has accepted this agreement. Reproduced in 28 *ILM* 1444; [1989] 14 *LOS* 10; Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 177.

elucidate the scope of the expression “prejudicial to the peace, good order or security of the coastal State”. Therefore, Para. 2 may be purported to merely exemplify the above vague expression by coming up with some objective references (acts) to facilitate the understanding and application of the concept of innocent passage. By no means is Para. 2 designed to exhaust all cases in which passage would be rendered non-innocent. No proposition to the contrary can be drawn from a review of the drafting of art. 19.⁷⁷⁴ Secondly, a close perusal will lead us, without any difficulty, to the fact that the opening sentence of Para. 2 is not worded “*Passage of a foreign ship shall be considered to be prejudicial ... only if ... it engages in any of the following activities*”, but “*Passage of a foreign ship shall be considered to be prejudicial ... if ... it engages in any of the following activities*” (emphasis added by the author). Therefore, it may be reasonably observed that here the catalogue of the cases being capable of rendering passage non-innocent might not be closed.⁷⁷⁵ In other words, although engaging in any of the listed activities would, no doubt, render the passage non-innocent, these activities do not exhaust all tests of non-innocence, because they are not *sine qua non* for passage to be non-innocent, as the wording of the Convention suggests. Similarly, it can hardly be claimed that passage of a foreign merchant ship which commits no act listed in art. 19(2) during the passage would surely remain innocent in any case.⁷⁷⁶ For instance, the transportation of terrorist suspects or of weapons to be used for terrorist operations can scarcely survive the test of innocence of passage, even though this constellation has not yet been expressly addressed in the list concerned.

It can thus be inferred that the tests of non-innocence may not be limited to those activities listed in Para. 2. Rather, they could be other activities or even something else rather than activities *per se*, such as the presence of specific cargoes and persons on board,⁷⁷⁷ ship type or ship conditions. Para. 1 of art. 19 stands on its own feet and can be applied alone, without necessarily being dependent on the provisions of Para. 2.

⁷⁷⁴ At the Conference, the International Chamber of Shipping (ICS) argued that the opening phrase of Para. 2 was open-ended and should be amended. But its proposal was not accepted. Nandan/Rosenne, *ibid.*, at 167 ff.

⁷⁷⁵ O’Connell/Shearer, *The International Law of the Sea* (1982), vol. I, 270; similar views expressed by the ICS at UNCLOS III, see in Platzöder (ed.), *The United Nations Conference on the Law of the Sea*, vol. IV, 240, 242.

⁷⁷⁶ Similar points made by Pardo, ‘The Convention on the Law of the Sea: A Preliminary Appraisal’ [1983] 20 *San Diego Law Review* 494; Yuan, ‘The United Nations Conference on the Law of the Sea – from a Chinese Perspective’ *Texas Int’l Law Journal* 1984, 447 f; also Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 265.

⁷⁷⁷ E.g. Section 8 of South Africa MTA 1981 provides: “the passage of a ship which carries or has on board in the territorial waters cargo or any appliance or apparatus the use of which or persons who may constitute a threat against the sovereignty, territorial integrity or political independence of the Republic, shall be deemed to be not innocent.” As cited by Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 233.

Therefore, the coastal State may fend off threats to its vital interests, namely, its peace, good order or security, by proportionately interfering with ongoing passage in advance of any real act. However, the precondition for the interference is that the State has good reason to believe and establish, taking into account the many factors involved, that intended passage or further proceeding through the territorial sea will very likely cause serious prejudice to its vital interests. Of course, the coastal State has to justify its measures taken. Any unjustifiable interference will be held accountable under international law.

In spite of that, it would be in the best interests of the international community to interpret art. 19 of UNCLOS in a narrow sense, namely, linking non-innocence only to the activities as listed in art. 19(2). Any outreach beyond that, although sometimes theoretically viable, would require confirmation in the form of a multilateral agreement before being put into practice, for unilateralism is the biggest challenge for the sound development of the law of the sea. In addition, interpretation is one thing and application is another. Therefore the final answer is to be found only in the accumulation of State practice.

UNCLOS, as CTS 1958, seeks to dissociate the concept of non-innocence of passage from that of non-compliance with local laws and regulations as well as relevant rules of international law. The dissociation of the two concepts is underlined by the fact that the obligation to comply is laid down in a separate article, i.e. art. 21(4) UNCLOS. As a result, according to the majority view,⁷⁷⁸ a violation of local laws will not necessarily deprive passage of its innocence.⁷⁷⁹ It is interesting to note that art. 19(2)(g) represents the only case in which the breach of relevant laws and regulations of the coastal State is mentioned.

Finally, it seems true that the definition of "innocence" in art. 19 of UNCLOS cannot be understood purely either subjectively or objectively.⁷⁸⁰ The intricacy of "innocence" thus necessitates taking into account both subjective and objective implications of the relevant provisions in the Convention. Apart from that, the basic and well-preserved test of whether the passage of a foreign ship causes

⁷⁷⁸ Froman, 'Uncharted Waters: non-innocent passage of warships in the territorial sea' [1984] 21 *San Diego Law Review* 660; Treves, 'Navigation' in Dupuy/Vignes (eds.), *A Handbook on the New Law of the Sea* (1991), vol. 2, 923; Guang, 'Conflicts between Foreign Ships' Innocent Passage and National Security of the Coastal States' in Van Dyke/Alexander/Morgan (ed.), *International Navigation: Rocks and Shoals Ahead?* (1988), 113; Hakapää/Molenaar, 'Innocent Passage – Past and Present' [1999] 23 *Marine Policy* 135; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 266.

⁷⁷⁹ However, Ngantcha took a contrary position on it. He maintained that: "... foreign ships which do not comply with 'appropriate' coastal State laws and regulations deprive themselves of the genuine exercise of the right of innocent passage and may be considered in non-innocent passage." In *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1992), 176.

⁷⁸⁰ O'Connell/Shearer went on to explain that: "Its content is complex: if there is intention to harm, then innocence is lacking, but the problem is one of knowledge of intention; supposition may be insufficient, yet a ship by its mere presence can cause prejudice to the coastal State." In *The International Law of the Sea* (1982), vol. I, 272.

prejudice to the vital interests as provided for should always be kept in place to get the concept of innocence duly interpreted and applied.

2. Non-innocent activities

The debate on when passage of a foreign ship is non-innocent will continue to exist. The least controversial proposition in this regard, if any, may be that undertaking any of the activities specified in art. 19(2) of UNCLOS would *ipso facto* render passage of a foreign ship non-innocent. Therefore, the following discussion will be devoted to these activities.

First of all, it should be noted that only activities occurring during passage in the territorial sea itself can characterize passage as non-innocent.⁷⁸¹ Commission of one act enumerated in art. 19(2) in the EEZ or on the CZ may not be immune from local jurisdiction, but it has little impact on determining whether the passage of a foreign ship through the territorial sea is innocent or not.

Para. 2(a) of art. 19, which refers basically to warships and government ships for non-commercial purposes, is modeled on art. 2(4) of the UN Charter and repeated in arts. 39, 54 of the same Convention afterwards. It follows that a flag State bears an international obligation to ensure that its ships will refrain from such threats or use of force.⁷⁸² Besides, the sovereignty of the coastal State is here put in the foreground, unlike in art. 2(4) of the Charter, where it is absent. All this reflects the extension of the scope of such threats or use of force in favor of the coastal State, although the content thereof still remains unclear.

Para. 2(b) concerns “any exercise or practice with weapons of any kind”. It is, generally, not relevant to merchant ships. Arguably, exchanging fire with pirates in case of self-defense should not have been contemplated under this item.

Item (c) under the paragraph deals with espionage on board. Normally, it has also no pertinence to merchant ships. However, in some special cases, merchant ships may be put into or used for espionage operations, or even government ships operated for non-commercial purposes can be camouflaged as merchant ships aimed at collecting sensitive information of the coastal State. It is difficult to draw a clear line between espionage and normal interests in the coastal landscape of passengers or crew members on board a foreign merchant ship. Here the pendulum seems to sway to the side of the coastal State. On the other hand, the development of new technologies makes such espionage more difficult to be identified, since sophisticated ship-borne radars, sensors and receivers are employed that can be used for both navigation and espionage. In such cases, it is almost impossible for coastal States to see any overt act as such from the outside.

Whereas a foreign merchant ship could barely undertake “any act of propaganda aimed at affecting the defence or security of the coastal State”,⁷⁸³ or “the

⁷⁸¹ Art. 19(2) UNCLOS unequivocally states that: “... if in the territorial sea it engages...”

⁷⁸² Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 175.

⁷⁸³ Para. 2(d) of art. 19 UNCLOS.

launching, landing or taking on board of any military device”,⁷⁸⁴ Para. 2(e) concerning “the launching, landing or taking on board of any aircraft” may deserve more attention. Certain deck operations of a ship-borne helicopter, such as flying over the ship to oversee the state of the ship and cargoes, hovering over the stem to ascertain the navigational conditions ahead, or rescuing a person who fell into the sea, should not be deemed as rendering the passage non-innocent. In these cases, the helicopter does not fly completely away from the mother ship and thus still remains a component of it. Therefore, such operations can hardly be categorized as within the scope of Para. 2(e).

Para. 2(g) of art. 19 corresponds to art. 21(h), which empowers the coastal State to adopt laws and regulations to prevent the infringement of customs, fiscal, immigration or sanitary legislation. Under Para. 2(g), the embarking or disembarking of any goods, currency or person by a foreign ship in the territorial sea in contravention of such laws and regulations would result in the ship being considered as no longer in innocent passage. To this point two more observations may be added. At the first place, not all such activities in the territorial sea are meant here. For instance, trans-shipment at a roadstead or deepwater port located in the territorial sea will not deprive passage of its innocence, as long as it is allowed by the relevant laws and regulations. Secondly, other contraventions apart from than loading or unloading of goods, currency or persons, such as faults regarding packaging, stowage or marking of goods, cannot render the passage of a foreign ship non-innocent. Para. 2(g) embodies the desire of the drafters to optimally protect the right of innocent passage in these particular fields. A similar provision comes up in art. 42(1)(d) with respect to the competence of States bordering international straits.

The provision in Para. 2(h) of “any act of willful and serious pollution contrary to this Convention” does obviously not agree with other items in the paragraph that require no special degree of seriousness of acts. This regulation originated from art. 16(2)(h) of the ISNT in 1975, which reads “any act of willful pollution, contrary to the provisions of the present Convention”. The fact that it went too far aroused several proposals, either to delete or modify it by reference to objective parameters, resulting in the addition of “serious” to the requirement of marine pollution.⁷⁸⁵

This extremely rigid provision can hardly make passage non-innocent, because there is seldom intentional and serious pollution and, if any, it is difficult to prove the intent to pollute. Furthermore, in contrast to Item (g), Item (h) is not directed against the violations of coastal State laws and regulations, but against that of the Convention. That shows another aspect of its toughness. As a result, this item must be read together with the prescription in Part XII of the Convention, where protection and preservation of the marine environment is addressed.⁷⁸⁶ However, this stringent provision in Item (h) does not seem to be commensurate with those

⁷⁸⁴ Para. 2(f) of art. 19 UNCLOS.

⁷⁸⁵ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), 169 ff.

⁷⁸⁶ Of course, the definition of pollution in art. 1 of the Convention is also relevant here.

in Part XII. According to the stipulation of the Part, serious discharge or significant pollution would expose the innocent passage of a foreign ship to interference by the coastal State, including physical inspection and detention of the ship for the purpose of proceedings.⁷⁸⁷

Para. 2(i) provides that, if a foreign ship during passage undertakes “any fishing activities”, its passage shall be regarded as non-innocent. Consequently, occasional and non-professional fishing on board with fishing rods could also fall within the scope of Para. 2(i).⁷⁸⁸ Compared with its parallel in CTS 1958,⁷⁸⁹ there are two alterations. The first is that Para. 2(i) is applicable not only to foreign fishing vessels, but to all foreign ships. In this sense, the fishery factor in the right of innocent passage has been broadened. The second alteration lies in that, under the new regime, non-compliance with the fishery laws and regulations of the coastal State alone does not necessarily render passage of a foreign ship through the territorial sea non-innocent, unless it engages in a fishing activity at the same time. In this connection, the fishery element appears to have been narrowed. At all events, Para. 2(i) demonstrates, in part, the desire of coastal States to safeguard their legitimate rights over living resources in the relevant maritime zones under their sovereignty or jurisdiction.⁷⁹⁰

According to Para. 2(j), any marine research or survey activities during innocent passage are prohibited in the territorial sea. This is in line with the provision of art. 245 of UNCLOS, which accords the coastal State the exclusive right to regulate, authorize and conduct marine scientific research in the territorial sea.⁷⁹¹ Correspondingly, art. 21(1)(g) allows the coastal State to adopt related laws and regulations. Foreign merchant ships are, basically, not the addressees of this rule. However, a liberal interpretation of “research and survey activities” may well involve them in questions with respect to the innocence of their passage.

Para. 2(k) deals with “any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State”. Therein should be included electromagnetic interference, illegal use of frequency resources, destruction of submarine cables and pipelines, colliding with navigational aids or any other facilities and installations. Besides, an intent to interfere therewith is required here. Therefore, such acts resulting from technical breakdowns on board or bumping into a buoy through negligence would not make passage non-innocent, although the ship involved may be held accountable for civil or

⁷⁸⁷ Arts. 220(2), (5) and (6) UNCLOS.

⁷⁸⁸ Hasselmann, “*Hierunter fällt im Zweifelsfall wohl auch der gelegentliche, nicht professionelle Fischfang mit Schleppangeln.*” In *Die Freiheit der Handelsschifffahrt* (1987), 268.

⁷⁸⁹ Art. 14(5) CTS 1958.

⁷⁹⁰ Cf. Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), 176. Further stipulations are seen in art. 21(1)(e) and (d), art. 42(1)(c) and art. 73 of the same Convention.

⁷⁹¹ Art. 245 goes on to provide in the second sentence that: “Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.”

administrative liability. Arguably, the definitions of key words like “communication”, “facilities” or “installations” may lie in the competence of the coastal State, while generally accepted international rules and standards ought to be taken into account.

Para. 2(1) embraces “any other activity not having a direct bearing on passage” in the category of activities that make passage non-innocent. This provision was criticized during UNCLOS III as being too vague and rendering the list of activities in art. 19(2) open-ended. It remained controversial until the end of the Conference. The attempts to change it at the Conference were, however, not successful.⁷⁹² As a result, it has to be admitted that the coastal State has considerable discretion in deciding what activities may fall hereunder. Be that as it may, the existence of the term “activity” in Para. 2(1) may underpin the argument that the conduct of ships should be the determinant factor in the judging process. In practice, the following activities, *inter alia*, could be judged as activities not having a direct bearing on passage: dumping, bunkering, broadcasting, hanging out posters or placards against local religions or social systems, picking coral reefs, rebellion on board, unwarranted stopping and anchoring other than as provided for in art. 18(2) of the Convention as well as navigation in zigzags. However, any arbitrary application of Para. 2(1) by the coastal State is not compatible with the spirit embodied in art. 24 that “the coastal State shall not hamper the innocent passage of foreign ships through the territorial sea”. Furthermore, the burden of proof would logically rest on the coastal State if the State, relying on Para. 2(1), so asserts.⁷⁹³

Notwithstanding claims to the contrary,⁷⁹⁴ the majority view appears to admit that the list of activities in art. 19(2) is non-exhaustive.⁷⁹⁵

It must also be mentioned that art. 19 contains no rule with regard to the activities that are listed in art. 19(2) but carried out with the authorization of the coastal State or resulting from any *force majeure*, distress or the like.⁷⁹⁶ Consequently, even ships in distress or rendering assistance to others in distress

⁷⁹² For instance, the proposal of the ICS in 1976, that of Germany (FRG) from 1978 to 1982 and that of Greece in 1982 to qualify the provision by substituting “similar” for “other”. Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 173 f.

⁷⁹³ Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 269.

⁷⁹⁴ See Para. 3 of the 1989 US-USSR Uniform Interpretation on Rules of International Law Governing Innocent Passage, 158.

⁷⁹⁵ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 270; Churchill/Lowe, *The Law of the Sea* (1999), 85; Hakapää/Molenaar, ‘Innocent Passage – Past and Present’ [1999] 23 *Marine Policy* 132; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 52.

⁷⁹⁶ Art. 16(3) of the ISNT/Part II (1975) did deal with these exceptional cases, but this regulation was dropped in art. 18 of the RSNT/Part II (1976). The ICS tried to reinstate it at the fifth session in 1976 without success. See details in Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 169 ff.

may not, in principle, break the stipulations in art. 19(2).⁷⁹⁷ Otherwise their passage would be deemed non-innocent and thus subject to “the necessary steps” taken by the coastal State. Of course, the coastal State can exempt those ships from such legal consequences in its legislation. Even failing such exemption, any operations of a foreign ship in cases of *force majeure* or distress, or rendering assistance to others in distress should, arguably, be still presumed to fall within the scope of innocent passage, so long as the *force majeure* or distress in view has not been deliberately contrived. As for the activities that are listed in art. 19(2) but authorized by the coastal State, there should be no problem, since such activities are not so much regulated by art. 19 as by the authorization itself.

Apart from art. 19, the passage of submarines and other underwater vehicles, which can theoretically be operated for commercial purposes, may be labeled as non-innocent if they do not navigate on the surface and show their flag. Obviously, there is a convincing argument for such labeling, i.e. submerged passage is evidently prejudicial to the peace, good order or security of the coastal State. It may be extrapolated that the requirement that such ships shall navigate on the surface and show their flag actually amounts to a precondition of innocence.⁷⁹⁸ In this connection, it is a provision in the national legislation of some countries, such as Sweden, Bulgaria and Romania, that submerged submarines in the territorial sea may be stopped and even attacked if necessary.⁷⁹⁹

Despite the above discussions, the basic approach to assess innocence of passage, namely, to see whether it is indeed prejudicial to the peace, good order or security of the coastal State, should be kept in mind while dealing with the activities in art. 19(2). Otherwise, the judgment on innocence would, in some cases, go far beyond the intention of the drafters.

3. Divergent judgments on innocence of passage

As earlier suggested, despite the presence of art. 19 of UNCLOS, doubts remain as to whether the innocence of passage of a foreign ship must depend on the conduct of the ship. While some argue that innocence can only be lost when the ship commits any activities specified in art. 19(2), others may adhere to the view that the tests of innocence may extend well over those activities in art. 19(2) to other activities or even other factors, such as intention of passage, character of ship, cargoes and persons on board, as well as ship conditions in general. That is to say, in view of such other activities or factors, passage can be judged as prejudicial to the peace, good order or security of the coastal State. In this connection, the ILA

⁷⁹⁷ Art. 19(2)(h) may, however, be inapplicable to foreign merchant ships in distress, because the intentional discharge of oil or noxious liquid substances into the sea in distress is, as an exception, permitted under Rule 11 of Annex I or Rule 6 of Annex II, MARPOL 73/78. Therefore, such a discharge is deemed not “contrary to this Convention” taking into account art. 311 and the last paragraph of the Preamble of UNCLOS.

⁷⁹⁸ Brown, *The International Law of the Sea* (1994), 57.

⁷⁹⁹ Shearer, ‘Submarines’ in Bernhardt (ed.), *EPIL* (1997), vol. III, 732.

Committee on Coastal State Jurisdiction Relating to Marine Pollution came to the conclusion in its final report that a foreign ship which is involved in a maritime casualty or can be categorized as a remarkably substandard ship may be considered in non-innocent passage.⁸⁰⁰

Even if one adopts the narrow and relatively objective approach limiting the tests of innocence only to the activities indicated in art. 19(2) of the Convention, divergent comprehensions and judgments on innocence still cannot be cleared up. Art. 19(2) enumerates activities as tests of innocence. However, neither art. 19 nor art. 21 lays down an appropriate standard for determining whether a breach has really occurred.⁸⁰¹ For instance, sophisticated ship-borne transmitters and receivers can be used to measure surface currents for the purpose of navigation. But they can also be used for marine research or remote sensing. Then where is a clear line between ordinary navigational operation and “the carrying out of research or survey activities”,⁸⁰² or that between navigational operation and “any act aimed at collecting information to the prejudice of the defence or security of the coastal State”?⁸⁰³ Imaginably, for one and the same act, the understanding of the coastal State could be quite different from that of the flag State.

Now again, the coastal State may theoretically refuse to recognize the innocence of passage by a passenger ship on the ground that a deck concert “prayer for world peace” is a very activity not having a direct bearing on passage.⁸⁰⁴ On the other hand, the flag State may rebut that accusation as ridiculous, because the concert poses no prejudice whatsoever to any vital interests of the coastal State.

It must be conceded that the vague provisions, especially in Para. 2(a) and (l), lack of definition of words like “propaganda”, “collecting information”, “research or survey”, and elusive presumption of an intent in some cases⁸⁰⁵ will definitely contribute to the divergent judgments on innocence in practice. In this context, another question may arise: who may conclusively determine whether the passage of a ship is innocent or not? To answer the question, one needs to take a look at the nature of the prescriptions concerning the right of innocent passage. As on other issues, UNCLOS seeks to strike a balance on this matter between the right of coastal States to exercise their jurisdiction over navigation in the territorial sea and the optimal maintenance of the right of innocent passage in favor of flag States. On the one hand, a coastal State can, based on the provisions mainly of art. 19 and its own interpretation verify and determine the innocent character of passage of a

⁸⁰⁰ See Conclusion No. 7: Vessel-source Pollution and Loss of the Right of Innocent Passage in the Final Report, *infra* note 877, 125.

⁸⁰¹ Rothwell, ‘Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice’ in Rothwell/Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 80.

⁸⁰² Art. 19(2)(j) UNCLOS.

⁸⁰³ Art. 19(2)(c) UNCLOS.

⁸⁰⁴ Art. 19(2)(l) of the Convention.

⁸⁰⁵ Arts. 19(2)(c), (d), (h) and (k) of the Convention.

foreign ship through its territorial sea.⁸⁰⁶ On the other, the interpretation and application of the relevant stipulation by the coastal State may not go so far as to unjustifiably encroach on the legitimate right of innocent passage enjoyed by the foreign ship. Otherwise the ship or the flag State may challenge the behavior of the coastal State. Therefore, neither the coastal State nor the flag State can finally determine the nature of the passage: innocent or not. However, it cannot be denied that, under present international law and practice, the discretionary latitude of the coastal State to label passage of foreign ships as non-innocent is far-reaching. In addition, considering the ambiguous language used in UNCLOS, the provisions therein, if interpreted liberally, can lead to inappropriate and substantial limitation to the right of innocent passage.⁸⁰⁷ For these reasons, restraint should be practised by both sides, particularly by the coastal State. Meanwhile, the related articles in the Convention need to be interpreted narrowly rather than broadly in order to contain the dichotomous and even diverse judgments on innocence. In the case of such situations, unilateralism is, at any rate, no solution to the problem. Rather, disputes relating to the interpretation and application of the provisions concerned should be settled through the proper mechanism.

Finally, for the purpose of handling divergent judgments, the fundamental test of innocence embodied in art. 19(1) should not be ignored. In this sense, the observations made by *Brown* in 1973 with respect to CTS 1958, as quoted below, still sound enlightening today:

There remains a large grey area in the middle where it will be necessary in each case to weigh competing social values against one another in order to determine whether it would be more reasonable or less reasonable to characterize a particular offence as being prejudicial to the peace, good order or security of the coastal State.

...

The task will always be to weigh two factors against each other:

- (1) the damage which would be caused in the particular instance by prevention of or interference with the passage of the vessel in question contrary to the acknowledged need of the international community for freedom of passage; and
- (2) the damage to the coastal State which would be caused by failure to prevent or interfere with the passage in question.⁸⁰⁸

IV. Innocent Non-passage

Innocent non-passage refers to those voyages in the territorial sea which are innocent but beyond the scope of “passage” defined in art. 18 of UNCLOS. For

⁸⁰⁶ The right has been recognized since the 1930 Hague Conference. See Observations of art. 5 of Draft Articles on the Legal Status of the Territorial Sea, LON Doc. C. 230. M. 117. 1930.V., 7.

⁸⁰⁷ Rothwell, ‘Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice’ in Rothwell/Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 80.

⁸⁰⁸ Brown, *Passage through the Territorial Sea, Straits Used for International Navigation and Archipelagos* (1973), 19 f.

instance, a foreign merchant ship sails into the territorial sea and anchors there, departing from its normal course due to a strong storm. After the storm it leaves the territorial sea to go on with its navigation. In this case, the ship operation in the territorial sea cannot be regarded as passage,⁸⁰⁹ although the operation itself is not necessarily illegal. Besides, if the navigation of a foreign ship in the territorial sea does not conform to the requirements as passage, the ship on such navigation may not claim the right of innocent passage. For this reason, innocent hovering or cruising around or anchoring in the territorial sea without any justifiable ground can only be categorized as innocent non-passage.⁸¹⁰ Finally, a voyage may fail to be recognized as passage if its purpose is not merely to go through the territorial sea, despite the fact that the voyage is, physically, consistent with the provisions of passage.

Foreign ships in innocent non-passage may not invoke the right of innocent passage. Given that the only legal difference between the territorial sea and internal waters lies in the right of innocent passage, a foreign merchant ship not exercising that right in the territorial sea puts itself in the same legal situation as a ship in internal waters.⁸¹¹ However, foreign ships on innocent non-passage could be immune from local jurisdiction if the non-passage is attributed to any *force majeure* or distress.

Needless to say, non-innocent non-passage of foreign merchant ships, which is normally illegal as well, is subject to the full jurisdiction of the coastal State concerned.

V. Right of Innocent Passage in State Practice

For the purpose of analyzing State practice in the right of innocent passage, States can be categorized in five groups according to their legislative practice in this respect.

The first group comprises Bulgaria, Croatia, France, Indonesia, and Trinidad and Tobago. They have almost reproduced arts. 18 and 19 of UNCLOS in their domestic enactments. This group may well include Finland, which has incorporated UNCLOS as a whole into its legislation.⁸¹²

16 States in the second group have modeled their legislation upon the above two articles of the Convention and produced a list of activities rendering passage non-innocent similar to that in art. 19(2). The content in the lists, however, is more or less different from that contained in art. 19(2). This block comprises Antigua

⁸⁰⁹ Cf. Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea' [1959] 8 *ICLQ* 93.

⁸¹⁰ Because the navigation does not live up to the requirement of being "continuous and expeditious", see art. 18(2) UNCLOS.

⁸¹¹ O'Connell/Shearer, *The International Law of the Sea* (1982), vol. I, 273.

⁸¹² Cf. Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution, *infra* note 877, 60; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 235.

and Barbuda, Bahamas, Barbados, Belize, Equatorial Guinea, Grenada, Iran, Jamaica, South Korea, Poland, Romania, St. Kitts & Nevis, St. Lucia, St. Vincent and Grenadines, Yemen and Yugoslavia.⁸¹³ Quite noticeable here is the legislation of South Korea. In its Territorial Sea Act 1977, the illegal discharge of pollutants has also been listed as an activity rendering passage of a foreign ship non-innocent.⁸¹⁴

The biggest group is the third one, which boasts 50 States. They have all explicitly recognized the right of innocent passage in their laws and regulations, despite the fact that eight of them employ other terms, such as “peaceful passage” (*Egypt*)⁸¹⁵ and “rights of free passage” (*Honduras*).⁸¹⁶ In this group, among others, are Brazil, China, India, South Africa, Argentina, Colombia, Mexico, Norway, Russia, the UK and the US.

Within the fourth group stand eleven States, namely, Canada, Chile, Denmark, Germany, Ireland, Morocco, Portugal, Sao Tome & Principe, Spain, Sweden and Tunisia. In the legislation of these States, no mention is made of the right of innocent passage or of any parallel right. But their recognition of the right of innocent passage is believed to be somehow implied in their national legislation.⁸¹⁷ The last group refers to those States whose position on the right of innocent passage is unclear.

In conclusion, among all the 144 coastal States, about 83 States explicitly or implicitly adhere to the right of innocent passage. On the other hand, there are still ten States making the right of innocent passage of foreign merchant ships in certain categories subject to prior notification or authorization, while three States grant it on the basis of reciprocity (*see Table 2 on p. 128*). Considering that the analysis is basically limited to national legislation, it would be too early to make any conclusion at this stage on whether UNCLOS has been satisfactorily followed in State practice.

F. Duties of Ships during Innocent Passage

Notwithstanding that the right of innocent passage is an independent right in the international law of the sea, foreign ships on innocent passage are still subject to some duties laid down by both conventional and customary laws. The reason for that is quite simple. The right of innocent passage, like any other legal rights, is

⁸¹³ *Ibid.*, at 61 and at 236 respectively.

⁸¹⁴ See Subpara. 9 of art. 5(2) of the Act (Law No. 3037, 31 December 1977).

⁸¹⁵ See art. 2 of the Decree Concerning the Territorial Waters of the Arab Republic of Egypt of 15 January 1951, as amended by Presidential Decree of 17 February 1958, in: *The Law of the Sea – National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* (1995), Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, the UN, 116.

⁸¹⁶ See art. 12 of the Constitution of the Republic of Honduras 1982 (Decree No. 131 of 11 January 1982), *ibid.*, at 156.

⁸¹⁷ See Final Report, 62.

not an absolute right and is to be exercised in the territorial sea, where coastal States enjoy sovereignty and territorial jurisdiction. The duties of foreign ships during innocent passage crystallize, at the same time, the competence of coastal States opposed to the right of innocent passage.

I. Duty of Observation of Laws and Regulations

Foreign merchant ships exercising the right of innocent passage are required to abide by the laws and regulations of the coastal State. Arguably, it is a basic condition for the coastal State to endure the regime of innocent passage within its territorial sea. In other words, exercising such a right in the territorial sea implies submission to the legal regime of the coastal State.⁸¹⁸ The consideration is reflected in UNCLOS, art. 21(4) of which provides that:

Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Art. 21(1) of the Convention sets out what are “such laws and regulations” adopted by the coastal State. These laws and regulations will be considered in more detail in the next Part of this thesis.

This duty of foreign ships on innocent passage turned up already in the draft articles on the legal status of the territorial sea at the 1930 Hague Conference.⁸¹⁹ A similar provision with some technical amendments was seen in the ILC draft on the territorial sea in 1956. Art. 18 thereof ran as follows:

Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.⁸²⁰

The emphasis here was on laws and regulations in respect of transport and navigation. In the commentary on art. 18, the ILC stated that:

Ships entering the territorial sea of a foreign State remain under the jurisdiction of the flag State. Nevertheless the fact that they are in waters under the sovereignty of another State imposes some limitation on the exclusive jurisdiction of the flag State. Such ships must comply with the laws and regulations enacted by the coastal State ...⁸²¹

⁸¹⁸ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 173.

⁸¹⁹ Art. 6 read: “Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the Coastal State, ...” Final Act of the Conference for the Codification of International Law, LON Doc. C. 228. M. 115. 1930.V., 16.

⁸²⁰ [1956] II *YBILC* 273-274.

⁸²¹ *Ibid.*, at 274.

Art. 17 of CTS 1958 largely reproduced the relevant text of the ILC draft in 1956. UNCLOS likewise, as seen above, takes over the keynote of CTS 1958, while it goes further to stress the necessity to observe “all generally accepted international regulations relating to the prevention of collision at sea” that refer basically to the IMO conventions, most notably, COLREG 1972.

However, it should be made clear that the duty to observe local laws and regulations as well as special international regulations is basically separate from the test of the innocence of passage. That is to say, infringement will make the offender liable to the proper penalty and “clearly amenable to the courts of the Coastal State”,⁸²² but it *ipso facto* enables no State to deprive the passage of its innocence. Of course, failure to observe the laws and regulations could, in certain cases, render the passage non-innocent. The observance of such laws and regulations cannot be required without limit. It may be argued that a foreign ship shall comply with the laws and regulations of the coastal State to the extent that this compliance may not prohibit innocent passage.⁸²³

II. Duty of Continuousness and Expeditionousness

As provided for in art. 18 of UNCLOS, foreign ships on innocent passage shall pass through the territorial sea continuously and expeditiously except in the case of certain specified constellations. The requirement of continuousness and expeditionousness constitutes a substantial duty of foreign ships on innocent passage. Any violation of this duty, e.g. hovering or cruising in the territorial sea, would render a voyage to be non-passage. Therefore, foreign ships on that voyage may not rely on the right of innocent passage.

III. Duty of Refraining from Engaging in Non-innocent Activities

It is self-evident that foreign ships shall refrain from being involved in any of the activities enumerated in art. 19(2) of the Convention if the ships want to remain on innocent passage. Arguably, foreign ships intending to exercise the right of innocent passage shall be free of anything that would be prejudicial to the peace, good order or security of the coastal State. This is also an essential duty. The breach of it would undoubtedly strip the ship of its right of innocent passage, as discussed in Section E.III.2. above.

⁸²² Observations of art. 6 of the Draft Articles on territorial sea at the Hague Conference, LON Doc. C. 230. M. 117. 1930.V., 8.

⁸²³ O’Connell/Shearer, *The International Law of the Sea* (1984), vol. I, 269.

IV. Duty of Navigation on the Surface and Showing the Flag

UNCLOS requires that submarines and other underwater vehicles navigate on the surface and show their flag.⁸²⁴ As CTS 1958 did, UNCLOS puts the relevant provision in the subsection of rules applicable to all ships. It means that the provision is equally applicable to military as well as commercial submarines and other underwater vehicles.⁸²⁵ However, as a matter of fact, most submarines and similar crafts are, at least presently, operated for non-commercial purposes.

Unlike in CTS 1958 where the provisions for submarines and that on the meaning of innocent passage were placed in the same article, they are separated in two articles in UNCLOS.⁸²⁶ Besides, the expression "are required", which is derived from the ILC draft of 1956 and repeated in both CTS 1958 and UNCLOS, is unusual in a legal text of this nature. The English version appears to leave it open that coastal States may decide to give up this requirement.⁸²⁷ Apart from that, considering the common purpose of passage by such ships, the submerged passage of those ships can be seen, with good reason, as a prejudice to the peace, good order or security of the coastal State. Therefore, it may be maintained that the duty to navigate on the surface and to show the flag is a quite essential duty for submarines and similar craft to claim the right of innocent passage.

V. Duty of Compliance with Sea Lanes and Traffic Separation Schemes

As already discussed, foreign ships on innocent passage through the territorial sea shall comply with local laws and regulations, including those concerning "the safety of navigation and the regulation of maritime traffic"⁸²⁸ and all generally accepted international regulations respecting collision prevention. Art. 22 further develops this duty by purporting that foreign ships shall confine their innocent passage to the designated sea lanes and traffic separation schemes established by the coastal State in accordance with the Convention.⁸²⁹ Generally speaking, this

⁸²⁴ Art. 20 of the Convention.

⁸²⁵ The ILC commented in 1956: "Under the 1955 draft, the provision in paragraph 5 was inserted in the sub-section on warships. It has been transferred to the general sub-section in order to make it equally applicable to commercial submarines, if these ships are ever re-introduced." [1956] II *YBILC* 273.

⁸²⁶ I. e. arts. 19 and 20 of the Convention.

⁸²⁷ The other versions of the Convention sound more compulsory. See Nandan/Rosenne, *A The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 183.

⁸²⁸ Art. 21(1)(a) UNCLOS.

⁸²⁹ The sea lanes and traffic separation schemes are, in particular, applicable to tankers, nuclear-powered ships and other ships of a dangerous nature. See art. 22(2) of the Convention.

duty is already covered by the duty to observe the laws and regulations. But it has been singled out on account of its practical significance.⁸³⁰

The right of innocent passage does not mean that foreign ships may roam about or wander through the territorial sea. Consequently, it is a duty for foreign ships to abide by the sea lanes and traffic separation schemes, as may be duly designated or prescribed by the coastal State. However, it is unclear from the provisions of the Convention what the consequences of a breach of this duty are. A minor breach thereof should not lead passage of a foreign ship to non-innocence, while a flagrant one would. Further, the passage of any tankers, nuclear-powered ships and ships of a dangerous nature which meanwhile commit an infraction against the said schemes would more likely be judged as non-innocent in comparison to other ships.

Finally, it is true that art. 22 is intended to deal with foreign ships on innocent passage. In practice, however, for the sea lanes and traffic separation schemes to be effective in promoting the safety of navigation, they should be likewise applicable to domestic ships. Otherwise there is the fear that the system will not work satisfactorily.⁸³¹

VI. Duty of Ships with Highly Dangerous Characteristics

Unlike any earlier treaty or draft, UNCLOS establishes an additional duty in art. 23 for foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances. It requires that these ships "carry documents and observe special precautionary measures established for such ships by international agreements".

However, the documents and measures are not specified in the article. Furthermore, it is unclear what is exactly meant by "international agreements". A German (FRG) proposal to add the words "generally accepted" before "international agreements" failed to be adopted at UNCLOS III.⁸³² Then there is the question of whether a ship shall carry documents and observe special measures as provided for in international agreements to which the flag State of the ship is not a party.⁸³³ The answer appears to be affirmative in the interests of the international community. Logically, the documents issued by non-parties to the relevant international agreements should be recognized as such for the purpose of art. 23, so long as they live up to the international standards established by the said agreements.

⁸³⁰ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 206 ff.

⁸³¹ Similar view of Nandan/Rosenne, *ibid.*, at 212.

⁸³² *Ibid.*, at 219.

⁸³³ Generally, it is held that, under art. 23, the responsibility to ensure compliance with this duty lies with the flag State. Nandan/Rosenne, *ibid.*, at 220. Another topic is whether the coastal State is entitled to verify compliance therewith in the territorial sea.

Despite the vague wording used in the Convention, “international agreements” here may well include SOLAS 1974, where certain documents and precautionary measures are set out.⁸³⁴ The annex to the convention also includes a chapter (VIII) on nuclear ships, which, *inter alia*, makes provision for a special form of Safety Certificate.⁸³⁵ Some of these documents are furnished by MARPOL 73/78, such as International Oil Pollution Prevention Certificate, Shipboard Oil Pollution Emergency Plan, International Pollution Prevention Certificate for the Carriage of Noxious Liquid Substances in Bulk and Shipboard Marine Pollution Emergency Plan for Noxious Liquid Substances.⁸³⁶

Reasonably, several IMO codes should be counted in the category as well, including the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC), the Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC), the International Maritime Dangerous Goods (IMDG) Code, the Code of Safety for Nuclear Merchant Ships and the International Safety Management (ISM) Code. While some IMO codes have become binding on State Parties,⁸³⁷ it may be claimed that art. 23 would generally upgrade other IMO codes concerning the requirements of documents and special precautionary measures that are normally of a non-mandatory nature.

The duty to carry documents and to observe precautionary measures is seen as an elusive duty for foreign ships *vis-à-vis* a coastal State. It is difficult for the coastal State to ascertain, without any interference with the passage, whether the ships in question have duly carried out their duty. The possibility to stop ships and to check documents as well as the measures required will be dealt with in the next Part of the dissertation. However, it is necessary to point out, at this stage, that the innocent passage of a ship in the category concerned may hardly be denied, even though it is found to have breached the duty to carry the necessary files and to comply with the special precautionary measures.

Additionally, these ships can be made subject to a duty to notify the specified information to the competent authorities of coastal/port States. In the case of

⁸³⁴ Regulations 12, 13 and 16 of the Consolidated Text of the Annex to the 1974 SOLAS Convention, *SOLAS Consolidated Edition 2001*, IMO (2001), 29 ff.

⁸³⁵ Brown, *The International Law of the Sea* (1994), 60; for further details, see Henry, *The Carriage of Dangerous Goods by Sea* (1985), 92 ff.

⁸³⁶ See Regulations 5, 26 of Annex I and Regulations 12, 16 of Annex II to MARPOL 73/78, *MARPOL 73/78 Consolidated Edition 2001*, IMO (2001), 53, 109.

⁸³⁷ The ISM Code became mandatory under SOLAS 1974 on 1 July 1998 for, *inter alia*, oil tankers, chemical tankers, gas carriers and bulk carriers. Available at: <<http://www.imo.org/HOME.html>> (last visited: September 1, 2002); Similarly, several other IMO codes, such as the IBC-Code and the IGC-Code of 1983, have been made mandatory after being incorporated in MARPOL 73/78 through “tacit acceptance” procedure. The codes can also be made mandatory in national legislation as was done in Germany with regard to the IMDG Code. Lagoni, ‘Die Internationale Seeschiffahrts-Organisation (IMO) als Rechtsetzungsorgan’ in Ehlers/Erbguth (Hrsg.), *50 Jahre Vereinte Nationen – Tätigkeit und Wirken der Internationalen Seeschiffahrts-Organisation (IMO)* (1997), *Rostocker Schriften zum Seerecht und Umweltrecht*, Band 2, 50 ff.

infringement, the ship concerned may face certain punishments, such as controls and fines in port.⁸³⁸

VII. Duty to Pay for Specific Services

The levying of passage tolls in coastal waters had been a contentious issue since as early as the 15th century. At the end of the 19th century it came gradually to be acknowledged that coastal States might not subject foreign shipping in the territorial sea to the payment of tolls.⁸³⁹ In *Schücking's* draft, it was stated that "within the territorial waters no dues of any kind may be levied, except dues intended solely to defray expenses of supervision and administration".⁸⁴⁰ So charges might, under the draft, be levied even for general services such as lighthouse maintenance. Nevertheless, the negotiations at the Hague Codification Conference appear to have led to a majority view on this topic that charges on foreign commercial ships should only be allowed as the payment for specific services rendered to the ships. The view was fully carried into the final Hague draft on the territorial sea. Art. 7 of the draft ran as follows:

No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

Charges may be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination.⁸⁴¹

Although it was not uncontested, the text survived almost verbatim into art. 18 of CTS 1958 which, in turn, has been taken over as art. 26 of UNCLOS.

Art. 26 of UNCLOS excludes any charges in respect of navigation itself. In this sense, it can be seen as the limitation to the coastal State's competence in this respect. Nevertheless, the article also establishes, indirectly, a duty to pay for specific services for foreign ships on innocent passage through the territorial sea if the coastal State so requires, given that the purpose of art. 26 of UNCLOS is

⁸³⁸ Lagoni, 'Vorsorge gegen Schiffsunfälle im Küstenvorfeld: Gemeinschaftliches Schiffsmeldesystem und Hafenzugang im Notfall' [2001] 7/8 *Transportrecht* 284 ff; Pursuant to the Directive 2002/59/EC, all ships with dangerous and polluting goods bound for or leaving a port of a Member State, irrespective of their size, shall notify the relevant information to the competent authorities as required. Furthermore, Member States shall lay down sanctions for any breach and take "all the measures necessary to ensure that those sanctions are applied". arts. 13, 25(2) of the Directive, O.J. 2002 L 208/10.

⁸³⁹ See more discussion by O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 837 ff.

⁸⁴⁰ See art. 10 of the draft, LON Doc. C.196.M.70.1927.V., 193; Rosenne (ed.), *League of Nations Conference for the Codification of International law [1930]* (1975), vol. II, 411.

⁸⁴¹ Art. 7 of the Hague draft on the territorial sea, LON Doc. C. 230. M. 117. 1930. V., 8.

actually to allow payment to be demanded for specific services rendered to ships.⁸⁴²

For the smooth application of art. 26, the main task would be to distinguish between general and specific services. General services include those that are basically provided for any ships passing by, such as lighthouse erection, buoyage placement, operation of other navigational aids, safety management and supervision, including VTS. On the other hand, specific services are those directed at a particular ship or ships, for example, pilotage – regardless of whether compulsory or not – towage, pushing services, urgent repairing, salvage, provision of necessities, particular weather forecasting, waterway dredging for given ships, etc. Apart from that, it is unclear from the provision whether the beneficiaries of navigational aids, namely, foreign ships, should somehow contribute to the maintenance thereof, insofar as concerns the territorial sea itself. Anyhow, there is no reason to dispute any arrangement similar to that provided for by the Convention for the straits used for international navigation.⁸⁴³

It may be implied in art. 26 that any payment for specific services rendered should be reasonably commensurate with the cost of providing such services. Furthermore, charges cannot be virtually transformed into a disguised tax on mere passage that would contradict art. 26(1).⁸⁴⁴

Again, a question here may be whether failure of foreign ships to pay for specific services rendered affects the right of innocent passage as such. It has been argued that there must be a positive link between innocent passage and the payment of due charges for specific services, given the fact that art. 26 is put in Section 3 of Part II of the Convention, which exhaustively regulates the right of innocent passage.⁸⁴⁵ However, the failure to pay should not compromise the right of innocent passage, notwithstanding that the coastal State or service provider can, without question, make claims in other ways than disrupting the ongoing innocent passage. The existence of art. 26 in Section 3 reveals nothing more than the fact that foreign ships, even though on innocent passage, have the duty to pay charges for the specific services accepted. In practice, nevertheless, international law constrains no service provider from exercising its lien on foreign ships or taking other appropriate measures to guarantee payment on the basis of private law.

⁸⁴² [1956] II YBILC 274.

⁸⁴³ Art. 43 encourages user States and bordering States to co-operate in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements to aid international navigation.

⁸⁴⁴ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 236.

⁸⁴⁵ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 177. He further held that the opinion is quite tenable, taking into account the legislative history of the provision.

G. Duties of Coastal States

Coastal States enjoy territorial jurisdiction over the territorial sea and thus may exercise various rights over foreign ships on innocent passage through the territorial sea. On the other hand, coastal States are also subject to several duties towards foreign ships exercising the right of innocent passage.

I. Duty of Abstention

As rightly pointed out by an eminent author, it is all too easy in international affairs for a State to recognize the existence of a right but to frustrate its exercise by acts which may respect the letter of the right but ignore its spirit.⁸⁴⁶ Under this background, art. 24(1) of UNCLOS is designed to eliminate such loopholes by declaring that:

The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

...

The above provision establishes a duty for the coastal State not to hamper the innocent passage of foreign ships except as otherwise regulated in the Convention. It is desirable to take a glimpse at its evolution in order to get a better understanding on it.

This duty came to light, for the first time, in the draft articles on the territorial sea at the 1930 Hague Codification Conference as the only duty of the coastal State then. Art. 4 stipulated that: "A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea."⁸⁴⁷ The provision, essentially in a negative or prohibitory tone, was purported to impose a strong restriction on the wide-ranging powers of the coastal State.

In comparison, the ILC formulated a much more burdensome duty for the coastal State in its 1956 draft, as article 16(1) prescribed:

The coastal State must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other States.⁸⁴⁸

The formulation confirmed the main principles upheld by the ICJ in the *Corfu Channel* case (UK v. Albania) in 1949.⁸⁴⁹ It has to be said that the attempt to

⁸⁴⁶ Brown, *The International Law of the Sea* (1994), 60.

⁸⁴⁷ Report of the Second Committee, LON Doc. C. 230. M. 117. 1930.V., 7.

⁸⁴⁸ [1956] II *YBILC* 273.

⁸⁴⁹ See Commentary (1) on art. 16, *ibid.*

simply copy the principles established in a case into a convention proved premature and unrealistic. At UNCLOS I, this draft provision met with strong opposition from the majority of States, because of the fear that the coastal State would be overburdened by international responsibilities that had never before been contemplated. Finally, CTS 1958 took an approach similar to that of the 1930 Hague formula by succinctly stating that: "The coastal State must not hamper innocent passage through the territorial sea."⁸⁵⁰

The tough regulation in CTS 1958 did not mean that the coastal State may not hamper innocent passage in any case. Some lawful utilizations of the sea by the coastal State could divert the innocent passage of foreign ships. What is important is that some key waterways, channels and sea lanes should be preserved for innocent passage. The contention was somehow reflected also in the ILC commentary on art. 16 of its 1956 draft.⁸⁵¹

Compared with the 1930 Hague solution and the formula in CTS 1958, art. 24(1) of UNCLOS is more sophisticated. In the meantime, the duty of abstention of the coastal State has been considerably weakened in art. 24(1) by a qualifying expression "except in accordance with this Convention". In comparison, there was no such qualification with the other two instruments. Consequently, the right of innocent passage under the new regime may be subject, in practice, to the other rules embodied elsewhere in the Convention, such as suspension of innocent passage, civil and criminal jurisdiction and environmental protection.

In addition, the interpretation of "practical effect of denying or impairing the right of innocent passage" could be different and controversial. In fact, even sound requirements may result in denying or impairing the effect on certain foreign ships, especially substandard ships. So the interpretation depends upon the specific circumstances concerned.

II. Duty of Non-discrimination

Art. 24(1)(b) of UNCLOS prohibits discrimination in the application of the Convention and any duly adopted laws and regulations by providing that:

... the coastal State shall not:

(a) ...

(b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

Here the prohibited discrimination falls into two types: discrimination against the nationality of ships and that against the State of departure, State of destination or

⁸⁵⁰ Art. 15(1) CTS 1958.

⁸⁵¹ "If they hamper innocent passage, installations intended for the exploitation of the seabed and subsoil of the territorial sea must not be sited in narrow channels or in sea lanes forming part of the territorial sea and essential for international navigation." [1956] II *YBILC* 273.

State owning the cargoes. By the terms of “in form or in fact” the provision covers both overt (legal) and covert (factual) discriminatory acts.

At UNCLOS III, the question was raised of the relationship between the enforcement of embargoes as well as other sanction measures adopted by the UN and the prohibition of discrimination in art. 24(1)(b). It is broadly held that such enforcement is not at variance with the duty of non-discrimination of the coastal State, because the obligations derived from the UN Charter prevail legally over that from UNCLOS.⁸⁵²

In this connection, attention needs to be paid to some cases in which special treatment, granted by one State to another or some other States, may be fully justified on the basis of bilateral or multilateral treaties. For that reason, as the ILC prepared its 1956 draft, it ignored the corresponding provision of the draft articles at the Hague Conference that actually called for both general MFNT and national treatment.⁸⁵³ This approach was carried over into CTS 1958. Therefore, despite art. 24(1)(b), the grant of a special treatment based upon bilateral navigation treaties or that within the EC cannot be invoked by other States as a ground for claiming the same treatment, failing a stipulation in the treaty to the contrary. Such special arrangements between/among States are not considered in violation of the general duty of non-discrimination among foreign ships.

Another point that can be made here is that the rule of nondiscrimination embodied in art. 24(1)(b) refers to foreign ships only.⁸⁵⁴ First, the said rule is one part of the whole regime of innocent passage through the territorial sea that merely concerns foreign ships. Secondly, considering the liberalization status of international maritime transport, it can scarcely be conceived that the said provision in the Convention was intended to extend national treatment to any foreign ships in the application of the Convention or of any properly adopted laws and regulations of the coastal State. So the reasonable conclusion may be that the provision of art. 24(1)(b) covers only foreign ships as unequivocally stated in art. 25(3).⁸⁵⁵

Besides art. 24(1)(b), the rule of nondiscrimination is underlined in art. 25(3), art. 26(2) and art. 227 in so far as the right of innocent passage is concerned.

⁸⁵² Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 227.

⁸⁵³ “The Coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.” art. 6(2) of the draft articles on the Legal Status of the Territorial Sea, Report of the Second Committee, LON Doc. C. 230. M. 117. 1930.V., 7.

⁸⁵⁴ A converse view was held by Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 226.

⁸⁵⁵ “The coastal State may, without discrimination in form or in fact among *foreign ships*, ...” (emphasis added), art. 25(3) of the Convention.

III. Duty of Information

The duty of information was first established in the *Corfu Channel* case in 1949. In the judgment of the case, the ICJ held that the coastal State was under an obligation to inform foreign ships of any danger to navigation within its territorial sea if it had knowledge thereof.⁸⁵⁶ Apart from that, this duty was also recognized later in CTS 1958, when it stated that:

The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.⁸⁵⁷

The duty has been subsequently absorbed in UNCLOS with a minor wording alteration.⁸⁵⁸ The duty of information should be understood as not beyond the appropriate publishing of relevant information. It does not imply that the coastal State is obliged to ensure the safety of navigation by, *inter alia*, investigating wreckages in the territorial sea and removing them at its own expense. However, the coastal State is expected to maintain some basic navigational aids and the like essential for ordinary shipping activities, such as lighthouses and a rescue capability.

Under UNCLOS, the duty of information as a whole comprises, besides the above, still other elements. Art. 16(2) requires the coastal State to give due publicity to the limits of the territorial sea, while art. 21(3) lays down a duty on the coastal State to furnish due publicity of all adopted laws and regulations. Likewise, such “due publicity” is prescribed in art. 22 and art. 25(3), respectively, with regard to the sea lanes and traffic separation schemes and the suspension of innocent passage in the territorial sea. Among these elements in the duty of information, one remarkable inconsistency lies in the fact that the term “appropriate publicity” is employed in art. 24(2), whereas in all other places the expression “due publicity” is used or meant. At any rate, the word “due” contains more legal requirement than that of “appropriate”, for the former may mean *proper* and *adequate* while the connotation of the latter depends on the specific circumstances. The requirement of “appropriate” can be deemed satisfied if the publicity given is proportionate to the knowledge the coastal State has so far. It appears that such a formulation has been designed to protect the coastal State from any dispute concerning responsibility due to poor publicity of any danger to navigation.⁸⁵⁹

The goal of publicity can be achieved only if the published information reaches the States, authorities and persons concerned. In this context, without excluding other proper means, publicity may well be carried out through the UN

⁸⁵⁶ The *Corfu Channel* case, [1949] *ICJ Reports* 22.

⁸⁵⁷ Art. 15(2) of CTS 1958. Noticeably, another duty of the coastal State as held by the ICJ in the same case, namely, “not to allow knowingly its territory to be used for acts contrary to the rights of other States”, was not taken in by CTS 1958.

⁸⁵⁸ “The coastal State *shall* give appropriate publicity to any *danger* to navigation ...” (emphasis added), art. 24(2) UNCLOS.

⁸⁵⁹ Hasselmann, *Freiheit der Handelsschifffahrt* (1987), 284.

and its special agencies like the IMO, which keeps the most direct and effective contact with the shipping authorities of States.⁸⁶⁰

IV. Conclusion

The above analysis may show that the duties of the coastal State envisaged for limiting the powers of the same state are of a general and preventive nature. On the one hand, they will withhold some unreasonable interference with innocent passage given their deterring effect. On the other, it has to be admitted that the duties are far from sufficient to counterbalance the numerous rights that the coastal State may enjoy and exercise over foreign ships on innocent passage. What is more, in practice it is difficult to identify whether these duties have been adequately carried out, or even breached.

In addition to these specific duties, the coastal State is no doubt subject to all other general rules of international law that may apply within the context of the right of innocent passage, such as the prohibition of abuse of right, non-discrimination, the requirement of proportionality and the rule of peaceful settlement of disputes.

⁸⁶⁰ See Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization (IMO), Study by the Secretariat of IMO, Doc. LEG/MISC/1, 1986, para. 130; Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 227.

Part 4: Jurisdiction over Foreign Merchant Ships in the Territorial Sea

A. Introduction

The contradistinction of coastal State jurisdiction over foreign ships in the territorial sea to that in internal waters lies basically in the fact that in the territorial sea the regime of innocent passage constitutes a limitation on coastal State jurisdiction.⁸⁶¹ On the other hand, foreign merchant ships in the territorial sea, even those on innocent passage, are still subject to coastal State jurisdiction, that may be roughly broken down into legislative jurisdiction and enforcement jurisdiction. Under the latter fall administrative jurisdiction, criminal and civil jurisdiction. On account of the increasing importance of marine environmental protection, coastal State enforcement jurisdiction concerning the marine environment, which will be dealt with separately later in the Part, deserves special attention as well.

At the same time, international law mainly embodied in UNCLOS has placed certain legal limits upon coastal State jurisdiction over foreign ships in the territorial sea. Therefore, the main purpose of this Part is to find out what discretion coastal States may enjoy in exercising their various kinds of jurisdiction in the territorial sea without incapacitating the right of innocent passage of foreign ships.

B. Legislative Jurisdiction: Competence to Regulate

I. General

Legislative jurisdiction refers to the power of coastal States to adopt laws and regulations for their territorial sea that has long been recognized in international law. This right springs from the sovereignty that coastal States have over the

⁸⁶¹ Normally such a limitation does not exist in internal waters. There are, however, some exceptional cases according to art. 8(2) of UNCLOS.

territorial sea.⁸⁶² In contrast to the enforcement jurisdiction accorded to coastal States, the legislative jurisdiction of the same States tends to be much broader. In other words, coastal States can in principle adopt rules in respect of any activities and matters of foreign ships in the territorial sea, as long as there is no express prohibition in international law. Nonetheless, the international community has long since spared no efforts to establish the common denominator for the legislative jurisdiction of coastal States over foreign ships on the international plane, given the background of the need for facilitating international navigation and trade that lie in the interests of all States. The achievements of that process so far are seen in UNCLOS.

Under the international law of the sea, the legislative jurisdiction of coastal States is generally exercised at three different levels. It can be firstly assumed at the international level. The conclusion of international conventions with relevance to the territorial sea, such as CTS 1958, UNCLOS and many IMO conventions or protocols, may well demonstrate the exercise of legislative jurisdiction by States in this sense. Under UNCLOS this jurisdiction is confirmed anew, *inter alia*, in art. 211(1).⁸⁶³ Secondly, legislative jurisdiction can be exercised at regional level. In this sense, the emergence of ten regional conventions with respect to marine environment protection under the UNEP Regional Seas Programme may illustrate this kind of legislative jurisdiction.⁸⁶⁴ In pursuance of art. 123 of UNCLOS, States bordering an enclosed or semi-enclosed sea are required to conduct regional co-operation on maritime issues that, needless to say, include legislative arrangements bearing on foreign shipping. arts. 194 and 197 of the Convention point likewise towards the legislative competence of coastal States over foreign ships at regional level.⁸⁶⁵ Lastly, the legislative jurisdiction is, most commonly, brought

⁸⁶² In Churchill/Lowe's view, the extent of the legislative jurisdiction of coastal States depends on the perception of the legal nature of the territorial sea. See *The Law of the Sea* (1999), 92.

⁸⁶³ "States, ... , shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and Such rules and standards shall, in the same manner, be re-examined from time to time as necessary." art. 211(1) UNCLOS.

⁸⁶⁴ They are: Barcelona 1976 (Mediterranean), Kuwait 1978 (Persian Gulf), Abidjan 1981 (West and Central Africa), Lima 1981 (South-East Pacific), Jeddah 1982 (Red Sea), Cartagena 1983 (Wider Caribbean), Nairobi 1985 (Eastern Africa), Noumea 1986 (South Pacific), Bucharest 1992 (Black Sea) and Antigua Guatemala 2002 (North-East Pacific). Available at: <<http://www.UNEP.ch/seas/main/hconlist.html>> (last visited: December 30, 2002).

⁸⁶⁵ Art. 194 (1) reads: "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment ..., and they shall endeavour to harmonize their policies in this connection." Art. 197 provides that: "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organization, in formulating and elaborating international rules, standards and recommended practices and procedures ..., taking into account characteristic regional features."

into play at national level. As far as the territorial sea proper is concerned, arts. 21, 22, 211(3) and (4) have a direct bearing on the national legislation of coastal States in the relevant fields.

II. Scope of Regulation

It may be asserted that, at global or regional level, the legislative jurisdiction of coastal States over foreign ships in the territorial sea is not restrained so long as its exercise does not run against existing international law. Therefore, the ensuing discussion focuses primarily on the question of how far the regulatory power of coastal States may go at the national level.

1. UNCLOS

The provisions dealing with coastal State legislative jurisdiction over foreign shipping in the territorial sea are basically incorporated in Part II and Part XII of UNCLOS. To achieve that, however, many efforts had already been made long before.

The efforts began, at the latest, at the 1930 Hague Codification Conference. The Hague Draft contained an article requiring foreign ships to comply with the laws and regulations enacted in conformity with international usage by coastal States, in particular, those regarding maritime navigation, pollution prevention and resources protection in the territorial sea.⁸⁶⁶ From the wording of the article, it may be implied that coastal States had legislative jurisdiction over foreign ships in the territorial sea, at least, over those matters listed therein. Nonetheless, no specific limitation could be inferred from the article or elsewhere in the draft on the scope of national regulation, whilst some general duties of coastal States were laid down, such as respect of innocent passage and non-discrimination, etc.⁸⁶⁷

⁸⁶⁶ "Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the Coastal State, and, in particular, as regards:

- (a) the safety of traffic and the protection of channels and buoys;
 - (b) the protection of the waters of the Coastal State against pollution of any kind cause by vessels;
 - (c) the protection of the products of the territorial sea;
 - (d) the rights of fishing, shooting and analogous rights belonging to the Coastal State."
- Art. 6(1) of the Hague Draft. See Report of the Second Committee, LON Doc. C.230. M. 117.1930.V., 7.

⁸⁶⁷ Art. 4(1) read: "A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea." Art. 6(2) stated that: "The Coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor save in matters relating to fishing and shooting, between national and foreign vessels." Art. 7(2) went further to stress that: "These charges shall be levied without discrimination." *Ibid.*, at 7 f.

The ILC adopted a similar formula in its 1956 draft, where the laws and regulations relating to “transport and navigation” were particularly put in the foreground.⁸⁶⁸ To further clarify the connotation of these laws and regulations relating to “transport and navigation”, the ILC worked out a list of examples over which the coastal State might be entitled to adopt laws and regulations. That list included:

- (a) the safety of traffic and the protection of channels and buoys;
- (b) the protection of waters of the coastal State against pollution of any kind caused by ships;
- (c) the conservation of the living resources of the sea;
- (d) the rights of fishing and hunting and analogous rights belonging to the coastal State;
- (e) any hydrographical survey.⁸⁶⁹

In addition, the Commission made references to additional examples of the above list in the Commentary. They were: use of the national flag, use of the route prescribed for international navigation, observance of rules relating to security and of customs as well as health regulations.⁸⁷⁰ However, the Commission considered such a list open-ended and decided to merely mention them in the Commentary without including them in the draft article itself.

The draft article 18 of the ILC was eventually carried over as art. 17 of CTS 1958 with minor alterations. As a result, it was still unclear whether any limitations *ratione materiae* on the legislative jurisdiction of coastal States were implied under CTS 1958.⁸⁷¹

The ambiguity regarding coastal State legislative competence was not allowed to persist under UNCLOS. Art. 21 of the Convention unequivocally circumscribes, although in a permissive tone in the first paragraph, the scope of laws and regulations that coastal States may enact by exhaustively enumerating the matters being covered. It reads as follows:

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of maritime traffic;
 - (b) the protection of navigational aids and facilities and other facilities or installations;
 - (c) the protection of cables and pipelines;
 - (d) the conservation of the living resources of the sea;
 - (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;

⁸⁶⁸ “Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.” Art. 18 of the ILC’s 1956 draft. [1956] II *YBILC* 273 f.

⁸⁶⁹ Paragraph (2) of the Commentary on draft art. 18, *ibid.*

⁸⁷⁰ Paragraph (3) of the Commentary on draft art. 18, *ibid.*

⁸⁷¹ Churchill/Lowe, *The Law of the Sea* (1983), 94.

- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
 - (g) marine scientific research and hydrographic surveys;
 - (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.
2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards.

It may suffice to say that, for States that are Parties to the Convention, the exercise of legislative jurisdiction at the national level is subject to the scope as prescribed above. Furthermore, as in some other places in the Convention, here one sees anew the delicate balance between the interests of international navigation and the right of coastal States to regulate the passage of foreign ships in the territorial sea. Although only a handful of acts are included in art. 19(2), the coastal State may regulate the innocent passage on a wide range of matters under art. 21(1). Nevertheless, the regulation must be in conformity with the Convention and other rules of international law. Among the listed matters, Paras. 1(a) and (b) concern navigation, maritime traffic and facilities or installations,⁸⁷² while Para. 1(c) relates to both the maintenance of communication systems (cables) and the preservation of the marine environment (pipelines).⁸⁷³ Paras. 1(d) and (e) cover primarily fishery issues, whereas Paras. 1(g) and (h) refer to art. 245, which accords the coastal State an exclusive right to regulate, authorize and conduct marine scientific research in its territorial sea, and to customs, fiscal, immigration or sanitary matters.

The relationship between art. 21(1) and art. 19(2) merits further elaboration. The activities listed in art. 19(2) are against the interests of the coastal State and thus make passage of a foreign ship non-innocent. However, art. 19(2) *per se* does not, except Item (g), shed any light on whether the activities are illegal in the context of local legislation, despite the presumption to that effect. This task is left to art. 21(1), according to which the coastal State may adopt relevant laws and regulations wherein those activities may be duly proscribed. Art. 21(1) covers a broad range of matters, including those dealt with in art. 19(2). It should be made clear that violation of art. 19(2) will render passage of a foreign ship non-innocent. On the other hand, violation of national legislation adopted under art. 21(1) does not necessarily lead to non-innocence, although the ship involved in the violation may be subject to penalties imposed by the coastal State.

Particularly noteworthy is Para. 1(f), which is echoed in art. 211. However, while art. 211(4) points merely to "marine pollution", Para. 1(f) of art. 21 refers generally to the "the environment of the coastal State" indicating that the competence of the coastal State may go beyond that for the marine environment or

⁸⁷² General concepts like "navigation" and "maritime traffic" can be taken as covering compulsory pilotage, ship reporting systems, vessel traffic services as well as routing systems, including sea-lane designation and traffic-separation schemes.

⁸⁷³ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 200.

marine pollution. Furthermore, Para. 1(f) is also linked to art. 192, which outlines the general obligation to protect and preserve the marine environment, and to art. 194, obliging States Parties to take all measures at their disposal to prevent, reduce and control pollution of the marine environment. From the prescription of the latter articles, the legislative competence of coastal States can well be extrapolated. Additionally, the existence of enforcement jurisdiction of coastal States in respect of the marine environment in the territorial sea⁸⁷⁴ clearly presupposes the existence of correspondent legislative jurisdiction. The importance of international cooperation in the exercise of legislative jurisdiction regarding the marine environment is stressed in arts. 197 and 211(1).

Noticeably, the primacy of generally accepted international rules and standards in design, construction, manning or equipment (DCME) is also underlined in the Convention. According to art. 21(2), national laws and regulations may not affect the DCME of foreign ships through the territorial sea unless they correspond with generally accepted international rules and standards.⁸⁷⁵ Obviously, this novel and significant restriction on the prescriptive power of coastal States reflects a basic concept incorporated throughout the Convention, i.e. trying to protect the integrity of global maritime navigation and to minimize interference with it by coastal State jurisdiction. In this context, the rule of reference “generally accepted international rules and standards” primarily concerns the legislative jurisdiction of coastal States. It thus represents “a facultative maximum”,⁸⁷⁶ aimed at safeguarding the primacy of international rules and standards over national laws and regulations in DCME matters. It may be safe to state that the answer to the question of what are generally accepted international rules and standards depends essentially upon the degree of international acceptance of those rules and standards, namely, upon State practice.⁸⁷⁷ To this end, “generally accepted international rules and standards” would seem to basically imply those established in the conventions of the IMO, notably SOLAS 1974 and STCW 1978. Nonetheless, some provisions in ILO 147 may also be relevant in this regard.

Notwithstanding the limitation placed on coastal States in DCME legislation, it was argued that incidental and minor effects on DCME standards would seem permitted under international law, unless the legislation concerned is actually a

⁸⁷⁴ See art. 220(2) UNCLOS.

⁸⁷⁵ Art. 21(2) reads: “Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards.”

⁸⁷⁶ See ‘Conclusion No. 1: The Purpose of the Concept of Generally Accepted International Rules and Standards in the Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000)’ in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction, The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (2001), 105 f.

⁸⁷⁷ Cf. views of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution, *ibid.*, at 107, 113.

détournement de pouvoir or promulgated for the purpose of imposing more stringent domestic DCME standards.⁸⁷⁸

Apart from the above, arts. 22 and 23 of UNCLOS may add some new elements to legislative jurisdiction in the marine environment despite the presence of arts. 21(1)(a) and (f). But they do not relate to art. 19(2). In other words, the breach of arts. 22 and 23 *per se* does not necessarily make passage of a foreign ship non-innocent. Art. 25 refers virtually to the enforcement power of coastal States. However, it is closely related to art. 21(1) in so far as rules on the identification of non-innocent passage, measures to be taken to prevent it and procedures, setting of port entry conditions, verification of conformity and prevention in case of breach, as well as rules on temporary suspension of innocent passage are to be established in national legislation under art. 21(1). In the same vein, charges levied on foreign ships for specific services rendered in the territorial sea can well be a regulatory subject in domestic enactments in pursuance of art. 21(1).⁸⁷⁹

From the above discussion, it is clear that coastal States enjoy wide-ranging prescriptive jurisdiction under UNCLOS. However, art. 21(1) should be read in conjunction with art. 24. The requirements laid down in the national statutes adopted under art. 2(1) shall not hamper the innocent passage of foreign ships through the territorial sea unless otherwise provided in UNCLOS.⁸⁸⁰

2. Other regulatory conventions

Among many international conventions bearing on coastal State jurisdiction over foreign shipping in the territorial sea, four conventions contain provisions that allow for the adoption of rules and standards applicable to foreign merchant ships.

a) COLREG 1972

In COLREG 1972, the only regulation with a legislative character is found in Rule 1 of Part A. The related part is as follows:

(b) Nothing in these Rules shall interfere with the operation of special rules made by an appropriate authority for roadsteads, harbours, rivers, lakes or inland waterways connected with the high seas and navigable by seagoing vessels. Such special rules shall conform as closely as possible to these Rules.⁸⁸¹

The regulation seems to be intended to confirm the right of coastal States to adopt such special rules basically in internal waters, although no definitions of roadsteads and harbours exist in the provision. Notwithstanding the restrictive wording of Rule 1(b), State practice in establishing such special rules, such as regulations

⁸⁷⁸ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 200.

⁸⁷⁹ Art. 26 UNCLOS allows States to levy charges upon foreign ships for specific services rendered.

⁸⁸⁰ Art. 24(1) UNCLOS.

⁸⁸¹ Cockcroft/Lameijer, *A Guide to the Collision Avoidance Rules* (1996), 3.

on traffic separation schemes,⁸⁸² in the territorial sea appears blameless.⁸⁸³ Apart from that, the proposition is confirmed in the General Provisions on Ships' Routing⁸⁸⁴ and backed up by arts. 21 and 22 of UNCLOS.

b) MARPOL 73/78

The topic of coastal State legislative jurisdiction was addressed during the negotiations of MARPOL 73/78. The consensus found its way in the end into arts. 4 and 9. As far as legislative competence of coastal States is under discussion, mention should first be made of art. 4(2), which states:

Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefore under the law of that Party.

As a result, coastal States Parties are obliged to enact laws and regulations or incorporate new rules into existing legislation in order to prohibit infractions of MARPOL 73/78 and punish those who would be held accountable. To ensure the deterrent effect of national enactments that may vary from one State to another, the penalties prescribed under the law of a State are required to be adequate in severity to discourage violations of the said convention.⁸⁸⁵ Inasmuch as the prescriptive jurisdiction here is confined merely to the prevention and punishment of the violations, coastal States are clearly in no position to unilaterally redefine the violations of the convention, either extending or shrinking the sphere of violations in their legislation.

Besides, the exercise of prescriptive competence in the territorial sea is implicitly subject to the regime of innocent passage, given the qualifying expression "within the jurisdiction". That is to say, sanctions taken against violating foreign ships may not amount to hampering innocent passage unless otherwise permitted under international law.⁸⁸⁶ The term "jurisdiction" is employed by the convention in a dynamic way, since it is to be construed in the light of international law in force at the time of the application or interpretation of the said convention.⁸⁸⁷ By "international law in force" is meant here primarily the provisions of UNCLOS. The reference in this manner is intended to avoid contradiction between the actual assumption of coastal State jurisdiction and existing international law.⁸⁸⁸

⁸⁸² The convention only confirms the authority of the IMO to adopt traffic separation schemes in Rule 1(d) by saying that "Traffic separation schemes may be adopted by the Organization for the purpose of these Rules".

⁸⁸³ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 210. In the Explanatory Note to the 1996 Decree of the Netherlands, which deals with navigation in the territorial sea, express reference was made to Rule 1(b) COLREG 1972, *ibid.*

⁸⁸⁴ It was adopted by the IMO in Resolution A. 572(14).

⁸⁸⁵ Art. 4(4) MARPOL 73/78, *MARPOL 73/78 Consolidated Edition* (1997), 4.

⁸⁸⁶ Art. 24(1) UNCLOS.

⁸⁸⁷ Art. 9(3) MARPOL 73/78, *ibid.*, at 9.

⁸⁸⁸ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 211.

c) SOLAS 1974

SOLAS 1974⁸⁸⁹ deals, *inter alia*, with the establishment of mandatory ships' routing, mandatory ship reporting and vessel traffic services in the territorial sea. No doubt, the adoption of such maritime traffic measures presupposes the exercise of prescriptive jurisdiction by coastal States.

Ships' routing is regulated in Regulation V/10 of the Annex to SOLAS 1974, which was incorporated in 1994. It reads:

1. Ships' routing systems contribute to safety of life at sea, safety and efficiency of navigation, and/or protection of the marine environment. Ships' routing systems are recommended for use by, and *may be made mandatory* for, all ships, certain categories of ships or ships carrying certain cargoes, when adopted and implemented in accordance with the guidelines and criteria developed by the Organization.

...

4. Ships' routing systems *should be* submitted to the Organization for adoption. However, a Government or Governments implementing ships' routing systems not intended to be submitted to the Organization for adoption or which have not been adopted by the Organization *are encouraged* to follow, wherever possible, the guidelines and criteria developed by the Organization.⁸⁹⁰ (emphasis added)

From the above stipulation it can be inferred that, on the one hand, the regulation tries to underscore the role of the IMO in the establishment of mandatory ships' routing; and on the other it recognizes, though indirectly, the fact that coastal States alone may establish such routing systems as well.⁸⁹¹ This is all the more relevant when the systems are located within the territorial sea. At any rate, coastal States are not obliged to submit such systems in the territorial sea to the IMO for adoption, although they may do so. The view is in line with the provisions in art. 22 of UNCLOS. In this connection, it is necessary to note that, as the same Regulation states, nothing in it shall prejudice the rights and duties of Governments under international law.⁸⁹² Therefore, coastal States may prescribe rules in respect of routing systems within their territorial seas, although the involvement of the IMO in the process can to some extent safeguard uniformity at international level. Consequently, the obligation of ships to use a mandatory ships' routing system as provided for in Para. 7 of the regulation should exist as well

⁸⁸⁹ The latest version entered into force on 1 July 2002 after the December 2000 and May 2002 amendments. Available at: <<http://www.empa-pilots.org/solas5>> (last visited: January 1, 2003).

⁸⁹⁰ *Ibid.*

⁸⁹¹ Among other scholars, Plant holds the contrary position and argues that the approval of the IMO is also necessary for ships' routing systems lying entirely in the territorial sea, even though such an interpretation conflicts with art. 22(3) of UNCLOS. See 'The Relationship between International Navigational Rights and Environmental Protection: A Legal Analysis of Mandatory Ship Traffic Systems' in Ringbom (ed.), *Competing Norms in the Law of Marine Environmental Protection* (1997), 22.

⁸⁹² Para. 10 of Regulation 10, *ibid.*

with regard to mandatory routing systems not adopted by the IMO but following the IMO guidelines and criteria.⁸⁹³

Regulation V/11 of the Annex to SOLAS 1974 focuses on the subject of mandatory ship reporting (MSR) systems. In contrast to the notification requirement in accordance with art. 211(7), the coverage of MSR is believed to be much broader, since it is principally of a proactive nature and designed not only for reporting information in the case of incidents or casualties. Given the considerable similarity between Regulation 10 and Regulation 11, it is reasonable to pay more attention to the differences between the two. Firstly, in Regulation 11 the mandatory character of a ship reporting system is conveyed indirectly by saying that "A ship reporting system, ..., shall be used by all ships, or certain categories of ships or ships carrying certain cargoes..." Secondly, in lieu of the somewhat obligatory term "should be", as is the case in Regulation 10(4), Regulation 11 merely provides that:

Contracting Governments may submit such systems to the Organization for recognition.⁸⁹⁴

On all accounts, it may be suggested that coastal States are entitled to unilaterally establish their MSR systems in the territorial sea on the condition that their operation does not bring about actual hampering of the innocent passage of foreign ships.⁸⁹⁵

The provisions for vessel traffic services (VTS) have been introduced in SOLAS 1974 since 1997. In the present version of the convention, Regulation V/12 handles this issue when it stipulates:

2. Contracting Governments undertake to arrange for the establishment of VTSs where, in their opinion, the volume of traffic or the degree of risk justifies such services.
3. Contracting Governments planning and implementing VTSs shall, wherever possible, follow the guidelines developed by the Organization. The use of a VTS may only be made mandatory in sea areas within the territorial sea of a coastal State.

Here coastal States have a free hand in exercising prescriptive jurisdiction in establishing VTSs where they consider it necessary to do so. Of course, while establishing and developing VTSs, the guidelines of the IMO are to be followed, when practicable, to maintain uniformity in general. Consistent with contemporary international law of the sea, the Regulation reconfirms the rule that a VTS may only be made mandatory within the territorial sea of a coastal State. Nevertheless, the establishment of VTSs should not undercut the regime of innocent passage.

⁸⁹³ Molenaar argues that within the territorial sea, submission to the IMO is to be preferred but not absolutely necessary, in *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 213.

⁸⁹⁴ See Para. 4 of Regulation 11 of the Annex to SOLAS 1974.

⁸⁹⁵ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 214.

d) Basel Convention 1989

The Basel Convention 1989,⁸⁹⁶ which entered into force on 5 May 1992 and boasts about 80 Parties,⁸⁹⁷ serves as the cornerstone in regulating transboundary movement of hazardous wastes and their disposal at international level. It touches upon coastal State jurisdiction to regulate in the territorial sea at several places.⁸⁹⁸ For instance, in art. 4 it stipulates:

2. Each Party shall take the appropriate measures to:

...

(d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and environment against the adverse effects which may result from such movement;

...

4. Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

...

11. Nothing in this Convention shall prevent a Party from imposing additional requirements that are consistent with the provisions of this Convention, ...

Apart from that, coastal States are entitled to introduce appropriate national/ domestic legislation to prevent and punish illegal traffic.⁸⁹⁹ Coastal States have absolute power in defining "hazardous wastes", which is a core term in this context.⁹⁰⁰ Furthermore, art. 6(1) requires the State of export to notify the States concerned, including the States of import and transit. Under arts. 6(3) and (4), transboundary shipping shall not be allowed to commence without the written consent of the States concerned. In this sense, the convention seems to have reshaped international law with respect to the right of innocent passage, that was, before the conclusion of the convention, believed free of any requirement of prior notification or approval. However, the momentum could be considerably reduced by the provisions in art. 4(12) designed to dispel the fears of maritime powers.⁹⁰¹ The relevant evolution in State practice will be looked into later.

⁸⁹⁶ Reprinted in Brown, *The International Law of the Sea, Vol. II Documents, Cases and Tables* (1994), 296 ff.. See also [1989] *ILM* 652.

⁸⁹⁷ Available at: <<http://www.basel.int/about.html>> (last visited: January 3, 2003).

⁸⁹⁸ Geographically it covers "an area under the national jurisdiction of one State" that conspicuously comprises not only the territorial sea, but also the EEZ. See arts. 2(3) and (9) of the Basel Convention 1989.

⁸⁹⁹ Art. 9(5) of the convention.

⁹⁰⁰ Art. 3 of the convention.

⁹⁰¹ Art. 4(12) reads: "Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea ..., and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments."

III. Enforceability of the Regulation

After discussing what matters coastal States may regulate, another question needs to be addressed: whether or not these laws and regulations of coastal States can be enforced against foreign merchant ships on innocent passage.⁹⁰² The question is of direct relevance to the practical effects of legislation by the same States.

The reasonable answer to the question appears to be that, in principle, these laws and regulations ought to be enforced somehow against foreign ships even on innocent passage.⁹⁰³ One cannot expect flag States to help enforce the laws and regulations of different coastal States.⁹⁰⁴ At the same time, it should be pointed out that, in the interest of innocent passage, any enforcement against foreign ships during passage in the territorial sea may be more limited than the laws and regulations may apply. Thus the following discussion will mainly center on how they are enforced, taking account of the regime of innocent passage. To this end, two different constellations, i.e. enforcement in accordance with the express provisions of UNCLOS and enforcement in pursuance of general international law and basic legal doctrines, will be addressed separately to get a complete picture of the enforceability of the laws and regulations of coastal States.

Pursuant to the majority view, interference even with the ongoing innocent passage of foreign merchant ships is, under contemporary international law of the sea, authorized in some cases.⁹⁰⁵ In this connection, arts. 25, 27, 28 and 220 of

⁹⁰² It is self-evident that no problem is posed in international law by any enforcement against those foreign merchant ships not qualified to claim the right of innocent passage, so long as due regard is given to basic rules like non-discrimination, necessity and proportionality.

⁹⁰³ Churchill/Lowe, *The Law of the Sea* (1999), "there is no doubt that States may enforce these laws against foreign ships, whether passing or stationary, in the territorial sea." 97; Hakapää/Molenaar, 'Innocent Passage – Past and Present' [1999] 23 *Marine Policy* 135. While commenting on art. 21(4) of UNCLOS and art. 17 of CTS 1958, they stated that: "Neither text includes explicit authorization of enforcement in the territorial sea but both imply that coastal States shall be able to secure the compliance of foreign vessels with coastal State regulation."; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 167; Observations on draft article 6 of 1930 Hague draft, "Vessels infringing the laws and regulations which have been properly enacted are clearly amenable to the courts of the Coastal State." LON. C. 230. M. 117. 1930.v., 8.

⁹⁰⁴ Arts. 94 and 217 UNCLOS, that deal with flag State jurisdiction, focus merely on compliance with applicable international rules and standards and do not mention laws and regulations of coastal States.

⁹⁰⁵ See the Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000), 87; Hakapää/Molenaar, "Yet, in view of the relevant conventions as well as legal doctrine, in some cases at least, such interference is authorized." In 'Innocent Passage – Past and Present' [1999] 23 *Marine Policy* 135; Nandan/Rosenne submitted that: "Paragraph 1 (of art. 24) recognizes that hampering of innocent passage by a coastal State may occur by virtue of laws and regulations specially directed to that end, and from requirements which are not overtly designed to hamper,

UNCLOS may be cited in support of the view. According to art. 25(2), a coastal State can take necessary steps in the territorial sea to prevent any breach of port entry conditions. Thereby it is implied that the coastal State may interfere with the innocent passage of a foreign ship in that case, since, despite the breach, the foreign ship itself can still be believed on innocent passage in the territorial sea. Furthermore, under arts. 27 and 28, foreign merchant ships passing through the territorial sea could well be made subject to criminal or civil jurisdiction under certain circumstances. Art. 220(2), which regulates coastal State enforcement in the territorial sea with respect to environmental violations, further broadens the scope for coastal States to interfere with the innocent passage of foreign merchant ships.⁹⁰⁶ In all these cases, the hampering of the innocent passage of foreign ships through the territorial sea is allowed as an exception. However, the interference has to stand the test of not having "the practical effect of denying or impairing the right of innocent passage".⁹⁰⁷ To this end, a creative and enlightening submission of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution is found in its final report in 2000 as follows:

While ships in non-innocent passage lose their *right* of innocent passage, violations of coastal laws and regulations only allow *interference with passage*, but not annulment of the right itself. Ships in innocent passage can still be detained and brought into port, although from a legal perspective the right of innocent passage does not cease to exist.⁹⁰⁸ (Emphasis added originally)

Notwithstanding the right of interference as above suggested, coastal States are expected to give due regard to the interests of navigation when taking their interfering measures, especially as far as foreign merchant ships are concerned.

As for those violations against which measures are not explicitly set out in the Convention, enforcement falls into another category. In principle, in these cases, coastal States have a duty not to hamper the innocent passage of foreign ships. Therefore, infringing foreign ships would only be subject to appropriate enforcement measures after they have arrived in ports or other parts of internal waters of coastal States. Apart from this, it appears justifiable for coastal States to interfere with the passage of a foreign ship committing a flagrant offence or the passage of "leper ships". Interference is also justifiable where a foreign merchant ship is involved in a maritime incident or casualty with the gross violation of applicable rules.⁹⁰⁹

deny or impair innocent passage but nevertheless have that practical effect." In *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 226; Churchill/Lowe, *The Law of the Sea* (1983), 97 f; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 167 f.

⁹⁰⁶ Thereunder a coastal State may undertake physical inspection of the ship and even detain it for the purpose of proceedings.

⁹⁰⁷ See art. 24(1)(a) UNCLOS.

⁹⁰⁸ *Supra* note 905, 87 f.

⁹⁰⁹ According to the opinion of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution, the last two cases may even lead the passage to non-innocence. See

In conclusion, foreign merchant ships on innocent passage are not only the objects of the legislative jurisdiction of coastal States but also of the enforcement jurisdiction of the same States. The time, manner and place of enforcement may vary with different circumstances as displayed in the preceding analysis. The laws and regulations which are properly enacted by coastal States for their territorial seas are, in principle, enforceable. Needless to say, coastal States may refrain from enforcement on their own judgment in respect of some petty breaches committed by foreign merchant ships passing through the territorial sea.

IV. State Practice

As far as the legislation on the territorial sea is concerned, States can roughly be divided into four categories. The first category includes nine States which have closely followed art. 21(1) of UNCLOS when they staked out their claims to legislative jurisdiction with regard to the passage of foreign ships through the territorial sea. They are Antigua and Barbuda,⁹¹⁰ Barbados,⁹¹¹ Belize,⁹¹² Equatorial Guinea,⁹¹³ Grenada,⁹¹⁴ Malta,⁹¹⁵ St. Kitts & Nevis, St. Lucia and St. Vincent & Grenadines.⁹¹⁶

In the second category stand those nations claiming prescriptive competence over a series of matters that, nonetheless, deviate to varying degrees from art. 21(1). They include, *inter alia*, Bangladesh,⁹¹⁷ Bulgaria,⁹¹⁸ Cape Verde,⁹¹⁹ Cook Islands,⁹²⁰ Guatemala,⁹²¹ and New Zealand.⁹²² Some other nations belong-

Conclusion No. 7: Vessel-source Pollution and Loss of the Right of Innocent Passage, Final Report of the ILA Committee, 125.

⁹¹⁰ See Para. 19 of the Maritime Areas Act 1982, reprinted in: *The Law of the Sea – National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* (1995), Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, the UN, 24.

⁹¹¹ Sec. 11 of the Territorial Waters Act 1977, *ibid.*, at 43.

⁹¹² Sec. 12(3) of the Act to make provisions with respect to the Territorial Sea, Internal Waters and the Exclusive Economic Zone 1992, *ibid.*, at 50.

⁹¹³ Art. 9 of the Act on the Territorial Sea and Exclusive Economic Zone 1984, 120.

⁹¹⁴ Sec. 11 of the Territorial Waters Act 1978, *ibid.*, at 146.

⁹¹⁵ Sec. 5 of the Territorial Waters and Contiguous Zone Act 1971, as amended in 1975, 1978 and 1981, *ibid.*, at 209.

⁹¹⁶ Sec. 16(3) of the Maritime Areas Act 1984 of St. Kitts & Nevis, *ibid.*, at 311; Sec. 16(3) of the Maritime Areas Act 1984 of St. Lucia, 322; Sec. 10(3) of the Maritime Areas Act 1983 of St. Vincent & Grenadines, 330.

⁹¹⁷ Sec. 9 of the Declaration of 13 April 1974, *ibid.*, at 39.

⁹¹⁸ Art. 23(1) of the Act governing the ocean space 1987, 64.

⁹¹⁹ Art. 22 of the Law delimiting the maritime areas of the Republic of Cape Verde 1992, 82.

⁹²⁰ Art. 7 of the Act of 14 November 1977, 94.

⁹²¹ Art. 5 of the Legislative Decree concerning the breadth of the territorial sea and the establishment of an exclusive economic zone 1976, 148.

ing to the third group address their claims only in a general way by stressing that foreign ships shall observe properly promulgated laws and regulations. These include Argentina,⁹²³ Brazil,⁹²⁴ China,⁹²⁵ Russia⁹²⁶ and Ukraine.⁹²⁷

The last category are those States which either have made no mention of legislative jurisdiction in their legislation on the territorial sea, or have so far enacted no special laws and regulations on the territorial sea in this sense. This category covers countries like Australia, Canada, Cuba, Cyprus, Denmark, France, Germany, Greece, Japan, Malaysia, the Philippines, South Korea, the UK, the US and Vietnam.

Apart from specific legislation on the territorial sea, coastal States may of course make claims to prescriptive competence in other legislation dealing basically with navigation, the marine environment, DCME standards, immigration and customs. Given the myriad laws and regulations enacted by about 150 coastal States in the world, it is impossible to proceed with a watertight investigation into State practice in respect of legislative jurisdiction in this thesis. As a result, the aim here is to build up a general profile of State practice in the fields of navigation, the marine environment and DCME standards by relying on the enactments of some States.

1. Navigation

At present, about 26 States claim or exercise prescriptive competence to establish sea lanes and traffic separation schemes (TSS) in their legislation on the basis of art. 22 of UNCLOS.⁹²⁸ Furthermore, some States, including Canada, Chile, China, Greece, Italy, Jamaica, Lebanon, Malta, the Netherlands, New Zealand, Oman, Russia, Spain and the US, put up more extensive navigational measures in their national regulations. For example, pursuant to the controversial Arctic Waters Pollution Act 1970, Canada has established 16 shipping safety control zones that still apply to ships carrying oil in a quantity in excess of 453 m³.⁹²⁹ Under the Maritime Safety Law of China 1983, the competent authority may

⁹²² Sec. 8 of the Territorial Sea and Exclusive Economic zone Act 1977, *ibid.*, at 239.

⁹²³ Art. 3(3) of the Act of 14 August 1991(No. 23. 968), *ibid.*, at 28.

⁹²⁴ Art. 3(3) of the Law on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf 1993, 59.

⁹²⁵ Art. 8(1) of the Law on the Territorial Sea and Contiguous Zone 1992, 87.

⁹²⁶ Arts. 9(2) and 13(2) of the Law on the State Frontier of the USSR 1982, 296.

⁹²⁷ Sec. 9(2) of the Statute of Ukraine concerning the State Frontier 1991, 391.

⁹²⁸ Cf. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 226. These States include Antigua & Barbuda, Bahamas, Belize, Bulgaria, China, Croatia, Estonia, Fiji, Finland, France, Indonesia, Jamaica, Kiribati, Lithuania, Marshall Islands, Namibia, Poland, South Africa, St. Kitts & Nevis, St. Lucia, Russia, St. Vincent & Grenadines, Tuvalu, Ukraine, Vanuatu, Yugoslavia.

⁹²⁹ VanderZwaag, 'Shipping and Environmental Protection in Canada: Rocking the Boat and Riding a Restless Sea' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 209.

designate traffic control zones or even navigation forbidden zones.⁹³⁰ Furthermore, the maritime safety authority of China can establish compulsory VTS in the territorial sea in accordance with the Regulations on the Safety Surveillance of the VTS 1997.⁹³¹ Similarly, Title 1 of the Port and Waterways Safety Act 1972 (PWSA 1972) and the Port and Tanker Safety Act 1978 (PTSA) of the US authorize the establishment of VTS and other operating requirements.⁹³² Besides, safety zones restraining navigational activities may well be designated according to the Deepwater Port Act 1975.⁹³³ In Europe, the 1991 and 1992 Decrees of Italy prohibit all ships from transiting, stopping in and anchoring in areas within one nm from the islands of Asinara and Pianosa, where high-security prisons are located. Furthermore, Spain and the UK regulate anchorage in the territorial sea with a view to excluding the parking of tankers.⁹³⁴ However, the designation of temporary exclusion zones for maritime casualties under the Merchant Shipping Act 1995 of the UK seems to be something different due to its temporary nature. The latest example of State practice in Europe may be the adoption of the Directive 2002/59/EC by the European Parliament and the Council, establishing a community vessel traffic monitoring and information system,⁹³⁵ which repeals the Council Directive 93/75/EEC. The new Directive covers MSR systems, VTS and other routing measures. It is intended to apply to all ships entering respective operational areas, including those on lateral passage.

State practice may show that coastal States exercise a wide prescriptive right to regulate navigational activities in the territorial sea. On the one hand, the exercise of this right, in some cases, has gone beyond the provisions of art. 22 of UNCLOS. On the other, it can hardly be deemed inconsistent with art. 21(1)(a) of the same Convention.

2. Marine environment

According to arts. 21 and 211(4) of the Convention, coastal States may set national discharge standards applicable to foreign ships passing through the territorial sea. In setting these standards, however, coastal States may not run against their obligations assumed under other international conventions, such as MARPOL 73/78. An investigation shows that 16 States are pushing ahead with a

⁹³⁰ Arts. 14, 17, 21 and 28 of the law, in *Collection of Sea Laws and Regulations of the PRC* (1990), Office of Laws and Regulations, State Oceanic Administration, 226.

⁹³¹ The Regulations were issued by the Ministry of Communications on 15 September 1997, available at: <<http://www.msa.gov.cn/flfg.nsf/vwjtgz>> (in Chinese) (last visited: January 7, 2003).

⁹³² See 33 USC § 1223, as cited by Noyes, 'Case Study of the United States of America', in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 369.

⁹³³ *Ibid.*, at 377.

⁹³⁴ Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in the same work of Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 26.

⁹³⁵ O.J. 2002 L 208/10.

zero-discharge policy in their enactments.⁹³⁶ But many other States choose to simply incorporate MARPOL 73/78 rules and standards into their own laws and regulations. For instance, Germany has already transformed many provisions of the convention into its national legislation by means of ordinances issued by the Federal Ministry of Transport.⁹³⁷ In the same vein, China has also put then applicable MARPOL 73/78 formulae in its Regulations on the Protection of Marine Environment by Vessels 1983. It is the case in the UK as well. Three Merchant Shipping Regulations in 1996 and 1998 are actually envisaged to give effect to three correspondent Annexes, i.e. I, II and V, to MARPOL 73/78.⁹³⁸

The attitude to the issue of the transport of hazardous substances in the territorial sea represents a significant aspect of marine environmental policy of coastal States. As discussed earlier, the issue is addressed in general in UNCLOS, while the trans-boundary transport of hazardous wastes is regulated in detail in the Basel Convention 1989. Taking into account various forms of State practice, including national legislation and declarations made upon signature and ratification of or accession to UNCLOS and the Basel Convention 1989, States can be classified into three groups in the forthcoming analysis.

The States in the first group include Germany, Italy, Japan, the Netherlands, Russia, Singapore, Thailand, the UK and the US.⁹³⁹ They take the view in their declarations or statements or bilateral agreement that no provisions in either of the two conventions may be construed as permitting coastal States to make the innocent passage of ships carrying hazardous substances subject to prior notification or authorization. Naturally they reject any efforts of some coastal States to prohibit such passage in their territorial seas. Comparatively speaking, the opinions of Germany and the US are representative of this group. The former pointed out in 1994 in its declaration upon the ratification of UNCLOS that:

None of the provisions of the Convention, which in so far reflect existing international law, can be regarded as entitling the coastal State to make the innocent passage of any specific category of foreign ships dependent on prior consent or notification.⁹⁴⁰

On the other hand, the US voiced its position on the Basel Convention 1989 in a note verbale communicated by its Mission to the UN in 1996 as follows:

⁹³⁶ These States include Antigua & Barbuda, Bahamas, Barbados, Belgium, Bulgaria, Canada, Denmark, Greece, Italy, Kuwait, Malta, New Zealand, Nicaragua, Romania, South Africa and US. See Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 220. China has been removed from the original list by the present writer, since Molenaar's inclusion may be induced by a translation mistake in the English version of art. 35 of the Regulations Governing Supervision and Control of Foreign Vessels 1979 whereby the word "arbitrarily" is mistakenly omitted.

⁹³⁷ Lagoni, 'Case Study of Germany', in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction, The Work of the ILC Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (2001), 262 f.

⁹³⁸ Anderson, 'Case Study of the United Kingdom', *ibid.*, at 351 ff.

⁹³⁹ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 229.

⁹⁴⁰ Available at: <http://www.un.org/depts/los/convention_agreements/convention_declarations> (last visited: January 8, 2003).

(2) It is the understanding of the United States of America that a State is a "transit State" within the meaning of the Convention only if wastes are moved, or are planned to be moved, through its inland waterways, inland waters or inland territory.

...

Further, at the time the United States of America deposits its instrument of ratification of the Basel Convention, the United States will formally object to the declaration of any State which asserts the right to require its prior permission or authorization for the passage of a vessel transporting hazardous wastes while exercising, under international law, its right of innocent passage through the territorial sea or freedom of navigation in an exclusive economic zone.⁹⁴¹

Nonetheless, it is assumed that some of these nations appear to back off from their original positions. Active participation of Italy in the drafting of the Izmir Protocol to the Barcelona Convention can be taken as an example of this change in attitude.⁹⁴² For other EU Member States it would also be the case with the establishment of a community vessel traffic monitoring and information system under the afore-mentioned Directive 2002/59/EC. The fact that the 1986 Ottawa Agreement between the US and Canada has been well complied with in practice may indicate that the US might no longer stick staunchly to its former policy.⁹⁴³

The States in the second group require prior notification or prior authorization with respect to the shipping of hazardous substances through their territorial seas. The group covers as many as 20 countries, including Canada, Colombia, Malta, Mexico, Egypt, Iran, Malaysia, Portugal and Turkey. Pursuant to the 1992 Wastes Regulations of Canada, transit passage is permitted only if "the import or export of that hazardous wastes is not prohibited under the laws of Canada".⁹⁴⁴ Some other documentary requirements are also stipulated therein. That strengthens the impression that Canada carries out a policy of prior authorization in this regard. Iran flatly excludes the passage of "nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances" from the domain of innocent passage and subjects it to prior authorization.⁹⁴⁵ Australia and New Zealand⁹⁴⁶ may also be counted in this group.

The last group of States categorically prohibits the shipping of hazardous cargoes in the territorial sea. The group includes Argentina, Guinea, Haiti, Ivory

⁹⁴¹ Reprinted in the LOSB, 1996, vol. 31, 39; see Para. 3 of the US-USSR Jackson Hole Agreement.

⁹⁴² Meriardi, 'Case Study of Italy' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 300.

⁹⁴³ Under art. 4 of the Agreement, prior notification of the passage is required to be given to the country of transit. For more details see Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 229 f.

⁹⁴⁴ *Ibid.*, at 232.

⁹⁴⁵ Art. 9 of the Act on the Marine Areas of the Iran in the Persian Gulf and Oman Sea 1993, 167.

⁹⁴⁶ See Australian approval requirement of radioactive waste transport in art. 2(1) of the Environmental Protection and Biodiversity Conservation Act 1999; under Sec. 51 of the Hazardous Substances and New Organisms Act 1996 of New Zealand, transit shipments of such objects are subject to prior approval from its competent authority.

Coast, Nigeria, the Philippines and Venezuela.⁹⁴⁷ China may narrowly be included in this group.⁹⁴⁸

In order to better protect the marine environment, some States impose a certificate requirement on foreign ships passing through the territorial sea. Under the Presidential Decree No. 504 of 1978, Italy claims the right to deny access to the territorial sea to foreign ships not carrying the certificate of insurance required by art. 7(11) of CLC 1969, regardless of whether these ships are on innocent passage.⁹⁴⁹ Similarly, Section 1016(b)(2) of OPA 1990 of the US provides that foreign tankers which are required to have "certificates of financial responsibility" on board may be denied entry to US navigable waters if the tankers fail to produce them.⁹⁵⁰ In contrast to that, Section 192A of the Merchant Shipping Act 1995 of the UK exempts foreign ships exercising the right of innocent passage from the requirement to carry an insurance certificate.⁹⁵¹

Some countries also claim the right in their legislation to prohibit certain activities, including discharge, anchorage, even navigation itself in marine parks and marine nature reserves.⁹⁵²

3. DCME standards

As indicated earlier, while UNCLOS confirms the legislative jurisdiction of coastal States in many other areas, it encloses the area of DCME standards of foreign ships as an enclave for "generally accepted international rules and standards".⁹⁵³ Accordingly, coastal States may not adopt and apply national DCME standards that exceed international ones *vis-à-vis* foreign ships. It is noteworthy

⁹⁴⁷ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 233.

⁹⁴⁸ Art. 39 of the Marine Environmental Protection Law 1999 prohibits the transport of any "dangerous wastes" in the territorial sea.

⁹⁴⁹ Meriardi, 'Case Study of Italy' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 297.

⁹⁵⁰ 33 USC § 2716(b)(2), Noyes, 'Case Study of the United States of America' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 375.

⁹⁵¹ Anderson, 'Case Study of the United Kingdom', *ibid.*, at 350.

⁹⁵² Marine Sanctuaries Act 1972 of the US, Noyes, 'Case Study of the United States of America' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 376; Framework Law on Protected Areas (No. 394) 1991 of Italy, Meriardi, 'Case Study of Italy' in *ibid.*, at 299, Section 35 of the Oceans Act 1996 of Canada, VanderZwaag, 'Shipping and Marine Environmental Protection in Canada: Rocking the Boat and Riding a Restless Sea', in Rothwell, Donald R./Bateman, S. (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 213; Great Barrier Reef Marine Park Act 1975 of Australia: White, 'Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 249.

⁹⁵³ Art. 21(2) of the Convention.

that foreign ships in art. 21(2) are not confined only to those exercising the right of innocent passage.⁹⁵⁴

Despite the above provisions, several States claim the right to establish more stringent national DCME standards applicable to foreign ships in the territorial sea. It is suggested that Sweden and Finland have expressed such ideas in their enactments.⁹⁵⁵ But a more well-known and influential example may be found in the practice of the US.

In OPA 1990 of the US, it is unequivocally provided that ship design, construction, equipment and operation regulations may “exceed standards set internationally”.⁹⁵⁶ Meanwhile, the Act requires that foreign tankers transporting oil in US waters, including the territorial sea, have double hulls to enhance oil-spill prevention.⁹⁵⁷ The requirement is, no doubt, at variance with the IMO standards set in 1994. According to 46 USC § 9101, the Coast Guard may apply US manning standards that go beyond generally recognized international standards to foreign ships.⁹⁵⁸ In addition, the standards for marine sanitation devices set forth in 33 CFR § 159 and established under the Clean Water Act 1972 (CWA 1972) apply to foreign ships passing through the territorial sea. These standards are believed to depart somewhat from that set in Annex IV on sewage to MARPOL 73/78.⁹⁵⁹ Apart from that, any intended analysis can be further complicated by the intricate power allocation between federal and state levels there. The famous case of *Intertanko* may well be illustrative of this complexity.⁹⁶⁰

In the Arctic Waters Pollution Prevention Act 1970, Canada displayed its ambition to apply special construction, equipment and crewing standards to any ships around Arctic coastal waters.⁹⁶¹ Although the standards are much stricter than international ones, they can now be, to some extent, legitimized by art. 234 of UNCLOS.

⁹⁵⁴ Nonetheless, the regulation is intended to apply primarily to those ships on innocent passage, since in the case of non-innocence coastal States would keep their eyes more on the non-innocence than on the infractions of DCME standards.

⁹⁵⁵ The claims were made in their statutes in 1980 and 1979 respectively. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 221.

⁹⁵⁶ See 46 USC §§ 3703a and 3715(a)(5), as cited by Noyes, ‘Case Study of the United States of America’ in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 374.

⁹⁵⁷ It is unclear whether lateral passage through the territorial sea is exempted therefrom. But the Louisiana Offshore Port has been actually excluded from the application of OPA 1990.

⁹⁵⁸ For more elaboration on it see Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 222.

⁹⁵⁹ *Ibid.*, at 223.

⁹⁶⁰ See more details of the case in: <http://www.wa.gov/ago/releases/rel_intertanko> (last visited: January 9, 2003).

⁹⁶¹ VanderZwaag, ‘Shipping and Environmental Protection in Canada: Rocking the Boat and Riding a Restless Sea’ in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 209.

As an example of another category, Section 85 of the Merchant Shipping Act of the UK absolves directly foreign ships on innocent passage from the obligation to fulfil national DCME standards.⁹⁶²

4. Observations

Generally, coastal States claim a wide range of legislative jurisdiction over foreign merchant ships passing through the territorial sea. It has to be admitted that exercise of legislative competence by some States is feared to be inconsistent with the provisions of UNCLOS in general and of the other special conventions in particular. These outreaching claims may have originated on various grounds. Nonetheless, it is true that many of them were made before the entry into force of the relevant benchmark instruments, or before the States concerned became parties to the instruments. Therefore, the ambitious provisions in national legislation of some States are expected to be brought into line with international conventions or rendered void upon their being bound by the conventions. Those States that hold excessive requirements but are not yet parties to the relevant international conventions may be exempted from much criticism, although “generally accepted international rules and standards” are binding, more or less, upon these States as well.

After all, what really matters lies not so much in legislative jurisdiction as in enforcement jurisdiction, which will be examined in the following sections of the thesis.

C. Administrative Jurisdiction of Coastal States

Enforcement jurisdiction in administrative matters forms an important component of the enforcement jurisdiction of coastal States over foreign merchant ships passing through the territorial sea. The exercise of criminal and civil jurisdiction over foreign merchant ships in innocent passage may be questioned under certain circumstances, as a matter of either international courtesy or law. In contrast, administrative prerogatives appear to be acknowledged as being absolutely within the ambit of coastal States. Administrative jurisdiction covers many vital fields, ranging from maritime traffic management, rights of protection and levy of charges for specific services to fisheries, customs, revenue, immigration, quarantine as well as protection of navigational aids and submarine cables and pipelines. The following elaboration focuses mainly on the first topics. The domain of the administrative jurisdiction of coastal States over foreign shipping includes, of course, the protection of the marine environment. However, that topic will be discussed in a separate section, given its increasing weight in coastal State enforcement jurisdiction.

⁹⁶² Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 221.

I. Maritime Traffic Management

1. Sea lanes and traffic separation schemes (TSS)

Usually shipping is not limited to fixed routes in the territorial sea. However, in some areas “where the density of traffic is great or where the freedom of movement of shipping is inhibited by restricted sea-room, the existence of obstructions to navigation, limited depths, or unfavorable meteorological conditions”,⁹⁶³ sea lanes or, alternatively, traffic lanes can be established by coastal States serving to promote the safety of navigation. TSS is a kind of traffic control system in which two or more sea lanes are established for the separation of opposing traffic flows or for the separation of traffic of ships in particular categories proceeding in the same direction.⁹⁶⁴ Other measures that may be established with regard to sea lanes include areas to be avoided, recommended tracks, deep water routes, two-way routes, roundabouts and inshore traffic zones.⁹⁶⁵

The first TSS was established in the Dover Strait in 1967⁹⁶⁶ based on the results of a study undertaken jointly by the Institutes of Navigation of the FRG, France and the UK.⁹⁶⁷ The effectiveness of the TSS can be evaluated statistically. Between 1956 and 1960 there were 60 collisions in the Strait of Dover; 20 years later, following the introduction of the TSS, the total was reduced to only 16 in the same comparable period.⁹⁶⁸

TSS was first formally recognized in COLREG 1972 as one of the most innovative regulations. In Rule 10 of the convention, a series of requirements are set out concerning the sound conduct of ships operating in or near a TSS area.⁹⁶⁹

⁹⁶³ Breuer, ‘Sea Lanes’ in Bernhardt (ed.), *EPIL* (2000), vol. IV, 338.

⁹⁶⁴ Cf. the General Provisions on Ships’ Routeing adopted by the IMO by Resolution A. 572(14), as amended.

⁹⁶⁵ *Ibid.* See also Breuer, ‘Sea Lanes’ in Bernhardt (ed.), *EPIL* (2000), vol. IV, 338 f.

⁹⁶⁶ Available at: <http://www.imo.org/Conventions/contents.asp?doc-id=649&topic_id=257> (last visited: January 11, 2003).

⁹⁶⁷ Mapplebeck, ‘Management of Navigation through Vessel Traffic Services’ in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 136.

⁹⁶⁸ See Website as *supra* note 966.

⁹⁶⁹ Rule 10 of COLREG 1972 runs as follows:

- (a) This Rule applies to traffic separation schemes adopted by the Organization and does not relieve any vessel of her obligation under any other rule.
- (b) A vessel using a traffic separation scheme shall:
 - (i) proceed in the appropriate traffic lane in the general direction of traffic flow for that lane;
 - (ii) so far as practicable keep clear of a traffic separation line or separation zone;
 - (iii) normally join or leave a traffic lane at the termination of the lane, but when joining or leaving from either side shall do so at as small an angle to the general direction of traffic flow as practicable.

Among others, it is stated that "This Rule applies to traffic separation schemes adopted by the Organization". As pointed out before, UNCLOS permits coastal States to designate their sea lanes and TSSs. Therefore, it seems fully within the discretion of coastal States either to submit their TSS to the IMO for adoption or not. So the question arises here of whether the Rule likewise applies to the TSSs which were established by coastal States alone, under the authority of art. 22 UNCLOS.

It is comprehensible that an IMO convention cannot arbitrarily state something like "This Rule applies to every TSS", regardless of whether it has been adopted by the Organization. The IMO may not obtrude into the competence of coastal States to make rules on their TSSs accorded by UNCLOS. On the other hand, international law prohibits no State from incorporating a rule in a global convention into its municipal legislation. As a result, Rule 10 can apply to those TSSs designated only by coastal States if they so choose.

Coastal States can, in principle, enforce this rule and even other additional ones prescribed for TSS against foreign merchant ships. Nonetheless, enforcement

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- (c) A vessel shall so far as practicable avoid crossing traffic lanes, but if obliged to do so shall cross on a heading as nearly as practicable at right angles to the general direction of traffic flow.
 - (d) (i) A vessel shall not use an inshore traffic zone when she can safely use the appropriate traffic lane within the adjacent traffic separation scheme. However, vessels of less than 20 m in length, sailing vessels and vessels engaged in fishing may use the inshore traffic zone.
(ii) Notwithstanding subparagraph d(i), a vessel may use an inshore traffic zone when en route to or from a port, offshore installation or structure, pilot station or any other place situated within the inshore traffic zone or to avoid immediate danger.
 - (e) A vessel other than a crossing vessel or a vessel joining or leaving a lane shall not normally enter a separation zone or cross a separation line except:
 - (i) in cases of emergency to avoid immediate danger;
 - (ii) to engage in fishing within a separation zone.
 - (f) A vessel navigating in areas near the termination of traffic separation schemes shall do so with particular caution.
 - (g) A vessel so far as practicable shall avoid anchoring in a traffic separation scheme or in areas near its terminations.
 - (h) A vessel not using a traffic separation scheme shall avoid it by as wide a margin as is practicable.
 - (i) A vessel engaged in fishing shall not impede the passage of any vessel following a traffic lane.
 - (j) A vessel of less than 20 m in length or a sailing vessel shall not impede the safe passage of a power-driven vessel following a traffic lane.
 - (k) A vessel restricted in her ability to manoeuvre when engaged in an operation for the maintenance of safety of navigation in a traffic separation scheme is exempted from complying with this Rule to the extent necessary to carry out the operation.
 - (l) A vessel restricted in her ability to manoeuvre when engaged in an operation for the laying, servicing or picking up a submarine cable, within a traffic separation scheme, is exempted from complying with this Rule to the extent necessary to carry out the operation.

may not have the practical effect of denying or impairing the innocent passage of the ships. Within or near the scope of TSS, appropriate interference from coastal authorities with the passage should not be considered as the hampering of the passage: for example, traffic warnings or an order to slow down. Furthermore, certain severe violations against the rules, such as bumping into the navigational aids, would justify more substantial interference, including criminal and civil jurisdiction. In accordance with the Maritime Areas Act 1996 of Jamaica, a contravention committed by a foreign merchant ship against Jamaican regulations in sea lanes and TSS would lead to a fine not exceeding J\$500,000 on conviction by indictment in a circuit court.⁹⁷⁰

Pursuant to art. 22 of UNCLOS, a coastal State may require foreign ships exercising the right of innocent passage through its territorial sea to use duly designated sea lanes and TSSs. One of the outstanding queries here may be what legal consequences would follow if foreign ships disregarded the requirement by passing through the territorial sea elsewhere. It is difficult to pronounce on this. Nonetheless, coastal States can, at least, issue warnings of disregard against delinquent ships and enforce appropriate punishments when the ships are in ports.

Fortunately, the report of enforcement in this regard is little heard. It may reflect the fact that the rules of TSS have been well observed so far. On the other hand, it might expose another sad reality that foreign merchant ships have no other choices than to follow whatever coastal States have stipulated.

The concept of TSS has been put into practice on the international plane for 36 years. Now there are nearly 200 such systems in operation all over the world, with more being added every year.⁹⁷¹ Germany, for instance, has, with adoption by the IMO, established six TSSs in its coastal waters in both the North Sea and the Baltic Sea,⁹⁷² whereas Canada now operates three TSSs that were also adopted by the IMO.⁹⁷³

⁹⁷⁰ See art. 13(8) of the Act, [1997] 34 *LOS* 34.

⁹⁷¹ Cf. Mapplebeck, 'Management of Navigation through Vessel Traffic Services' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 138.

⁹⁷² They are Elbe Approach, Terschelling-German Bight, Jade Approach, German Bight Western Approach, off Kiel Lighthouse and Rostock Approach. Cf. *Vessel Traffic Services Guide Germany* (1996), *Bundesamt für Seeschifffahrt und Hydrographie* (BSH); the letter from Prof. Dr. Peter Ehlers, President of the BSH, Germany, on 27 January 2003.

⁹⁷³ They are located in the approaches to Chedabucto Bay (Nova Scotia), the Bay of Fundy and approaches (New Brunswick), the Strait of Juan de Fuca and its approaches (British Columbia). VanderZwaag, 'Shipping and Environmental Protection in Canada: Rocking the Boat and Riding a Restless Sea' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 223.

2. MSR systems and VTS

Another important segment of maritime traffic management is the introduction of ship reporting systems. Ship reporting systems contribute to the safety of life at sea, the safety and efficiency of navigation, and the protection of the marine environment.⁹⁷⁴

Some States have been maintaining such systems for many years. The Australian ship reporting system, for example, has been in operation for 30 years, as a constituent of the Australian search and rescue mechanism.⁹⁷⁵ In 1994 the IMO changed its traditional system, which allowed only TSS to be made compulsory, to permit coastal States to introduce MSR systems with the adoption of the IMO. Under a MSR system, ships of certain types entering the scope of the system are obliged to provide, usually by radio, some basic information, including the name of the ship, destination, ship position and ship speed to the specified authorities of the coastal State at the reporting positions. For example, in pursuance of the MSR system of the Great Barrier Reef region, all ships over 50 m, all oil tankers, liquefied gas carriers, chemical tankers or ships coming within the INF Code⁹⁷⁶ and ships engaged in towing over a required dimension are to report to the authorities concerned by VHF at designated reporting points. The center of the MSR system is situated at Hay Point and jointly operated by the federal and local authorities. Information is fed back to passing ships to facilitate their safe passage through the reporting area.⁹⁷⁷

Apart from that, there are a number of such MSR systems adopted by the IMO: *inter alia*, French MSR off Finisterre, MSR in the Straits of Malacca and Singapore, in the Strait of Dover, off the northeastern and southeastern coasts of the US, in the Strait of Gibraltar, in the Great Belt in Denmark, in the Gulf of Finland, off Ushant in the English Channel and in the Adriatic Sea.⁹⁷⁸ It is said that there exists a limited ship reporting system in Greece, which came into force

⁹⁷⁴ Regulation 11 of the Annex to SOLAS 1974.

⁹⁷⁵ White, 'Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 252; Mapplebeck, 'Management of Navigation through Vessel Traffic Services' in *ibid.*, at 141.

⁹⁷⁶ I.e. International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-level Radioactive Wastes on Board Ships adopted by the IMO on 27 May 1999 (MSC. Res. 88(71)).

⁹⁷⁷ White, 'Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 252.

⁹⁷⁸ Mapplebeck, 'Management of Navigation through Vessel Traffic Services' in *ibid.*, at 141; Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution, 83; available at: <http://www.imo.org/inforesource/mainframe.asp?topic_id=112&doc_id= (last visited: April 12, 2003).

in 1993 without IMO endorsement and has since then been operational in the vicinity of the port of Piraeus.⁹⁷⁹

Like TSS and MSR, VTS is also an effective instrument in maritime traffic control. The use of VTS goes back to 1950s, when the development of radio and radar made it possible for coastal/port States to monitor and track the movement of ships in coastal waters. In March 1950, a radar surveillance system was established at Long Beach, California. It can be regarded as the first VTS in the world.⁹⁸⁰

Since then, VTS has gained in importance in the domain of maritime traffic management in the following decades. As a response to the variety of VTS displayed in State practice, the IMO adopted the guidelines for VTS in 1985.⁹⁸¹ However, the Organization had not introduced mandatory VTS within the territorial sea into its regulatory conventions, specifically SOLAS 1974, until 1997. In the same year, the Organization updated the former guidelines for VTS to adapt to the new developments in this area. According to the latest VTS guidelines, VTS is:

a service implemented by a Competent Authority, designed to improve the safety and efficiency of vessel traffic and to protect the environment. The service should have the capability to interact with the traffic and to respond to traffic situations developing in the VTS area.⁹⁸²

As Regulation 12 of SOLAS 1974 states, VTS is intended to contribute to the safety and efficiency of navigation and to the protection of the marine environment, shore areas and offshore facilities from possible adverse effects of maritime traffic. Under a mandatory VTS, ships entering the VTS area shall report to and may be tracked by the authorities. Presently there are a large number of VTS systems in operation in the world.⁹⁸³ Germany alone has 18 mandatory VTS systems in operation.⁹⁸⁴

In comparison to TSS, MSR and VTS are not addressed explicitly in UNCLOS, despite the fact that arts. 21(1)(a) and (b) cover them in general. The Convention can be assumed to have accorded coastal States certain rights to ask for information from passing foreign ships in the territorial sea in relation to the

⁹⁷⁹ Strati, 'Case Study of Greece' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 282.

⁹⁸⁰ Available at: <http://www.imo.org/safety/mainframe.asp?topic_id=387> (last visited: January 12, 2003).

⁹⁸¹ IMO Doc. Res. 578(14), 20 November 1985; Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution, 83.

⁹⁸² Guidelines for Vessel Traffic Services, IMO Doc. Resolution A. 857(20), 3 December 1997.

⁹⁸³ But some of them are voluntary ones, such as the Arctic Canada VTS covering the waters of Ungava Bay, Hudson Bay and part of James Bay south. VanderZwaag, 'Shipping and Marine Environmental Protection in Canada', in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 225.

⁹⁸⁴ *Vessel Traffic Services Guide Germany* (1996), Bundesamt für Seeschifffahrt und Hydrographie.

enforcement of port entry requirements, either unilaterally⁹⁸⁵ or cooperatively.⁹⁸⁶ But this is confined only to the passage to ports in internal waters or port facilities outside internal waters. Furthermore, the *travaux préparatoires* of the Convention show that the robust efforts intended to make the passage of ships carrying dangerous or noxious substances subject to prior notification were refused at UNCLOS III.⁹⁸⁷ However, under compulsory MSR or VTS systems, foreign ships on innocent passage and coming within the relevant areas are obliged to furnish information about ship operations to the coastal States concerned. Actually, the information provision or reporting here is scarcely distinct in substance from prior notification.

Therefore, as far as the enforcement jurisdiction of coastal States is concerned, MSR and VTS are poised to challenge the limits of coastal State competence as delimited in UNCLOS. Similarly, it is understandable to have some doubts about the consistency of these provisions in related conventions. Nevertheless, given widespread State practice with respect to MSR or VTS and the peculiar status of the IMO as “the competent international organization”, the variance between UNCLOS and SOLAS 1974 is to be apprehended as new developments in international maritime law. At all events, the adoption by the IMO in the case of MSR and the conformity with the guidelines developed by the Organization in the case of VTS appear to be necessary to dispel the possible fear of inconsistency.

If MSR or VTS were made mandatory against foreign ships, any violation would in principle be subject to the punishment as prescribed in the relevant traffic regulations.⁹⁸⁸ Some petty contraventions, such as the incompleteness of reporting, slightly late reporting or failure to keep a continuous listening watch on a specified VHF channel for a short while within the system area, can be handled on the spot through warnings. Penalties against other moderate trespasses, including deviation from the designated routes, failure to come up to requirements to slow down and ignoring warnings, seem to have to be imposed in ports or in other parts of internal waters. For foreign ships on lateral passage, a cumulative offence point-counting system⁹⁸⁹ could be introduced to help enforce MSR or VTS regulations. The system, which may be extended to other fields of coastal State enforcement, would ensure the enforceability of the traffic regulations of coastal States on the one hand and minimize interference with innocent passage on the other. Of course, if foreign ships defy the control measures flagrantly or

⁹⁸⁵ See art. 25(2) of the Convention.

⁹⁸⁶ Art. 211(3) of the Convention.

⁹⁸⁷ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 206 ff.

⁹⁸⁸ Art. 22 of the Regulations on the Safety Surveillance of the VTS 1997 of China refers to this issue in general by stating that “In the case of violations, appropriate penalties may be imposed by the competent authorities according to the relevant laws and regulations”.

⁹⁸⁹ Under this system, a violation is recorded with certain points according to the seriousness of the violation. The ship with a specified total number of points is then subject to substantial interference for the purpose of enforcement by coastal States.

violations lead to serious traffic congestion, great danger to traffic, or cause material damage to navigational aids, then further enforcement measures, such as boarding, inspection and even detention, are justifiable. Enforcement *vis-à-vis* foreign ships on lateral passage can be an element of future cooperation in port State control among port States.

3. Compulsory pilotage

Compulsory pilotage was first introduced into Europe early in the 19th century with some controversy, basically within internal waters.⁹⁹⁰ Since then it has been a generally recognized right of coastal States to impose pilotage requirements upon foreign merchant ships in internal waters.⁹⁹¹ An example is the case of compulsory pilotage in both the Inner Route of the Great Barrier Reef and the Hydrographers Passage established by Australia on 1 October 1991.⁹⁹² However, the right may not be taken for granted in the territorial sea. UNCLOS does not address the issue directly, despite a catch-all reference to navigational matters in art. 21(1)(a).

Nevertheless, while the introduction of compulsory pilotage covering the whole territorial sea is no doubt excessive, its introduction in some particular areas can be justified in international law. These particular areas could be entrances, enclosed waters, narrow channels, areas studded with islets or reefs, areas plagued with adverse hydrographical or meteorological conditions, or where navigational charts are dearly inadequate. In addition, compulsory pilotage is always carried out as a component of other traffic control measures, including MSR and VTS. For example, German authorities impose compulsory pilotage upon foreign merchant ships of specified categories under the German Bight VTS.⁹⁹³

Be that as it may, some forms of international arrangements would be useful in strengthening conformity with international law and winning as broad an international recognition as possible. In this connection, mention should be made of

⁹⁹⁰ See the elaboration of O'Connell/Shearer, *International Law of the Sea* (1984), vol. II, 836.

⁹⁹¹ This right has been confirmed in art. 11 of the Geneva Statute on Maritime Ports of 1923. [1926-27] 58 *LNTS* 285.

⁹⁹² Rothwell, 'Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice' in Rothwell/Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 83.

⁹⁹³ The ships falling within the compulsory pilotage are: tankers exceeding 130 m in length or 21 m in breadth en route from/to Rivers Ems, Jade, Weser, Elbe, tankers carrying gas/chemical/petroleum or its products in bulk, or unloaded tankers, if not properly cleaned after carrying; bulk carriers exceeding 220 m in length or 32 m in breadth en route from/to River Elbe; bulk carriers exceeding 250 m in length or 40 m in breadth or 13.5 m in draught en route from/to Rivers Jade or Weser; other ships exceeding 330 m in length or 45 m in breadth en route from/to Rivers Jade, Weser or Elbe. *Vessel Traffic Services Guide Germany* (1996), *Bundesamt für Seeschifffahrt und Hydrographie*, 15.

three IMO resolutions encouraging the use of pilotage services in certain areas, namely, in the Baltic Sea, in the entrance to it, and in the North Sea and English Channel.⁹⁹⁴

Compulsory pilotage in the territorial sea always applies selectively to certain types of ships with special characteristics and only in some particular places. Therefore, non-compliance would likely justify interference with the passage by the coastal State concerned, albeit not necessarily leading to non-innocence of the passage.

4. *Intervention in maritime casualties*⁹⁹⁵

Part II of UNCLOS contains no express provisions on what measures coastal States may take in the case of maritime incidents in the territorial sea. Therefore, one has to turn to other articles that may give some clues in this regard. Pursuant to art. 221, coastal States may take and enforce proportionate measures *beyond the territorial sea* to protect their interests upon the occurrence of maritime casualties in accordance with international law, both customary and conventional. Logically, it can be presumed that coastal States may have no less right to take and enforce proportionate measures to protect themselves *within the territorial sea*. The right is virtually vested with coastal States under general international law, including the doctrine of self-protection. The view is strengthened by the fact that coastal States enjoy sovereignty over the territorial sea.⁹⁹⁶ Consequently, coastal States can proceed with intervening in maritime incidents in the territorial sea without having to ground their measures on the non-innocence of passage of the foreign ships in question.⁹⁹⁷

Unlike international legislation, many domestic enactments address this issue directly. Pursuant to the Navigation Regulations promulgated under the Navigation Act 1982 of Australia, masters and owners of the ships involved in a maritime casualty are obliged to report it and the Marine Incident Investigation

⁹⁹⁴ IMO Res. A. 480(IX) (1975), Res. A. 486(XII) (1981), Res. A. 620(15) (1987). See website of the IMO (last visited: January 15, 2003).

⁹⁹⁵ Art. 221(2) reads: "For the purpose of this article, 'maritime casualty' means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo." Also see the definition of incident in art. 2(6) MARPOL 73/78.

⁹⁹⁶ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 168; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 198; Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000), 127.

⁹⁹⁷ In the Final Report the ILA Committee proposed bringing maritime casualties under either non-passage according to art. 18 of UNCLOS or non-innocence based on art. 19(2)(l) in order to deprive a ship involved in a maritime casualty of its right of innocent passage. Nevertheless, the inference is feared to be unnecessary and far-fetched.

Unit may take appropriate measures to investigate any maritime incidents.⁹⁹⁸ Similar provisions are found in a 1983 US act that revised and consolidated numerous US shipping laws.⁹⁹⁹ According to art. 37 of the German Ordinance on Maritime Shipping Waterways, the operators of the ships related to a casualty are obliged to report to the Water & Shipping Agency without delay and take proper safeguard measures as required.¹⁰⁰⁰ Under the Marine Environmental Protection Law 1999 of China, in the case of maritime casualties which cause or are likely to cause serious damage, the maritime safety authorities may take compulsory measures to prevent or reduce the damage from casualties.¹⁰⁰¹ The Regulations on the Investigation and Settlement of Maritime Traffic Accidents 1990¹⁰⁰² go further to allow competent authorities to detain the foreign ships involved in maritime casualties for the purpose of investigation.¹⁰⁰³ Besides, based on the investigation results, the authorities can impose warnings or fines upon foreign crew members on board.¹⁰⁰⁴ In addition, the authorities may, by virtue of the findings of inquiries, enjoin the ships concerned to tighten up safety management on board. If the ships fail to do so, they may be prevented from further sailing or diverted from the territorial sea.¹⁰⁰⁵

On 23 November 2002, the Panamanian tanker *Gaz Poem* carrying 20,000 tons of liquefied gas burst into flames shortly after 34 crew members abandoned ship. She was then about 10 nm south of Sanmen Island of Canton, namely, in the territorial sea of China. After the fire had been put out, the authorities took control of the ship and launched an investigation into the accident. This maritime casualty caused great concern, because two nuclear power plants, *viz.* Dayawan and Lingao, are situated 40 km away from the place of the accident.¹⁰⁰⁶ This case may show that coastal States are, besides a general duty to rescue, entitled to intervene in maritime casualties by taking necessary measures in the territorial sea. Moreover, an abandoned ship cannot be deemed still on innocent passage.

⁹⁹⁸ White, 'Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 253.

⁹⁹⁹ Noyes, 'Case Study of the United States of America' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 379.

¹⁰⁰⁰ See § 37 *Seeschiffahrtsstraßen-Ordnung* (*SeeSchStrO*), German BGBl. 1998I, 3209.

¹⁰⁰¹ Art. 71 of the Law, available at: <<http://law.people.com.cn/bike/viewnews.html?id=5000>> (last visited: January 14, 2003). The Law applies in internal waters and the territorial sea, excluding economic zone and on the continental shelf.

¹⁰⁰² See the source in *supra* note 930, 268.

¹⁰⁰³ *Ibid.*, art. 13 of the Regulations.

¹⁰⁰⁴ *Ibid.*, art. 17 of the Regulations.

¹⁰⁰⁵ *Ibid.*, art. 19 of the Regulations.

¹⁰⁰⁶ People's Daily (overseas ed.), 29 November 2002; available at: <<http://www.xinhua.net.com/newscenter>> (last visited: November 27, 2002); available at: <<http://news.yahoo.com/news?tmpl>> (last visited: November 24, 2002), Burning Tanker Threatens Explosion Near Hong Kong, Yahoo News.

II. Rights of Protection of Coastal States

Rights of protection of coastal States can be traced back to art. 5 of the Hague draft of 1930.¹⁰⁰⁷ Art. 16 of CTS 1958, on which art. 25 of UNCLOS is modeled, elaborated the rights of protection further. The provision recognizes the right of a coastal State to prevent non-innocent passage, to interfere with the passage of foreign ships which neglect its port entry conditions and to protect its security interests by temporarily suspending the innocent passage of foreign ships in its territorial sea. Coastal States may also prevent navigational operations not within the passage as envisaged in art. 18 of the Convention. These issues will be investigated in the following paragraphs.

1. Entitlement of coastal States for confirmation of non-innocence

In pursuance of art. 25(1) of the Convention, the assertion of protection right with regard to non-innocent passage is dependent on establishing that the passage is non-innocent. As already mentioned, there may exist different judgments on whether the passage is innocent or not. For the purpose of the exercise of the coastal State's enforcement jurisdiction in general and that of the right of protection in particular, coastal States are entitled to define and confirm the non-innocence of passage.¹⁰⁰⁸ While some States have incorporated a list of non-innocent activities in their legislation, many others choose to address this topic generally or even to make no express mention in their legislation.¹⁰⁰⁹ Obviously, for those States which have not yet regulated non-innocence in detail, the issue will be handled on a case-to-case basis mainly by their administrative organs.

Nevertheless, the confirmation of non-innocence of passage of foreign ships ought to stand the test of international law, primarily embodied in UNCLOS. The subsumption of "willful and serious pollution, of any kind, of the water and the atmosphere"¹⁰¹⁰ or "submerged navigation"¹⁰¹¹ into the activities leading to non-

¹⁰⁰⁷ The draft article read: "The right of passage does not prevent the Coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject." LON Doc. C. 230. M. 117. 1930. V., 7.

¹⁰⁰⁸ The view was held also by the ILC in its commentary on art. 17 of its 1956 draft by stating that "This article recognizes the right of the coastal State to verify the innocent character of the passage, if need should arise, ..." [1956] II YBILC 273.

¹⁰⁰⁹ See *supra* Section E.V in Part 3 of the book.

¹⁰¹⁰ Art. 9(h) of the Act Concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania 1990, in *The Law of the Sea – National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* (1995), Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, the UN, 288.

¹⁰¹¹ Art. 5(5) of the Territorial Sea Act 1977 of South Korea, 283.

innocence can be considered within the permit of the Convention. The inclusion of any illegal discharges¹⁰¹² and “any act of pollution of the marine environment contrary to the rules and regulations”¹⁰¹³ in the category of non-innocent activities, or adding the element of economic interests to the forbidden information collection and propaganda,¹⁰¹⁴ however, seem to go too far. Meanwhile, it would be a matter of debate whether willful discharge or pollution,¹⁰¹⁵ and “any act of serious international pollution contrary to international law”¹⁰¹⁶ can be labeled as acts of non-innocence.

At any rate, in practice foreign ships should be allowed to explain their operations on being suspected prior to the confirmation of non-innocence. To this end, the Jackson Hole Agreement of the US and the former USSR may be indicative to some degree of State practice, which is cited as follows:

A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.¹⁰¹⁷

In fact, coastal States are reluctant to explicitly declare the non-innocent passage of foreign ships. On the one hand, coastal States do not want to be caught up in international disputes in this respect. On the other, it is not always an easy task to ascertain whether the passage is innocent or not. Furthermore, ships, especially foreign merchant ships, normally follow the requirements of coastal States to avoid unnecessary delay, unless the requirements are ostensibly groundless.

2. Prevention of non-innocent passage

Coastal States enjoy territorial sovereignty over the territorial sea and the only substantial limitation on that is the right of innocent passage of foreign ships. Consequently, it is generally acknowledged that foreign ships would fall fully under coastal State jurisdiction if the foreign ships ceased to be on innocent passage.¹⁰¹⁸ UNCLOS also confirms it by stating that the coastal State may take

¹⁰¹² Art. 5(9) of the same Act, *ibid.*

¹⁰¹³ Art. 6(g) of the Act on the Marine Areas of the Iran, 166.

¹⁰¹⁴ See arts. 6(c) and (d) of the same Act, *ibid.* In this connection, the Convention refers only to the interests of defence and security, see arts. 19(2)(c) and (d) UNCLOS.

¹⁰¹⁵ “The willful discharge” in art. 18 of the Maritime Areas Act 1996 of Jamaica, [1997] 34 *LOS* 37; “willful pollution” in art. 9(8) of the Act concerning the maritime areas of the Polish Republic and the marine administration 1991, 268.

¹⁰¹⁶ Art. 7(f) of the Act on the Territorial Sea and Exclusive Economic Zone of Equatorial Guinea, No. 15/1984, *ibid.*, at 120.

¹⁰¹⁷ See Para. 4 of Uniform Interpretation of Rules of International Law Governing Innocent Passage reached and signed in 1989.

¹⁰¹⁸ Churchill/Lowe, *The Law of the Sea* (1999), 87; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 249.

the necessary steps in its territorial sea to prevent passage which is not innocent.¹⁰¹⁹

However, the Convention does not declare what "the necessary steps" should be and what procedure should be followed. The provision may be intended to refer the further elaboration to the coastal State concerned. A review of existing domestic enactments shows that, in comparison with a large number of States that recognize the right of innocent passage, far fewer States expressly claim enforcement powers *vis-à-vis* foreign ships on non-innocent passage.¹⁰²⁰ For example, French and Romanian legislation adopts a general way of empowering their authorities to take all necessary measures to prevent non-innocent passage.¹⁰²¹ Some other States, such as Bulgaria and South Korea, choose to set out specific means to exercise their enforcement jurisdiction.¹⁰²² In the meantime, others simply keep silent on this issue. The explanation of the silence may lie in the assumption that the enforcement competence of coastal States in such cases is so deeply rooted in international law and State practice that any incorporation in national legislation would be superfluous.¹⁰²³

Despite the differences among municipal regulations, it may safely be stated that international law prohibits no State, whether explicitly claiming enforcement jurisdiction or not, from taking all appropriate measures to prevent any non-innocent passage of foreign ships in its territorial sea. Therefore, it is completely within the discretion of coastal States to decide on what specific steps will be taken to prevent non-innocent passage. The steps taken shall conform to the basic rules of general international law, such as necessity, proportionality and non-discrimination. The commonly used measures in this context comprise warning, warning shot, stopping, boarding, inspection, detention, institution of proceedings, diversion or expulsion. Where the foreign merchant ships concerned defy orders to

¹⁰¹⁹ Art. 25(1) of the Convention.

¹⁰²⁰ For an analysis in detail see Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), as in note 1020, 268 ff. According to the analysis, there are 21 States claiming express enforcement competence in relation to the non-innocent passage of foreign ships.

¹⁰²¹ Art. 5(1) of the Decree Regulating the Passage of Foreign Ships through French Territorial Waters 1985 permits the relevant authorities to "take the necessary steps in their territorial waters to prevent or interrupt any passage which is not innocent", while the Romanian authorities are vested, under the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone 1990, with the power to "use all legal means, including coercive measures, to prevent the passage of any foreign ship through the internal waters or the territorial sea when such passage is not innocent".

¹⁰²² Art. 30(1)(d) of the Act governing the Ocean Space 1987 of Bulgaria singles out stopping, inspection and arrest as measures against the non-innocent passage; art. 6 of the Territorial Sea Act 1977 of South Korea specifies stopping, searching and seizure, *ibid.*, 284.

¹⁰²³ Similar view by Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 269.

cooperate during enforcement, the competent authorities may resort to coercive measures, including the use of force as the last resort.¹⁰²⁴

In the case of non-innocent passage, the captain or person in charge of a foreign merchant ship could face punishment in the form of either a fine or imprisonment pursuant to the penal code of the coastal State concerned.¹⁰²⁵ It is noteworthy that States claiming enforcement jurisdiction generally have not drawn a clear line in their legislation between ships on innocent passage and those on non-innocent passage.

3. Prevention of non-passage

As ships on non-innocent passage, those engaged in navigational activities outside the sphere of the passage envisaged in art. 18 of UNCLOS are likewise subject to full coastal State jurisdiction. They cannot invoke the right of innocent passage either. These non-passage activities may manifest themselves as hovering or cruising around and sailing in zigzags, as well as unnecessary stopping and anchorage. There is no express provision in UNCLOS declaring the right to cope with the foreign ships not engaged in passage. But the coastal State's right to prevent non-passage activities of foreign merchant ships in the territorial sea is held to exist undoubtedly in customary international law.¹⁰²⁶ Coastal States are entitled to take wide-ranging measures to control and prevent non-passage. Foreign merchant ships on non-passage may be stopped, expelled or even arrested by coastal States for any contravention of their laws and regulations.

Nonetheless, what may trigger off a dispute is the confirmation of the non-passage in practice. The understanding of key concepts like "for the purpose of ...", "continuous", "expeditious", "incidental to ordinary navigation" or "rendered necessary by *force majeure* or distress or for the purpose of rendering assistance"¹⁰²⁷ may vary considerably from State to State. Again, the pendulum swings towards the side of coastal States. They can either substantiate the concepts in their legislation, or come up with their own understanding during the exercise of enforcement jurisdiction. According to art. 8 of the Decree Establishing Shipping Regulations for the Territorial Sea 1996 of the Netherlands, for instance, anchorage in certain parts of the territorial sea may be made subject to prior approval.¹⁰²⁸ As earlier mentioned, Spain and the UK conduct some control on the anchoring of tankers in the territorial sea. The indication seems to be that under these circumstances the anchoring is considered not as "incidental to ordinary navigation", but as a non-passage activity.

¹⁰²⁴ See art. 30(2) of the Act 1987 of Bulgaria, *ibid.*

¹⁰²⁵ E. g. art. 13(7) of the Maritime Areas Act 1996 of Jamaica, [1997] 34 *LOS* 34.

¹⁰²⁶ Churchill/Lowe, *The Law of the Sea* (1999), 87.

¹⁰²⁷ See art. 18 UNCLOS.

¹⁰²⁸ Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in Rothwell/Bateman (ed.) *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 26.

On all accounts, coastal States seize the upper hand in this respect, although foreign ships can challenge the perception of coastal States at national and international fora.

4. Prevention of breach of port entry conditions

According to art. 25(2) of UNCLOS, coastal States have the right to take the necessary steps in the territorial sea to prevent any breach of the conditions to which admission of foreign ships to internal waters including ports or a call at a port facility outside internal waters is subject. Generally speaking, the Convention leaves coastal States as much room for maneuver as in the case of non-innocent passage of foreign merchant ships. Therefore, once the admission to ports, whether situated inside or outside internal waters, is rendered subject to certain conditions that do not go beyond the treaty duties accepted by the coastal State concerned, any breach of the conditions would bring about the same legal consequences as that of non-innocence.

A brief review of existing international conventions and academic publications tends to indicate that international law generally lays down no specific limitation, except for treaty obligations, including those under the IMO conventions, on the scope of port entry conditions. So coastal States basically have their hands free to set out port entry conditions from the considerations of their own particular interests.¹⁰²⁹ No doubt they can lay down the conditions either in municipal legislation, or in bilateral navigation treaties or even in a regional agreement. In some cases coastal States may also impose port entry conditions on certain foreign ships on the basis of reciprocity to maintain the equality of sovereignty. The conditions fixed may relate to DCME standards, environmental protection as stipulated in art. 211(3), nature of cargoes or persons aboard, or something else.

As well-known instances, New Zealand and Vanuatu take a steadfast stance in denying foreign nuclear ships the entry into their ports.¹⁰³⁰ By so doing they have virtually set out a port entry condition. The US double-hull requirement for

¹⁰²⁹ As already pointed out in Part 2, there is no generally recognized right of access to ports and coastal States may regulate on access to their ports from their own interests. However, States have to live up to the treaty obligations that they may have undertaken, for example, under the IMO conventions.

¹⁰³⁰ Both countries declared in the early 1980s that they had closed their ports to nuclear-powered ships. Sohn, 'International Navigation: Interests Relating to National Security' in Van Dyke/Alexander/Morgan (ed.), *International Navigation: Rocks and Shoals Ahead?* (1988), 316; Section 11 of the New Zealand Nuclear Free Zone Act 1987 provides for: "Entry into the internal waters of New Zealand by any ship whose propulsion is wholly or partly dependent on nuclear power is prohibited." Available at: <<http://canterbury.cyberplace.org.nz/peace/nukefree.html>> (last visited: January 19, 2003).

tankers may be free of much criticism as well when it is taken as a port entry condition.¹⁰³¹

Taking into account the broad competence to set port entry conditions, the enforcement power to prevent a breach of the conditions is, accordingly, great. One can even venture to say that the innocent passage of foreign ships heading to ports is actually under the full control of coastal authorities. Any violation of the conditions would invite interference with the passage. However, the wording of “necessary steps” reminds coastal States of the significance of necessity and reasonableness in the enforcement. At any rate, the exercise of self-restraint, due publishing of the conditions and communication to the IMO are highly expected of coastal States.

Only a handful of domestic enactments address the issue. Under German law,¹⁰³² disregard (*Nichtbeachtung*) of port entry or leaving conditions may result in certain legal consequences, ranging from warning by the Traffic Center (*Verkehrszentrale*) or physical control in case of breach (*Verstoß*). Much tougher measures may be taken against foreign ships carrying hazardous cargoes in case of breach. While the provisions of art. 25(2) of the Convention have been simply carried over into French and Romanian legislation,¹⁰³³ a US statute authorizes the relevant law-enforcing organ to order any foreign ship to operate or anchor in a manner as required if “he determines that such vessel does not satisfy the conditions for port entry set forth in section 1228 of this title”.¹⁰³⁴ Therefore, with respect to enforcement in this regard, much more still remains to be seen in State practice in the future.

5. Suspension of innocent passage

Another right of protection of coastal States is embodied in the possibility for the States to suspend the innocent passage of foreign ships in the territorial sea. Art. 25(3) of UNCLOS¹⁰³⁵ has almost taken over art. 16(3) of CTS 1958,¹⁰³⁶

¹⁰³¹ Noyes, ‘Case Study of the United States of America’ in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 389.

¹⁰³² See Nr. 7 der Anlage zu § 1 Abs. 1 Anlaufbedingungsverordnung (AnLBV) of 23 August 1994, BGBl. 1994 I, 2246.

¹⁰³³ Art. 5(2) of the French Decree 1985, art. 15 of the Romanian Act 1990, *ibid*.

¹⁰³⁴ 33 USC § 1223(b). Cited as Noyes, ‘Case Study of the United States of America’ in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 369.

¹⁰³⁵ Art. 25(3) of UNCLOS runs: “The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, *including weapons exercises*. Such suspension shall take effect only after having been duly published.” (emphasis on main difference added)

¹⁰³⁶ It read: “Subject to the provisions of paragraph 4, the coastal State may, without discrimination among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.”

except that weapons exercise is added as an example having a bearing on coastal State security. The inclusion seems to have been motivated by concerns of the then existing military alliances.¹⁰³⁷

The stipulation of the right of suspension of innocent passage reveals, on the one hand, the primacy of coastal State sovereignty over the right of innocent passage of foreign ships in the territorial sea. On the other hand, the right of suspension is under delicately envisioned qualifications. Consequently, coastal States shall take into account these qualifications while suspending innocent passage in practice.

In the first place, suspension may only be temporary. For general understanding, it would be more a matter of days, weeks or months than years or decades, not to speak of the permanent closure of a certain portion of the territorial sea.

Secondly, suspension is allowed only in specified areas of the territorial sea. In other words, suspension may, on no account, cover the entire territorial sea.

Thirdly, suspension must be essential for the protection of coastal State security, including weapons exercises. So suspension should be an indispensable measure, and not just one convenient option, for the protection of that security. Nonetheless, the essentiality of a suspension of innocent passage for security is such a sensitive matter that it can only be identified by the coastal State itself.¹⁰³⁸ On the other hand, the justification of the essentiality in question, if any, can rarely be made public for analysis. Anyhow, environmental concern or traffic considerations may not be invoked to rationalize the suspension.

Fourthly, international law allows no discrimination against foreign ships in the enforcement of a suspension of innocent passage in the territorial sea. As far as foreign merchant ships are concerned, there should be no problem.¹⁰³⁹

The last condition of suspension is publicity. That is to say, suspension has to be duly published in advance, otherwise it could not take effect. Publication through the public media available to mariners can be deemed "duly published".

The above prescription has been echoed in some national legislation.¹⁰⁴⁰ Anyway, considering the ambiguous provisions and the room for maneuver implicitly accorded to coastal States, it is sometimes quite difficult to ascertain whether a suspension is within or without the permit of the right to suspend innocent passage in the territorial sea as provided for in the Convention.

In March of 1992, Indonesia closed parts of its territorial sea, namely, the waters in and around East Timor, to an intended voyage by *Lusitania Expresso*, a

¹⁰³⁷ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 165.

¹⁰³⁸ *Ibid.*, at 166.

¹⁰³⁹ For warships it would be problematic to apply the non-discrimination principle. For example, in a joint NATO military exercise in the Turkish territorial sea in the Black Sea, the possible suspension of innocent passage may, in practice, be only applicable to non-NATO warships.

¹⁰⁴⁰ Art. 6(2) of the French Decree 1985, art. 16 of the Romanian Act 1990, and art. 17 of the Statute of Ukraine Concerning the State Frontier 1991.

Portuguese cargo ship that was believed to be carrying peace activists from Australia to East Timor.¹⁰⁴¹ It was the temporary suspension of innocent passage, but it was actually targeted at only one foreign merchant ship. If no specific foreign ship is singled out explicitly in a suspension despite the fact of targeting, the suspension can still narrowly be deemed to be consistent with conventional rules. However, in its statement of 25 February 1992 the Indonesian Government complained that the passage of the Portuguese ship would “instigate confrontation, aggravate tension, induce divisiveness and incite disturbance in East Timor”, and then declared its decision to close the territorial sea to *Lusitania Expresso* “for the sake of public order”.¹⁰⁴² Furthermore, it is an open question whether the closure was essential for the protection of Indonesian security. Therefore, the suspension can hardly be taken as conforming to art. 25(3) of UNCLOS. Rather, it would be more reasonable to found the closure on the non-innocence of the passage,¹⁰⁴³ although, as earlier discussed, confirmation of non-innocence based on the cargoes or persons on board is not yet free of controversy.

Another example is the French suspension of innocent passage in 1995. Taking into consideration the planned resumption of underground nuclear weapons tests on the atolls of Mururoa and Fangataufa in September 1995, an order was issued by the French Polynesian authority to suspend the right of innocent passage by French and foreign ships in the territorial sea around the two atolls. The order remained effective until 31 May 1996.¹⁰⁴⁴ France can basically justify the suspension based on security considerations due to the nuclear weapons tests. The suspension lasting one year can also be characterized as “temporary” as required by the Convention.

Any intrusion into the suspension areas could logically be treated as non-innocent passage, legitimizing any necessary measures taken by coastal States once the right of innocent passage has been expressly suspended.

In conclusion, despite the conventional circumscription, coastal State competence to suspend the right of innocent passage of foreign ships tends to be liberally interpreted and applied in State practice. However, a question remains to be answered, i.e. whether the right to suspend innocent passage may be used to justify the establishment of military security zones in the territorial sea.

¹⁰⁴¹ Rothwell, ‘Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice’ in Rothwell/Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 92.

¹⁰⁴² Permanent Mission of the Republic of Indonesia to the United Nations Press Statement of the Indonesian Government on the Voyage of the Portuguese Vessel “*Lusitania Expresso*” (Press Release No. 02/PR/92); Rothwell, *ibid.*

¹⁰⁴³ Art. 19 of the Convention states: “Passage is innocent so long as it is not prejudicial to the peace, *good order* or security of the coastal State.” (emphasis added).

¹⁰⁴⁴ Order No. 707 of 23 June 1995 Suspending Navigation by French and Foreign Vessels in the Territorial Waters of Mururoa and Fangataufa Atolls, Official Journal of French Polynesia, 29 June 1995. Rothwell, ‘Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice’ in Rothwell/Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 89.

6. Establishment of security zones in the territorial sea under Art. 25(3) UNCLOS?

The designation of military security zones in the territorial sea is closely related to the right to suspend the navigation of foreign ships for the purpose of national defense. Notwithstanding that it had been contentious throughout the last century whether coastal States have the power to enclose security zones in various categories at sea,¹⁰⁴⁵ the establishment of such zones was, in the meantime, no rarity in State practice.

Following the outbreak of World War II, 21 American States adopted the Declaration of Panama, whereby a security zone extending up to 300 miles from the shores of the continent was established as "a measure of continental self-protection". But the American States did not fully enforce it due to opposition from the belligerents.¹⁰⁴⁶ Under US legislation, the Secretary of the Army may establish military danger zones in internal waters, territorial sea and also contiguous zone where restrictive measures in varying degrees can be applied against foreign ships. The US President is also authorized to do so. In the 1940s alone, the US President established 17 Maritime Control Areas.¹⁰⁴⁷ In 1962 President *Kennedy* issued a proclamation setting out a wide range of interference measures against any ship heading for Cuba, including interception, boarding and search, diverting to another destination, and detention in the case of non-compliance. Not surprisingly it was accused of engaging in "piracy" by some States.¹⁰⁴⁸ It is believed that the proclamation applied to a vast area of sea surely comprising the territorial sea of the US.

As a response to the Korean War, China declared three military zones supposedly early in 1950s. These zones were the Military Warning Zone in the northwestern part of the Yellow Sea, the Military Navigation Zone in the Hangzhou Bay and the Military Operations Zone situated north of Taiwan.¹⁰⁴⁹ All the zones covered parts of the territorial sea and navigation activities therein had been rigorously controlled or prohibited. The claim to the three military zones is believed to have been dropped late in the 1980s. In the Sino-Japanese Fisheries Agreement, which was concluded in 1997 and remains in effect right now, no mention is made thereof.

¹⁰⁴⁵ Van Dyke, 'Military exclusion and warning zones on the high sea' [1991] 15 *Marine Policy* 147 f.

¹⁰⁴⁶ Sohn, 'International Navigation: Interests Relating to National Security' in Van Dyke/Alexander/Morgan (ed.), *International Navigation: Rocks and Shoals Ahead?* (1988), 312.

¹⁰⁴⁷ *Ibid.*, at 313.

¹⁰⁴⁸ *Ibid.*

¹⁰⁴⁹ Park, 'China and Maritime Jurisdiction: Some Boundary Issues' in Park *et al.* (ed.), *The Law of the Sea: Problems from the East Asia Perspective* (1987), 285.

In 1973 Libya claimed the waters of the Gulf of Sirte out to 100 miles as a military security zone and later as historic waters.¹⁰⁵⁰ Similarly, North Korea staked out its Military Warning Zone on 1 August 1977. The zone extends out to 50 nm in the Sea of Japan and coincides with its EEZ in the Yellow Sea. Foreign merchant ships may enter and sail in the zone only with the advance approval.¹⁰⁵¹

At the start of the Falklands (Malvinas) War, the UK declared a maritime exclusion zone around the islands within a 200-mile radius, threatening to sink any Argentine ship entering the zone. Later on, in April 1982, the UK claimed a total exclusion zone prohibiting all foreign ships from entering the zone.¹⁰⁵² Following in these footsteps, Nicaragua went on to proclaim a 25-mile naval and air security zone in 1983, requiring all foreign ships to seek prior permission to enter it.¹⁰⁵³

The latest example would be the declaration of Papua New Guinea in 1990 claiming a 50 nm exclusion zone around Bougainville. The establishment of the zone was intended to help thwart a rebellion on and attempted secession of the island. Papua New Guinea withdrew the claim in the end in view of forcible protests by Australia.¹⁰⁵⁴

From the above discussion, one can see that some military zones were established in wartime and others in peacetime. Whereas it would be difficult to dispute the legality of the establishment of such zones during wartime,¹⁰⁵⁵ the enclosure or maintenance of any military security zone at sea in peacetime may not stand the test of contemporary international law.¹⁰⁵⁶ Specifically, it can hardly be justified by the right to suspend innocent passage in the territorial sea. Firstly, many of such zones tend to reach out to the territorial sea. Secondly, one may suspect the temporary nature of some military zones. In some cases, it is uncertain whether such zones still exist now. The sensitivity of security considerations leads to the deplorable lack of transparency in this regard. Thirdly, it is not yet beyond

¹⁰⁵⁰ Sohn, 'International Navigation: Interests Relating to National Security' in Van Dyke/Alexander/Morgan (ed.), *International Navigation: Rocks and Shoals Ahead?* (1988), 313.

¹⁰⁵¹ Xinhua News Agency, 1 August 1977.

¹⁰⁵² Sohn, *ibid.*, at 314.

¹⁰⁵³ Sohn, *ibid.*, at 313.

¹⁰⁵⁴ See more in Brown (ed.), *Australian Practice in International Law, 1990 and 1991 – Freedom of navigation – declaration by Papua New Guinea of a 50-nautical mile exclusion zone around Bougainville – Australian response* (1992), also [1992] 13 *AYIL* 297; Shearer, 'Navigation Issues in the Asian Pacific Region' in Crawford/Rothwell (ed.), *The Law of the Sea in the Asian Pacific Region* (1995), 207; Rothwell, 'Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice' in Rothwell/Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 88.

¹⁰⁵⁵ The application of the rules of war and neutrality is envisaged in the second sentence of art. 19(1) UNCLOS by referring to "other rules of international law". This is also echoed in the Preamble to the Convention.

¹⁰⁵⁶ Here one could easily be trapped in the ancient question of the definition of war and peace.

doubt that the establishment of such zones is essential for coastal State security. However, for those States which have become Parties to UNCLOS, such excessive claims are presumed to have been put aside implicitly, considering that the Parties are under an obligation to bring their behavior in line with the provisions of the Convention.

Nevertheless, it would be comprehensible to establish exclusion zones at sea, even with a permanent nature, around certain locations with special characteristics. Such locations may be, *inter alia*, naval dockyards,¹⁰⁵⁷ coastal nuclear power plants and islands with high-security prisons.¹⁰⁵⁸ The justification may lie ultimately in the general principle of self-defense in international law, given the fact that threats around such localities do exist all the time.

III. Collection of Charges for Specific Services

Collection of charges from foreign merchant ships passing through the territorial sea reveals another aspect of coastal State jurisdiction. Notwithstanding that art. 26 limits the charges only to those for specific services rendered to the ship concerned, the article is still seen as a facultative clause. In other words, coastal States may collect charges from foreign ships for specific services in the territorial sea.

It is important, however, to fix the scope of the charges that may be levied by coastal States. As already pointed out, the key issue here is to distinguish between general and specific services in practice. This already discussed in the antecedent sub-section 6.7 in Part Three. The charges can be levied in ports if services are provided during inward or outward passage. The payment can also be made on the spot upon services having been supplied, e.g. in the case of pilotage or towage. Alternatively, the relevant payment could well be arranged, either in advance or afterwards, by the representative office of the shipping company sitting in the coastal States. It is noteworthy that in many countries the provision of such specific services is equivalent to the discharge of an administrative or quasi-administrative duty.¹⁰⁵⁹

Despite the fact that general services are excluded from the bases of charges, there would seem no obligation for coastal States to establish and maintain

¹⁰⁵⁷ Churchill/Lowe, *The Law of the Sea* (1999), 87.

¹⁰⁵⁸ Italy prohibits all ships from transiting, stopping and anchoring in areas within one nm from the islands of Asinara and Pianosa, where high security prisons are located. See Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in Rothwell/Bateman (ed.) *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 26.

¹⁰⁵⁹ For example, pilotage in the German territorial sea is offered by pilots belonging to a Pilots' Association (*Lotsenbrüderschaft*) which is an entity in the sense of public law. See art. 27 of the Maritime Pilotage Law 1984 (*Gesetz über das Lotsenwesen*), BGBl. 1984 I, 1213, as last amended through a law on 17 July 1997, BGBl. I, 1832; in China, pilots are in fact employees of the port authorities.

navigational aids at their own expense for the purpose of facilitating innocent passage. What coastal States are required to do under present international law is only limited to the respect of the right of innocent passage and the publishing of available information on any danger to navigation.¹⁰⁶⁰ On this ground, it was admitted by some jurists that dues for navigational aids would be legitimate if they were of a remuneratory and non-discriminate nature.¹⁰⁶¹ However, the view is not so convincing as it seems. Here the more relevant fact is that international law does not allow the levying of charges for general services that navigational aids offer. It is fully optional for a coastal State whether it builds up such an aiding system or not. Actually many navigational aids are established primarily for the ships of the coastal State itself and cabotage along its coast under municipal legislation. Consequently, the States that still charge light dues levy them in practice only on the foreign ships staying in ports or having entered internal waters.¹⁰⁶²

At any rate, no charges, fees or dues may be collected on foreign ships by reason only of their passage through the territorial sea. Under a piece of Canadian legislation in 1993 amending the Canada Shipping Act, the Minister of Fisheries and Oceans was authorized to certify private oil pollution-response organizations for any geographical area, and these organizations were given authority to charge fees on oil tankers above 150 tons and all other ships above 400 tons sailing in Canadian waters.¹⁰⁶³ It came as no surprise that enforcement of the legislation ran into snags due to objections from all sides.¹⁰⁶⁴ The example demonstrates again that mere passage through the territorial sea cannot be taken as the basis for any charge.

Also noticeable is the relationship between innocent passage and the charges held payable. In principle, non-payment would not deprive the passage of its innocence. Otherwise the drafters would have incorporated it in art. 19(2) of UNCLOS. But it does not follow that coastal States are prohibited from taking any appropriate steps to ensure payment. As previously suggested, coastal State interference is not necessarily identical with the annulment of the right of innocent passage. For example, a coastal State may well exercise its civil jurisdiction over a payment dispute and, for that purpose, arrest the responsible foreign ship. Furthermore, some reasonable administrative measures are also conceivable. In the meantime, the right of innocent passage of the ship is deemed to still exist. The ship concerned can proceed with its passage after getting over the restraint.

¹⁰⁶⁰ See art. 24 UNCLOS.

¹⁰⁶¹ O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 840.

¹⁰⁶² *Ibid.*, at 842.

¹⁰⁶³ VanderZwaag, 'Shipping and Marine Environmental Protection in Canada: Rocking the Boat and Riding a Restless Sea' in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 216.

¹⁰⁶⁴ *Ibid.*

Finally, it seems sensible that coastal States are, under certain circumstances, permitted to request basic information about foreign ships to facilitate or ensure the payment of charges.¹⁰⁶⁵

D. Coastal State Enforcement Jurisdiction over Marine Environment

Under contemporary international law of the sea, the enforcement competence of coastal States over the marine environment in the territorial sea has been considerably enlarged. In the following section, several aspects of marine environmental protection are selected to shed some light on coastal State enforcement jurisdiction in terms of conventional provisions and corresponding State practice.

I. Pollution from Ships

1. Enforcement jurisdiction under international conventions

Enforcement jurisdiction over pollution caused by vessels is a relatively new element in the enforcement regime. The exercise of enforcement jurisdiction had broadly been considered, primarily, to be the responsibility of the flag State in question, so long as the pollution occurs outside the internal waters of coastal States. Consequently, international conventions prior to UNCLOS either made no direct reference to coastal State competence or attributed only a complementary role to coastal States in this respect.

The Hague draft on the territorial sea did mention pollution caused by vessels,¹⁰⁶⁶ but there was no express corresponding provision for coastal State enforcement power. Nevertheless, some kind of coastal State enforcement power may have been recognized by the drafters at the time, since “vessels infringing the

¹⁰⁶⁵ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 177; [1956] II YBILC 274.

¹⁰⁶⁶ “Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the Coastal State, and, in particular, as regards:

...

(b) *the protection of the waters of the Coastal State against pollution of any kind caused by vessels;*

... ” (emphasis added) See art. 6 of the said draft, LON Doc. C. 228. M. 115. 1930. V., 16.

laws and regulations which have been properly enacted are clearly amenable to the courts of the Coastal State".¹⁰⁶⁷

Similarly, no direct reference to coastal State enforcement jurisdiction was found in CTS 1958 either with respect to pollution caused by vessels.

Actually MARPOL 73/78 is the first international instrument in which coastal State enforcement jurisdiction in the territorial sea over pollution from ships is expressly dealt with, while UNCLOS addresses it with more precision.

a) MARPOL 73/78

As far as coastal State enforcement jurisdiction over pollution from ships is concerned, three articles of the convention deserve special attention.

According to art. 4(2), coastal States are obliged to enforce the provisions of MARPOL 73/78 whenever violations have occurred within their jurisdiction, obviously including the territorial sea. Enforcement shall be in the form of either the institution of proceedings in accordance with national law or referring the related information and evidence to the flag State.¹⁰⁶⁸ Besides, Regulations 9(3) and 10(6) of Annex I to the convention set out further requirements for effective enforcement in the case of oil discharges at sea.¹⁰⁶⁹

To facilitate enforcement, art. 6(1) goes further and imposes an obligation on all parties to the convention to "co-operate in the detection of violations and the enforcement of the provisions of the present Convention, using all appropriate and practicable measures of detection and environmental monitoring, adequate procedures for reporting and accumulation of evidence". The obligation to cooperate has been anchored in several regional instruments, such as the 1983 Bonn Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, the 1971 Copenhagen Agreement between Sweden, Denmark, Norway, Finland and Iceland,¹⁰⁷⁰ and the 1990 Lisbon Accord.¹⁰⁷¹

Other provisions bearing on the enforcement jurisdiction of coastal States are found in arts. 9(2) and (3), which declare that the application of MARPOL 73/78 shall not prejudice the jurisdictional regime under general international law

¹⁰⁶⁷ See Observations of art. 6 of the same draft, the Report of the Second Committee at the Hague Conference, LON Doc. C. 230. M. 117. 1930. V., 7.

¹⁰⁶⁸ See art. 4(2) MARPOL 73/78, *MARPOL 73/78 Consolidated Edition* (1997), IMO, 5.

¹⁰⁶⁹ For example, Regulation 9(3) provides for: "Whenever visible traces of oil are observed on or below the surface of the water in the immediate vicinity of a ship or its wake, the Government of Parties to the Convention should, to the extent they are reasonably able to do so, promptly investigate the facts bearing on the issue of whether there has been a violation of the provisions of this regulation or regulation 10 of this Annex. The investigation should include, in particular, the wind and sea conditions, the track and speed of the ship, other possible sources of the visible traces in the vicinity, and any relevant oil discharge records." *Ibid.*, at 59.

¹⁰⁷⁰ Mahmoudi, 'Case Study of Sweden', 333.

¹⁰⁷¹ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 254.

basically reflected in UNCLOS.¹⁰⁷² It can be inferred that enforcement measures under the former convention should be taken by the parties to it in a way that conforms to the provisions of the latter, even though some of these parties are perhaps not yet parties to the latter. For instance, while art. 4(4) of MARPOL 73/78 requires that penalties be “adequate in severity to discourage violations of the present Convention” and “equally severe irrespective of where the violations occur”, the imposition of penalties cannot go so far as to run against art. 230(2) of UNCLOS. According to it, no imprisonment may be imposed for the pollution offence committed in the territorial sea unless in the case of non-innocent passage. In addition, the requirement of “equally severe irrespective of where the violations occur” and the simplistic idea of either instituting proceedings or referring to the flag State may, as will be seen in the coming discussion, not be in conformity with the provisions in UNCLOS. The variance can be explained by the fact that, at the time of the conclusion of MARPOL 73/78, UNCLOS III was just beginning and nobody could foresee what the new regime would be. Nevertheless, necessary adjustments to MARPOL 73/78 would appear to be expected to ensure its consistency with UNCLOS.

b) UNCLOS

Coastal State enforcement jurisdiction with regard to pollution from ships has been remarkably strengthened under UNCLOS. As far as the territorial sea is concerned, art. 220 will be the focus of discussion. The article is considered to be a noticeable departure from the principle of the exclusive jurisdiction of the flag State over its ships when they are on innocent passage through the territorial sea of a foreign State.¹⁰⁷³ Together with arts. 218 and 219, art. 220 represents the change in the overall enforcement jurisdiction regime in international law in favor of port and coastal States.

The article adopts a progressive approach, whereby coastal State enforcement competence varies with *loci delicti* and the seriousness of the pollution or the damage caused. In the first place, art. 220(2) deals exclusively with coastal State enforcement jurisdiction relating to pollution caused by vessels in the territorial sea as it prescribes:

Where there are *clear grounds* for believing that a vessel navigating in the *territorial sea* of a State has, during its *passage therein*, violated laws and regulations of that State

¹⁰⁷² “(2) Nothing in the present Convention shall prejudice the codification and development of the laws of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 C(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

(3) The term ‘jurisdiction’ in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention.” art. 9 MARPOL 73/78.

¹⁰⁷³ Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 282.

adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake *physical inspection* of the vessel relating to the violation and may, where the evidence so warrants, institute *proceedings*, including *detention* of the vessel, in accordance with its laws, subject to the provisions of section 7. (emphasis added)

From the provisions it can be seen that coastal States have much room for discretion in exercising enforcement jurisdiction over ships on passage in the territorial sea concerning violations therein. The most substantial qualification laid down on coastal States for the said enforcement lies in the requirement that there must exist “clear grounds” for believing that violation has indeed occurred in the territorial sea. The qualification is conspicuously intended to add reasonableness and necessity to the coastal State jurisdiction concerned and thus to prevent the States from arbitrarily disturbing the passage of foreign ships through the territorial sea. However, the determination of whether clear grounds exist and of what may constitute clear grounds is left to the coastal States. Therefore, it remains to be seen whether the restriction can work well in practice as expected.

In the same paragraph, there are two additional restrictions. Whereas the respect of safeguards in section 7 needs no further elaboration, the compatibility of enforcement measures with the relevant provisions in Part II, section 3 deserves a close look. From these provisions at least one conclusion can be drawn that the exercise of enforcement powers by undertaking appropriate measures, including inspection, detention and institution of proceedings, is thought compatible with the regime of innocent passage. But the question here may be how it could be in practice. Obviously, any kind of enforcement action will virtually impair, if not deny completely, the right of innocent passage of foreign ships through the territorial sea.¹⁰⁷⁴ As a result, the only sensible solution would be to apply art. 220(2) with great caution only if the situation really warrants. Further, coastal States shall minimize interference with the passage of foreign ships and may only take enforcement measures that are necessary and proportional under the given circumstances.

Art. 220(2) makes no distinction between innocent and non-innocent passage. However, as previously pointed out, no limitation is placed on coastal States by international law with respect to their enforcement jurisdiction over non-innocent passage. Therefore, it can be presumed that innocent passage is actually meant by the word “passage” in this paragraph. Furthermore, the right to undertake physical inspection should be understood as embracing that to track, pursue, request information, board or even direct the delinquent ship into one port for the purpose of inspection.

As in other enforcement clauses, the term “applicable international rules and standards” appears in this paragraph as well. It can be observed that whether international rules and standards are applicable in specific enforcement cases depends on whether the States involved have properly accepted the rights and obligations with respect to the rules and standards, through either joining an

¹⁰⁷⁴ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 245.

international instrument containing these rules and standards or incorporating them into national laws and regulations.¹⁰⁷⁵ However, international rules and standards may already be applicable so long as the coastal State alone has accepted these rules and standards through whatever manner and made them effective within its jurisdiction. If there may be any doubts on this view in the context of the EEZ, it appears to be quite tenable so far as the territorial sea is under discussion, where the coastal State enjoys territorial sovereignty.

Besides Para. 2, some other paragraphs are also relevant to coastal State enforcement jurisdiction in the territorial sea. Para. 3 deals with the case where the infringing ship sails in the territorial sea or the EEZ, while the violation was committed in the EEZ. In this case, the coastal State concerned is entitled merely to require the ship to furnish information about its identity and port of registry, its last and next port of call and other related information.¹⁰⁷⁶ It is noteworthy that the violation here, unlike in Para. 2, is directed at applicable international rules and standards as well as national laws and regulations conforming and giving effect to such rules and standards. Understandably, here the jurisdiction of coastal States to regulate becomes more limited in the EEZ than in the territorial sea.

Para. 5 serves as the furtherance of the case in Para. 3, but addresses more grave violations which result in "a substantial discharge causing or threatening significant pollution of the marine environment". In this context, the coastal State may conduct physical inspection of the suspected ship for matters relating to the violation if three preconditions are met. First, there must be clear grounds for believing that such a violation has been committed in the EEZ. Secondly, the ship has refused to give the requested information or given evidently flawed information. Thirdly, the circumstances of the case render such inspection necessary and reasonable. Notwithstanding that no mention is made of Section 7, unlike in Paras. 2 and 6, enforcement under this paragraph is still deemed subject to the said safeguards, especially to art. 226 regulating the investigation of foreign ships.

Pursuant to Para. 6, the coastal State may go further to institute proceedings, including detention of the ship involved, in accordance with its laws, if "clear objective evidence" bears out that the ship has committed a violation referred to in Para. 3 and the violation led to "a discharge causing major damage or threat of major damage" to the coastline or related interests of the coastal State, or to any resources of its territorial sea or EEZ. Again, the national laws here on which the intended proceedings will be based shall not be more exacting than applicable international rules and standards.¹⁰⁷⁷ The expression of "major damage" to the

¹⁰⁷⁵ The Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000) in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction, The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (2001), 114 ff.

¹⁰⁷⁶ See art. 220(3) UNCLOS.

¹⁰⁷⁷ A cross-reference can be made to art. 211(5) where coastal States are allowed to adopt only laws and regulations that conform and give effect to generally accepted international rules and standards in respect of the EEZ for fighting against pollution from ships.

coastal interests of the coastal State is not elaborated in the Convention. However, the *Amoco Cadiz* tragedy and other similar incidents may well illustrate the notion, taking into account the legislative history.¹⁰⁷⁸ Admittedly, the notion leaves much discretion to coastal States for their judgment.

2. State practice

With respect to enforcement jurisdiction in the territorial sea over pollution caused by vessels, State practice presents a colorful picture. Some States claim general enforcement power in respect of pollution committed in the territorial sea. At the same time, they have also incorporated the main elements of arts. 220(3), (5), (6) and (7) of UNCLOS into their legislation.¹⁰⁷⁹ Romania can also be subsumed to this group on account of its graded enforcement regime in the territorial sea, despite the fact that the term “reasonable grounds” takes place of “clear grounds” in its legislation.¹⁰⁸⁰

Several other States, including China and Germany, have just staked out general administrative and criminal jurisdiction in this respect without expressly specifying the measures to be taken. Under the Marine Environmental Protection Law 1999 of China, an administrative fine with a maximum of RMB¥ 300,000 (EUR 37,000) may be imposed by the authorities upon those held accountable for marine pollution including that from ships. In the case of severe pollution, those responsible for the pollution will be prosecuted under criminal law.¹⁰⁸¹ In the German MARPOL Act 1981, the Federal Ministry of Transport is empowered to promulgate ordinances and to punish any contravention of MARPOL 73/78 and its protocols with a fine of up to DM 100,000 (EUR 51,000).¹⁰⁸² Under the German

¹⁰⁷⁸ Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 301.

¹⁰⁷⁹ E.g. Antigua and Barbuda, see art. 20A(3-8) of the Maritime Areas Act 1982, in *The Law of the Sea-National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone* (1995), Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, the UN, 25 f. Quite similar provisions are found in the legislation of Belize, Grenada, Jamaica and St. Lucia; also Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 256 f.

¹⁰⁸⁰ Arts. 32 and 33 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania 1990, loc. cit. in previous note, 291 f.

¹⁰⁸¹ Art. 91 of the Law, available at: <<http://law.people.com.cn/bike/viewnews.html?ld=5000>> (last visited: January 14, 2003).

¹⁰⁸² Arts. 2(1) and (2) of the MARPOL Act 1981 (German BGBl. 1982 II, 2) in the version of 18 September 1998 (BGBl. 1998 II, 2546); so far three ordinances in this regard have been issued, to wit, *Verordnung über die Verhütung der Verschmutzung der Nordsee durch Schiffsabwässer vom 6. Juni 1991* (BGBl. 1991 I 1221), *MARPOL-Ordnungswidrigkeiten Verordnung vom 23. Dezember 1983* (BGBl. 1983 I 1677) and *MARPOL-Zuständigkeitsverordnung vom 23. Dezember 1983* (BGBl. 1983 I 1679). Cf. Lagoni, ‘Case Study of Germany’ in Franckx (ed.), *Vessel-Source Pollution and*

Penal Code, serious pollution can likewise bring criminal prosecution into play.¹⁰⁸³ It is noticeable that both States make no distinction between enforcement in the territorial sea and that in the EEZ, or between enforcement against ships on innocent and non-innocent passage.

The Protection of the Sea Act 1983 of Australia allows boarding and inspection to verify compliance with provisions of MARPOL 73/78, without underlining the requirement of "clear grounds".¹⁰⁸⁴ However, Sec. 27A(1)(b) of the Act permits detention of a ship only if "there are clear grounds for believing that a pollution breach has occurred as a result of acts or omissions in relation to the ship while navigating in the territorial sea".¹⁰⁸⁵ Art. 59 of the Bulgarian Act governing the Ocean Space 1987¹⁰⁸⁶ follows the model of arts. 220(2), (3), (5) and (6), insofar as it highlights the requirement of "clear grounds" and confines the appropriate steps to information request, inspection in the case of incomplete information and seizure of the ship. Nonetheless, enforcement jurisdiction under the Act seems to be the same, irrespective of the enforcement place, either in internal waters, territorial sea or in the EEZ, while no attention is paid to the *locus delicti*.

The legislation of Greece grants the authority broad powers to prohibit the entry into its territorial sea of any foreign tanker that has suffered damage and does not live up to the protective measures required.¹⁰⁸⁷ Along similar lines, under the Chilean Regulations 1992, the maritime authority may deny foreign ships entry into the territorial sea which have deficiencies in their pollution-control systems or present a danger of marine pollution.¹⁰⁸⁸ The Law on the State Frontier 1982 of the former USSR, succeeded by Russia, addresses the enforcement competence of border guards in the territorial sea in general, without dealing with pollution caused by vessels in particular. Art. 31 authorizes border guards to

Coastal State Jurisdiction, The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000) (2001), 262 f.

¹⁰⁸³ See art. 4 of the German StGB in the version of 13 November 1998, BGBl. 1998 I, 3322, available at: <<http://www.redmark.de/redmark/f/FStGB1.html>> (last visited: May 10, 2002). According to art. 5(11) of the Code, it can be presumed that the enforcement action may be taken in the territorial sea against the ship having committed pollution in the EEZ.

¹⁰⁸⁴ Sec. 27(1) of the Act which was amended in 1994 to cover the EEZ. McGrath/Julian, 'Protection of the Marine Environment from Shipping Operations: Australian and International Responses' in Rothwell/Bateman (ed.) *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 195; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 257.

¹⁰⁸⁵ McGrath/Julian, 'Protection of the Marine Environment from Shipping Operations: Australian and International Responses' in Rothwell/Bateman (ed.) *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 257.

¹⁰⁸⁶ *Supra* note 1022, 69 f.

¹⁰⁸⁷ Arts. 7(2) and (3) of the Law no. 743 of 13/17 October 1977; Strati, 'Case Study of Greece' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 280.

¹⁰⁸⁸ Molenaar, *Coastal State Jurisdiction over Vessel-source Pollution* (1998), 258.

require information, to stop and inspect a foreign merchant ship if it refuses to give information or violates the applicable rules there. After inspection the ship may be expelled from the internal waters or territorial sea. Pursuant to art. 31(4), discharge of harmful substances may justify the detention of the ship concerned.¹⁰⁸⁹

In the UK, the competent enforcement authority is the Maritime and Coastguard Agency. It is responsible for investigating suspected discharges and, in appropriate circumstances, prosecuting the owners and masters of ships. For that purpose, the Agency is entitled to detain ships suspected of having failed to observe the prohibition of discharges in the territorial sea or UK "controlled waters". Detention is normally effected in ports or internal waters.¹⁰⁹⁰ Offenders are normally punished with a fine. In certain cases, the delinquent ship may even be sold by order of the court. For example, on 30 March 1998, a Norwegian ship was indicted for discharging engine-oil bilge off the west coast of Scotland in the territorial sea and thus a fine was imposed on the owners amounting to GBP 5,000 plus GBP 15,000 in costs.¹⁰⁹¹

In the territorial sea of the US, the authorities have a wide spectrum of powers to enforce the country's laws with respect to vessel-source pollution, including OPA 1990, CWA 1972 and PWSA 1972. Enforcement measures range from denial of entry into the territorial sea, operation and anchorage as directed, boarding and inspection to verify compliance, to detention and forfeiture.¹⁰⁹²

In conclusion, despite more or less deviation from the related provisions of UNCLOS, the State practice reviewed so far appears to have generally followed conventional rules. However, a large number of States do not distinguish between enforcement powers in the territorial sea and in the EEZ. Nor do they make a distinction between ships on innocent passage and those not in innocent passage. Moreover, what has been said in this section may, in some cases, still hold good in the ensuing sections, where repetition will be intentionally left out.

II. Control of Ships with Dangerous Substances

1. Conventional provisions: UNCLOS and Basel Convention 1989

Seemingly the control of ships carrying dangerous substances falls within the domain of the prevention of pollution from ships. However, they are generally regarded as different issues in international law of the sea. While the former

¹⁰⁸⁹ It is interesting to note that detention is also applicable in the same way to the case of non-innocence as stipulated in art. 31(1).

¹⁰⁹⁰ Anderson, 'Case Study of the United Kingdom' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 354.

¹⁰⁹¹ *Ibid.*, at 355.

¹⁰⁹² For more elaboration on the US case see Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 264.

focuses merely on the passage itself of the ships concerned, the latter relates basically to the discharge violations of applicable rules. During UNCLOS III, the attempt to put "ships having special characteristics", namely tankers and ships carrying nuclear or other inherently dangerous or noxious substances, under the requirement of prior notification or approval failed to achieve its goal.¹⁰⁹³ UNCLOS touches upon the issue in art. 22 dealing with sea lanes and TSS as well as in art. 23, which obliges the above ships to "carry documents and observe special precautionary measures established for such ships by international agreements" while passing through the territorial sea. Nevertheless, such provisions seem to fall short of dispelling the fears of coastal States regarding ships carrying dangerous substances, since no enforcement competence is expressly accorded to these States.¹⁰⁹⁴

In that context came the birth of the Basel Convention 1989, which concentrates on the control of transboundary movement of hazardous wastes excluding nuclear wastes. Under the convention, besides the prescriptive jurisdiction to place the requirement of prior notification or permission on transboundary movement of hazardous wastes that may well involve international shipping, coastal States, as States of transit, are also invested with corresponding enforcement powers. In this regard, art. 4(4) of the convention may be cited below:

Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

Art. 9(5) echoes the above regulation, as it requires that each party "introduce appropriate national/domestic legislation to prevent and punish illegal traffic". Moreover, art. 4(7) goes on to provide that:

Furthermore, each Party shall:

- (a) *Prohibit* all persons under its national jurisdiction from transporting or disposing of hazardous wastes unless such persons are authorized or allowed to perform such types of operations;
- (b) Require that hazardous wastes and other wastes that are to be the subject of a transboundary movement be packed, labeled, and transported in conformity with *generally accepted and recognized international rules and standards* in the fields of packing, labeling, and transport, and that due account is taken of relevant *internationally recognized practices*;
- (c) Require that hazardous wastes and other wastes be accompanied by a *movement document* from the point at which a transboundary movement commences to the point of disposal. (emphasis added)

Pursuant to the first sub-paragraph, coastal States are entitled to prohibit any transport of hazardous wastes without permission. The remaining two sub-paragraphs seem to serve the same purpose as that shown in art. 23 of UNCLOS. However, it

¹⁰⁹³ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 206 ff, 218.

¹⁰⁹⁴ No enforcement powers could be inferred from the provisions of arts. 192, 194(1) and 194(3)(b) of UNCLOS, because these provisions are about general obligations, not about enforcement jurisdiction.

still remains unsettled whether coastal States may, in the territorial sea, intercept foreign ships to verify compliance with the said measures and documentary requirement. This is even truer when taking into account the prominence of the innocent passage regime.¹⁰⁹⁵

2. State practice

The ambivalent text of relevant conventional regulations actually provides ammunition to both sides in State practice.¹⁰⁹⁶ As earlier pointed out, as many as 23 States demand prior notification or authorization for the passage of nuclear-powered ships and other ships with dangerous substances, while nine States categorically prohibit such passage through the territorial sea. It is conceivable, therefore, that these States would take some corresponding enforcement measures in the case of violations. In China, for instance, any foreign ship transporting dangerous wastes in the territorial sea would be expelled.¹⁰⁹⁷

In addition, pursuant to Chilean and Greek legislation, as just discussed in Section D.I.2., the authorities may also deny ships with dangerous materials entry into their territorial seas or expel them therefrom. Sec. 7 of the South Africa PACOPOSOA 1981 allows boarding for certificate control at all times.¹⁰⁹⁸ This regulation is presumably also applicable to ships with dangerous goods. According to Romanian legislation, the competent authorities may carry out inspection of nuclear-powered ships and of ships transporting radioactive or other dangerous substances within the territorial sea.¹⁰⁹⁹ What is more, the authorities may order the ship concerned to leave the territorial sea, if it is found that the presence of the ship may have dangerous consequences.¹¹⁰⁰

Some initiatives at regional level may also throw a certain light on State practice. To this end, two regional instruments should be mentioned. The first is the 1996 Izmir Protocol to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution.¹¹⁰¹ In art. 6(4) of the protocol, which regulates the transboundary movement of hazardous wastes in the territorial sea, only the requirement of prior notification is confirmed while that of prior authorization is brushed off.¹¹⁰² The second one is the 1998 Teheran Protocol to

¹⁰⁹⁵ Especially art. 24 of UNCLOS and art. 4(12) of the Basel Convention 1989.

¹⁰⁹⁶ Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in the same work of Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 28.

¹⁰⁹⁷ Art. 79 of the Marine Environmental Protection Law 1999 of China; but the practice is deemed hardly being in conformity with arts. 19-24 UNCLOS.

¹⁰⁹⁸ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 263.

¹⁰⁹⁹ Art. 13(1) of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania 1990, 288.

¹¹⁰⁰ Art. 13(2) of the Act, *ibid.*

¹¹⁰¹ [1976] 15 *ILM* 290.

¹¹⁰² Art. 6(4) reads: "The transboundary movement of hazardous wastes through the territorial sea of a State of transit only takes place with the prior notification by the

the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution.¹¹⁰³ Under the protocol, transit States have a right of prior consent of waste shipments through areas under their national jurisdiction covering the territorial sea.¹¹⁰⁴ Both protocols should basically be held applicable only on an *inter se* basis after they come into force in the future. It is questionable under international law if they could be made applicable to the ships of non-parties by virtue of the sovereignty over the territorial sea.

With respect to nuclear-powered merchant ships, State practice shows that the passage of such ships through the territorial sea, like entry into internal waters, is largely regulated by the relevant bilateral agreements entered into between the flag and coastal States in question. For that purpose, the US concluded more than a dozen bilateral agreements with other States for its nuclear merchant ship *Savannah*. Similarly, Germany reached five such agreements with the Netherlands, Liberia, Portugal, Argentina and Brazil for its nuclear-powered ship *Otto Hahn*.¹¹⁰⁵ It may follow that, in practice, the passage of nuclear-powered merchant ships through the territorial sea generally needs prior approval either in the form of bilateral agreements or on a case-to-case basis.

In recent years, the controversial transport of nuclear fuel at sea has emerged frequently in the headlines of the media and increasingly directed public attention to the issue. These disputed activities include the 1992 voyage of the Japanese *Akatsuki Maru*,¹¹⁰⁶ the 1995 voyage of the British ship *Pacific Pintail*,¹¹⁰⁷ the 1997 journey of another British ship *Pacific Teal*, and the 1999 convoy of both

State of export to the State of transit, as specified in Annex IV to this Protocol. After reception of the notification, the State of transit brings to the attention of the State of export all the obligations relating to passage through its territorial sea in application of international law and the relevant provisions of its domestic legislation adopted in compliance with international law to protect the marine environment. Where necessary, the State of transit may take appropriate measures in accordance with international law. This procedure must be complied with within the delays provided for by the Basel Convention." Available at: <<http://www.unep.ch/basel/Mislinks/Izmir.html>> (last visited: February 10, 2003).

¹¹⁰³ [1978] 17 *ILM* 511.

¹¹⁰⁴ Art. 8(5) of the protocol, cited as Molenaar, 29.

¹¹⁰⁵ For more information, see Lagoni, 'Der Hamburger Hafen, die internationale Handels-schiffahrt und das Völkerrecht' [1988] 26 *AVR* 316 ff; Churchill/Lowe, *The Law of the Sea* (1999), 91; Von Münch, 'International Legal Problems of the Marine Environment' in *Internationales Seerecht – Seerechtliche Abhandlungen 1958-1982 mit einer Einführung in das Internationale Seerecht* (1985), 142; Hakapää, *Marine Pollution in International Law* (1981), 165; Boulanger, 'International Conventions and Agreements on Nuclear Ships' in *Nuclear Law for a Developing World* (1969), IAEA Legal Series No. 5, 175 ff.

¹¹⁰⁶ See Van Dyke, 'Sea Shipment of Japanese Plutonium Under International Law' [1993] 24 *ODIL* 399 ff.

¹¹⁰⁷ Van Dyke, 'Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials' [1996] 27 *ODIL* 379 ff.

British ships.¹¹⁰⁸ It is worth mentioning that, in response to strong pressure, the French, British and Japanese corporations involved and their governments jointly decided to disclose information on the transport route before the start of the shipments in 1999. Interestingly, the shipments were returned back from Japan by the same ships in September 2002, following a legal battle over safety information relating to the consignments. It is claimed that, since the start of this heavily armed voyage, altogether 80 States have condemned the voyage and denied the ships access to their waters.¹¹⁰⁹

In the midst of other similar shipments, there was great concern over possible environmental incidents and many transit States prohibited the ships from entering their territorial sea and in some cases even the EEZ. Meanwhile, some enforcement actions have been reported. For example, in 1995 Brazil and Chile invoked the precautionary principle and employed their navy to force the ship *Pacific Pintail* out of the territorial sea and the EEZ.¹¹¹⁰ Ireland has repeatedly expressed its concerns about and opposition to such shipping through the Irish Sea. So far it has successfully excluded the shipments through its territorial sea. Nevertheless, these concerns and opposition eventually culminated in the *MOX Plant* case (*Ireland v. UK*) before the ITLOS in December 2001.¹¹¹¹

From the above analysis, one can see that, while enforcement actions taken by coastal States *vis-à-vis* ships carrying dangerous substances might, more or less, be justified under the Basel Convention 1989, they are not free of controversy in the context of UNCLOS. However, State practice reflects, on the one hand, growing concerns of States about the marine environment. On the other, it may adumbrate an emerging trend towards a more stringent control of such shipments through the territorial sea. At any rate, while prior authorization is in clear contrast with the rules contained in UNCLOS, prior notification cannot be regarded as an obstacle to innocent passage so long as it is intended to make coastal States well informed of and thus better prepared for such passage through their territorial seas.

¹¹⁰⁸ During the Voyage taking place from July to September 1999, the two British ships transported nuclear fuel from France to Japan. See more in Currie/Van Dyke, 'The Shipment of Ultrahazardous Nuclear Materials in International Law' [1999] 8 *RECEIL* 113 ff.

¹¹⁰⁹ Available at: <<http://www.itv.com/news/Britain540547.html>> (last visited: February 11, 2003).

¹¹¹⁰ Van Dyke, 'Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials' [1996] 27 *ODIL* 396.

¹¹¹¹ For the details see website <http://www.itlos.org/start2_en.html> (last visited: February 11, 2003). Ireland fears that the planned project of MOX Plant would result in more shipments of nuclear waste through the Irish Sea, which would pose serious threats to fishery activities and the marine environment in the Irish Sea, including the territorial sea of Ireland. See Request for Provisional Measures and Statement of Case of Ireland, *ibid*.

III. Marine Protected Areas

Coastal State enforcement jurisdiction in marine protected areas is not addressed expressly under UNCLOS, as far as the territorial sea is concerned. Nevertheless, the coastal State may establish marine protected areas under customary international law. Therefore, the elaboration of enforcement measures in this regard is basically left to the special international conventions and domestic legislation.

Among others, MARPOL 73/78 should particularly be adverted to on account of its close relevance to shipping activities. In its Annexes I, II and V, the convention has defined certain sea areas as special areas, which are provided with a higher level of protection than other areas of the sea and thus require some more stringent measures for the prevention of pollution. For instance, Regulation 10 in the Annex I to the convention has alone designated the Mediterranean Sea, Baltic Sea, Black Sea, Red Sea, "Gulfs" area, Gulf of Aden, Antarctic area and North West European Waters as special areas with strict controls on the discharge of oily wastes.¹¹¹² Pursuant to this regulation, any discharge into the sea of oil or oily mixture from any oil tanker and any other ship above 400 tons gross tonnage shall be, subject to some exceptions, banned in the special areas. Moreover, no discharge into the sea shall contain chemicals or other substances in quantities or concentrations that are hazardous to the marine environment.¹¹¹³

Another category of marine protected areas within the framework of the IMO is a particularly sensitive sea area (PSSA). PSSA is a sea area that needs special protection through actions by the IMO because of its significance in terms of ecological, socio-economic or scientific value and that may be easily damaged by shipping. Once an area is approved as a PSSA, tougher mandatory measures can be introduced to control shipping activities in the area, such as stricter discharge standards, equipment requirements for ships and even the establishment of an area to be avoided (ATBA).¹¹¹⁴ So far five PSSAs have been designated by the IMO.¹¹¹⁵

The Agenda 21 and the Convention on Biological Diversity adopted at Rio in 1992 should also be mentioned in this connection. While the former urges coastal States to commit themselves to the "establishment and management of protected

¹¹¹² In Annex II the Baltic Sea, Black Sea and the Antarctic area are identified as special areas for the purpose of strict controls on tank washing and residue-discharge procedure; in Annex V the Mediterranean Sea, Baltic Sea, Black Sea, Red Sea, "Gulfs" area, North Sea and Wider Caribbean region including the Gulf of Mexico and the Caribbean Sea are designated as such for the prevention of pollution by garbage on board. See the website of the IMO, available at: <http://www.imo.org/Environment/mainframe.asp?topic_id=305> (last visited: February 13, 2003).

¹¹¹³ See Regulations 10(2) and (4) of Annex I to MARPOL 73/78.

¹¹¹⁴ ATBA means an area with defined limits in which the navigation by all ships or by certain classes of ships is prohibited.

¹¹¹⁵ They are the Great Barrier Reef, the Sabana-Camagüey Archipelago in Cuba, Malpelo Island in Colombia, around the Florida Keys and the Wadden Sea. *Ibid.*

areas”,¹¹¹⁶ the latter lays down an obligation for the States to take general measures for conservation and sustainable use of biological diversity.¹¹¹⁷

Although coastal States basically have enforcement jurisdiction in this field under general international law, these conventional provisions further confirm, if not fashion, the authority of coastal States to enforce relevant rules and standards in the marine protected areas that may well cover the territorial sea.

On the other hand, many coastal States have established and enforce restrictions, in varying degrees, on maritime navigation in the marine protected areas designated under domestic legislation. In accordance with the Spanish Framework Law on Protected Areas 1991, the authorities may exclude motorized navigation from marine parks and reserves.¹¹¹⁸ Under the Marine Sanctuaries Act 1972, twelve marine sanctuaries have been established in US coastal waters. Some activities including anchoring and discharges are prohibited or strictly regulated within and, under certain circumstances, even without the sanctuaries.¹¹¹⁹ In China, contraventions in marine nature reserves against its Nature Reserves Regulations 1994 can lead to an administrative fine or, in some flagrant cases, to criminal prosecution.¹¹²⁰

IV. Dumping

If foreign ships carrying dangerous substances enter the territorial sea of a coastal State for the purpose of dumping wastes or other matter there, the legal issue would be changed to coastal State jurisdiction with respect to dumping in the territorial sea. In that case, the foreign ships must be subject to local enforcement jurisdiction in accordance with duly promulgated national legislation and applicable international rules and standards. This principle is undisputed in international law and shored up by several global conventions, such as UNCLOS¹¹²¹ and LC 1972.¹¹²²

¹¹¹⁶ See 17.7 of the Agenda 21, available at: <<http://www.un.org/esa/sustdev/agenda21chapter17.htm>> (last visited: February 12, 2003).

¹¹¹⁷ Art. 6 of the convention, available at: <<http://www.biodiv.org/convention/articles.asp>> (last visited: February 13, 2003).

¹¹¹⁸ Meriardi, ‘Case Study of Italy’ in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 299.

¹¹¹⁹ Noyes, ‘Case Study of the United States of America’ in *ibid.*, at 3761.

¹¹²⁰ See arts. 37-40 of the Regulations. At the time of writing, 19 marine nature reserves have been established. Available at: <<http://www.soa.gov.cn/zrbhq/bao2.htm>> (last visited: February 13, 2003).

¹¹²¹ Art. 216(1) reads: “*Laws and regulations* adopted in accordance with this Convention and *applicable international rules and standards* established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping *shall be enforced*:

(a) *by the coastal State* with regard to dumping *within its territorial sea* or its exclusive economic zone or onto its continental shelf;

(b) ...” (emphasis added)

Unlike the constellations investigated earlier, ships engaged in dumping in the territorial sea are under full coastal State jurisdiction. They cannot be considered on innocent passage by reason of either their purpose of voyage – dumping rather than passage, or the provisions in art. 19(2)(h) – dumping as an act of “wilful and serious pollution”. As previously suggested, coastal States have a free hand in dealing with non-passage or non-innocence in the territorial sea. Consequently, it is basically up to coastal States how to enforce their laws and regulations as well as applicable international rules and standards relating to dumping in the territorial sea.¹¹²³ China, for instance, forbids any foreign ship to conduct dumping operations in the territorial sea¹¹²⁴ and forbids any shipment of foreign wastes thereto for the purpose of dumping.¹¹²⁵ A violation will face a warning or, under certain circumstances, a fine ranging from RMB¥ 100,000 (EUR 11,000) to RMB¥ 1,000,000 (EUR 110,000).¹¹²⁶

Under the 1996 Protocol to LC 1972, which has not entered into force yet, a reverse listing approach is adopted, whereby a general prohibition on dumping at sea is imposed except for wastes listed in Annex 1 to the Protocol.¹¹²⁷ The approach is intended to strengthen coastal State control on dumping. Some States, such as Canada,¹¹²⁸ have incorporated the new standards into their domestic legislation.

V. Ice-covered Areas: art. 234 of UNCLOS

Ice-covered areas merit special attention due to their particular characteristics in terms of navigation and marine environment. However, the Convention fails to produce an unequivocal solution to the debate which took place at UNCLOS III primarily between Canada and the former USSR on the one hand, and the US on the other.¹¹²⁹

¹¹²² Arts. II and IV of LC 1972, available at: <<http://www.londonconvention.org>> (last visited: February 15, 2003).

¹¹²³ Pursuant to art. 210(5) of UNCLOS, no dumping can be carried out without the express and prior approval of the coastal State. Additionally, under art. 216(1)(c) UNCLOS, the port State of loading has also enforcement jurisdiction against any intended dumping.

¹¹²⁴ Art. 33 of the Regulations on the Prevention of Marine Pollution from Ships 1983.

¹¹²⁵ Art. 7 of the Regulations on the Prevention of Dumping of Wastes at Sea 1985.

¹¹²⁶ Art. 87 of the Marine Environmental Protection Law 1999, available at: <<http://law.people.com.cn/bike/viewnews.html?!d=5000>> (last visited: February 14, 2003).

¹¹²⁷ See art. 4.1.1 of the 1996 Protocol and art. 1 of Annex 1 to the Protocol.

¹¹²⁸ Canadian Environmental Protection Act 1999, VanderZwaag, ‘Shipping and Environmental Protection in Canada: Rocking the Boat and Riding a Restless Sea’ in Rothwell/Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (2000), 217.

¹¹²⁹ Rosenne/Yankov, *The United Nations Convention on the Law of the Sea 1982 – A Commentary* (1991), vol. IV, 392 f.

First of all, it is controversial where the article is purported to apply.¹¹³⁰ In other words, how to interpret the expression “within the limits of the exclusive economic zone”.¹¹³¹ This article, or specifically the expression as cited above, should be interpreted as covering the territorial sea as well. Otherwise the Convention would illogically have assigned broader powers to coastal States in the EEZ than in the territorial sea.¹¹³² Nevertheless, as far as the territorial sea is concerned, what really matters here is the issue of the permissibility of introducing more stringent measures in respect of DCME for foreign ships,¹¹³³ since an introduction in other aspects is indisputable under international law. The solution to this pending issue will depend on the attitude towards another uncertainty in art. 234. That is what the requirement in the article that “Such laws and regulations shall have due regard to navigation” actually means. Jurists divide anew on whether coastal States are obliged to observe generally accepted international rules and standards concerning DCME in their relevant domestic legislation that, in turn, lays down the basis for coastal State enforcement jurisdiction.¹¹³⁴ However, it can be claimed that the measures taken by coastal States, either prescriptive or enforcement, may go beyond applicable international rules and standards. Otherwise, there would be no reason to retain art. 234 in the Convention. A contrary view would seem also to run against the purpose and objective of this special article of the Convention.

Consequently, the conclusion can be drawn that coastal States may have more enforcement competence, especially in the field of DCME, in the ice-covered parts of the territorial sea compared with that in other parts of the territorial sea. In this sense, the preventive and intrusive measures that are, under Canadian Arctic Waters Pollution Prevention Act 1970, allowed to take in an anti-pollution zone of up to 100 nm from the Arctic coasts can roughly be justified by art. 234 of the Convention.¹¹³⁵

VI. Nuclear-Free Zone

The first nuclear-free zone was established in accordance with the Treaty for the Prohibition on Nuclear Weapons in Latin America, which was signed at Tlateloco

¹¹³⁰ See the elaboration on the division in The Final Report of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000) in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 101.

¹¹³¹ See in art. 234 of the Convention.

¹¹³² The Final Report of the ILA Committee, 101.

¹¹³³ Art. 21 of the Convention limits the laws and regulations concerning DCME only to those giving effect to generally accepted international rules and standards.

¹¹³⁴ The Final Report of the ILA Committee, 102.

¹¹³⁵ Von Münch, ‘International Legal Problems of the Marine Environment’ in *Internationales Seerecht – Seerechtliche Abhandlungen 1958-1982 mit einer Einführung in das Internationale Seerecht* (1985), 156.

in Mexico on 14 February 1967.¹¹³⁶ Following the model of the Tlateloco treaty, the South Pacific Forum (SPF) States adopted a similar treaty, the South Pacific Nuclear Free Zone Treaty, at Rarotonga in the Cook Islands on 6 August 1985.¹¹³⁷ While the flat expression "the State exercises sovereignty in accordance with its own legislation"¹¹³⁸ without mentioning relevant international rules in the first treaty may cause some concerns, the treaty of Rarotonga explicitly confirms its respect for the rights and freedoms of navigation in the zone under international law.¹¹³⁹ However, a dispute could arise from the interpretation and enforcement of art. 5(2) of the latter treaty. The regulation is considered the most innovative provision in the treaty and reads:

*Each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships or aircrafts to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.*¹¹⁴⁰ (emphasis added)

Obviously, this ambivalent stipulation may provide ammunition for both coastal States and maritime powers which hold quite disparate arguments. That notwithstanding, as a regional agreement, its enforcement is supposed not to give rise to the problem of *pacta tertiis*. The legitimate rights and freedoms of any third State in the nuclear-free zone ought to be left intact. This rule is reflected in art. 194(4) of UNCLOS and art. 4(12) of the Basel Convention 1989. However, to what extent the rule will be truly respected will depend on the development of State practice.

In 1987, New Zealand established the first national nuclear-free zone in the world under its Nuclear Free Zone, Disarmament, and Arms Control Act.¹¹⁴¹ The nuclear-free zone covers the territorial sea but does not include the innocent passage of foreign ships.¹¹⁴² In recent years, the parliament of the country has been mulling over a nuclear-free zone extension bill which would prohibit foreign nuclear-powered ships or ships carrying nuclear materials from passing through

¹¹³⁶ The treaty is called the treaty of Tlateloco as well and entered into force for 23 Latin American countries as of 1 January 1989. See the website <<http://dosfan.lib.uic.edu/acda/treaties/latin1.htm>> (last visited: February 16, 2003); also Fong, 'South Pacific Nuclear Free Zone Treaty' in Van Dyke/Alexander/Morgan (ed.), *International Navigation: Rocks and Shoals Ahead?* (1988), 363.

¹¹³⁷ The treaty, also referred to as the treaty of Rarotonga, came into force on 11 December 1986 and right now twelve of 15 SPF States are members to the treaty. Available at: <<http://www.fas.org/nuke/control/spnfz>> (last visited: February 15, 2003); see also Fong, *ibid.*, at 364.

¹¹³⁸ Art. 3 of the treaty of Tlateloco.

¹¹³⁹ Art. 2(2) of the treaty of Rarotonga, available at: <<http://www.iaea.or.at/worldatom/Documents/infcircs/others/inf331.shtml>> (last visited: February 16, 2003).

¹¹⁴⁰ *Ibid.*

¹¹⁴¹ Available at: <<http://canterbury.cyberplace.org.nz/peace/nukefree.html>> (last visited: February 16, 2003).

¹¹⁴² See Sections 4(c) and 12(a) of the Act, *ibid.*

the territorial sea. If it is passed, it will reshape the landscape of coastal State jurisdiction, both prescriptive and enforcement, over foreign ships in the territorial sea. It would probably trigger off strong repercussions from other maritime powers. In addition, it should be noted that some Caribbean States likewise press for declaring the Caribbean Sea a nuclear-free zone for the purpose of preventing the shipping, storing or dumping of radioactive substances in the region.¹¹⁴³

VII. Limitations to the Enforcement of Coastal/Port States: Safeguards in UNCLOS

From the above analysis, one may come to the perception that UNCLOS unprecedentedly grants coastal States a wide range of enforcement powers with regard to marine environmental protection. Correspondingly, the Convention sets out a series of safeguards in Section 7 of Part XII aimed at placing some restraints on the exercise of coastal State enforcement jurisdiction to ensure that enforcement is in line with the general principles of international law.

First of all, as for the investigation of foreign ships referred to several times in the discussion, the States shall not delay a foreign ship longer than is essential for necessary investigation as prescribed in arts. 216, 218 and 220.¹¹⁴⁴ It is interesting that art. 219 may also justify investigation as a legitimate means of ascertaining the unseaworthiness of a foreign ship before taking administrative measures to prevent it from sailing. Physical inspection belongs generally to investigation. Pursuant to the regulation in the Convention, primary physical inspection of a foreign ship shall be confined merely to a documentary examination, whereas further physical inspection, which focuses on the verification of the relevant documents on board, may be undertaken subsequent to such an examination and under the specified circumstances.¹¹⁴⁵ In addition, the issue of prompt release and the notification to the flag State of the compulsory measures are also underscored, corresponding to other provisions in the Convention.¹¹⁴⁶

Secondly, the safeguards also concern proceedings. In the proceedings that may be duly instituted by coastal or port States, measures shall be taken to facilitate the participation of other parties or relevant persons and organizations in the proceedings.¹¹⁴⁷ Besides, the proceedings instituted by States pursuant to arts. 218(1), (2) and 220(6), namely the proceedings launched for any violation committed by a foreign ship beyond the territorial sea, shall be suspended upon the introduction of proceedings in respect of the same substance by the flag State within six months. The regulation seems to underline the primacy of flag State jurisdiction. But this underlining appears to be compromised by a proviso which is designed to enable the coastal or port States to retain jurisdiction in some

¹¹⁴³ Kwiatkowska/Soons, 'Plutonium Shipments' [1994] 25 *ODIL* 419 ff.

¹¹⁴⁴ See provisions in art. 226(1)(a) of the Convention.

¹¹⁴⁵ *Ibid.*

¹¹⁴⁶ Arts. 226(1)(b), (c) and 231 of the Convention.

¹¹⁴⁷ Art. 223 UNCLOS.

cases.¹¹⁴⁸ Additionally, the termination of the suspended proceedings and the time to launch the proceedings are also regulated in the article.

Significant and possibly influential provisions are to be found in art. 230, according to which only monetary punishment may be ruled in courts with respect to relevant violations by foreign ships both in and beyond the territorial sea. The only exception thereto is non-innocent passage within the context of marine environmental protection, whereby the imposition of imprisonment against the persons in charge of the delinquent ship or even the imposition of forfeiture of the ship is allowed. Here measures and penalties should be clearly distinguished. That is to say, the measures taken to secure the payment of fines, such as detention or escort to a port on a provisional basis, cannot be regarded as a non-monetary penalty.

Special attention is also to be paid to the regulation in the Convention dealing with the manner of the exercise of coastal State enforcement powers. Art. 225 lays down that, in the exercise of the said powers against foreign ships, "States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk". While the second half is understandable, the first does not seem to be so. Against a foreign ship which deliberately tries to escape or even to resist a legitimate enforcement action, necessary measures, which would, in most cases, inevitably endanger its safety of navigation or otherwise bring about certain harm to the pursued ship, can be taken to secure the effective enforcement. Of course, the enforcement must be subject to the rules of necessity and proportionality as delicately paraphrased in the cases of *I'm Alone*,¹¹⁴⁹ *The Red Crusader*¹¹⁵⁰ and *Saiga*.¹¹⁵¹ In any event, the regulation implies no blanket prohibition of the use of force in any circumstances.¹¹⁵² Therefore, the regulation, especially the phrase of "endanger the safety of navigation", should be strictly interpreted. As regards the use of force, a discussion has already been held in Subsection C.II.2.b) in the first part of the thesis. Without repeating what has been discussed, it is necessary to highlight here that the rules of customary law require

¹¹⁴⁸ The proviso is "unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels". Obviously, the interpretation and the enforcement of the proviso is, to a large extent, up to the coastal State concerned. See art. 228 UNCLOS.

¹¹⁴⁹ [1935] III *RIAA* 1609; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 1072; Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' [1986] 35 *ICLQ* 341 f.

¹¹⁵⁰ [1962] 35 *ILR* 485; O'Connell/Shearer, *ibid.*, at 1072; Shearer, *ibid.*, at 341.

¹¹⁵¹ See Paras. 153-159 of the Judgment of the ITLOS, *The M/V Saiga(No.2)* case (*Saint Vincent and the Grenadines v. Guinea*), 1 July 1999; available at: <http://www.itlos.org/start2_en.html> (last visited: March 24, 2004).

¹¹⁵² Fenwick, 'Legal Limits on the Use of Force by Canadian Warships engaged in Law Enforcement' [1980] 18 *CYL* 113 ff; Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' [1986] 35 *ICLQ* 342.

coastal States to weigh the gravity of the violation in question against the safety of navigation and the safety of life at sea.

Lawfulness, reasonableness and non-discrimination of enforcement measures are also underlined in the safeguards, any breach of which would result in liability of enforcing States.¹¹⁵³ In addition, the subjects of enforcement powers are clearly circumscribed similar to the case in art. 107, which deals with the seizure of ships on account of piracy on the high seas.¹¹⁵⁴

The burden of proof seems to rest basically with coastal States, considering the requirement of the existence of "clear grounds" or "clear objective evidence" for the violation.¹¹⁵⁵ The requirement is placed on the enforcing States as a precondition for the exercise of enforcement jurisdiction. The view is strengthened through the fact that the investigation right is assigned to the enforcing States in several relevant articles. However, in practice, a foreign ship involved in a case is not completely free of the burden of proof. Of relevance here is the *Gold Crest* case before the Dutch Supreme Court in 1994.¹¹⁵⁶ At issue was the burden of proof in connection with art. 5(1) of the PPSA, a Dutch enactment concerning marine environmental protection. The article prohibits the discharge of substances, subject to the exceptions as specified in MARPOL 73/78. The court ruled that the public prosecutor has to establish that the suspected ship did discharge hazardous substances, whereas it is the duty of the ship-owner concerned to prove that the discharge falls within the exceptions if he so argues.¹¹⁵⁷

Finally, an interesting but legitimate question can arise: whether the safeguards as just reviewed are applicable only to the field of the marine environment. A strict interpretation of the relevant provisions in UNCLOS may produce an affirmative reply to the question. There is no reason, however, to brush them aside in other fields, such as navigation and fisheries. Therefore, the safeguards should be applied *mutatis mutandis* to other aspects than marine environmental protection, unless the application runs directly against the express provisions of generally accepted international conventions including UNCLOS.

¹¹⁵³ Arts. 227 and 232 of the Convention.

¹¹⁵⁴ See art. 224 of the Convention.

¹¹⁵⁵ Cf. arts. 220(2), (3), (5) and (6) UNCLOS.

¹¹⁵⁶ *Hoge Raad* (Supreme Court), 13 September 1994, No. 97413 E; cited as Molenaar/Dotinga, 'Case Study of the Netherlands' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 317.

¹¹⁵⁷ *Ibid.*

E. Criminal Jurisdiction over Foreign Ships in the Territorial Sea

I. Introduction

Criminal jurisdiction is one of the traditional elements of coastal State jurisdiction and has persistently been addressed in international codification efforts. Criminal jurisdiction over foreign ships in the territorial sea has to deal with two competitions, namely, concurrent jurisdiction over the same offences by coastal and flag States, and competing interests of free navigation on the one hand and of effective enforcement of criminal law on the other.

While talking about criminal jurisdiction in the territorial sea, one may not fail to advert to the classical case of *R. v. Keyn* 1876.¹¹⁵⁸ The case arose out of a collision between a British steamer and the German ship *Franconia* in the British territorial sea. The accident was caused by a fault of the *Franconia* and killed a passenger on the steamer. For that reason, the master of the *Franconia* was prosecuted before the Central Criminal Court in London for manslaughter. At the end of the proceedings, the jury found him guilty. The case went to the Court for Crown Cases Reserved, which finally ruled that “in absence of statutory enactment, the Central Criminal Court had no power to try such an offence”.¹¹⁵⁹ It is interesting to point out that the case was hotly debated and the ruling was by seven votes to six. It reflected the contentiousness of the findings in the case in particular and a fundamental doctrinal uncertainty in respect of coastal State criminal jurisdiction over passing foreign ships in general.

As a remedial response to the case, the British parliament enacted the Territorial Waters Jurisdiction Act of 1878. The Act invested English courts with jurisdiction over indictable offences committed by foreigners aboard foreign ships in the territorial sea. Great criticism was triggered off both at home and abroad by this unprecedented enactment. On the other hand, it might be the very start of the process of fusing English rules into the modern international law of the sea.

International concerns were expressed as well over the US practice in fighting against liquor transport by foreign ships within its territorial sea.¹¹⁶⁰ Likewise worth mentioning may be the case of the *Ernst Woermann* in 1905. While sailing in Southampton Water, this German ship was required by the British authorities to cooperate in the arrest of *Elias Goldstein*, a fugitive offender on board from the British possession Cape Colony. The captain refused to allow the arrest on the

¹¹⁵⁸ The case is also called *The Queen v. Keyn* (1876), Law Records, 2 Exch.Div. 63; Quoted as Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927/1970), 124 f; also O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 264; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 40.

¹¹⁵⁹ Jessup, *ibid.*, at 125.

¹¹⁶⁰ For more details see Jessup, *ibid.*, Chapters IV and V, at 209 ff.

ground that *Goldstein* was a German on a German ship. The ship sailed then directly to Hamburg. The British government complained of the captain's "irregularity" but dropped the matter in the end.¹¹⁶¹ Draft efforts in 1920s by academic societies, either by the AAIL or by the ILA, do not seem to have shed more light on a generally accepted customary rule in this regard either.¹¹⁶²

Therefore, it may be concluded that, until 1920s, there existed no widely recognized customary international rules as might be drawn from State practice and academic codifications. The outstanding task was eventually finished at the Hague Codification Conference in 1930.

II. Developments in International Fora

Given the background that coastal State criminal jurisdiction over foreign ships in the territorial sea can only be restricted by the right of innocent passage, the discussion in this regard had always focused on the interaction between local criminal jurisdiction and the regime of innocent passage. For those foreign ships that cannot claim the right of innocent passage, it may suffice to say that coastal States have complete competence to enforce their criminal enactments.

At the Hague Conference, the issue of criminal jurisdiction was extensively discussed. In the end, a draft article on criminal jurisdiction was included in the Final Act of the Conference, which ran as follows:

A Coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

- (1) if the consequences of the crime extend beyond the vessel; or
- (2) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (3) if the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

The above provisions do not affect the right of the Coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel in the inland waters of that State or lying in its territorial sea, or passing through the territorial sea after leaving the inland waters.

The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel.¹¹⁶³

The formula was designed to conciliate the interests of international navigation, which ought to be interfered with as little as possible, with the desire of coastal States to make their criminal laws effective throughout the whole territory. It may be noteworthy that this draft article virtually refused the Basis of Discussion No.

¹¹⁶¹ *Ibid.*, at 173 f.

¹¹⁶² For more information see Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 99.

¹¹⁶³ Art. 8 of the draft articles on the Legal Status of the Territorial Sea, Final Act of the Conference for the Codification of International Law, LON Doc. C. 228. M.115. 1930.V., 16.

23 drawn up by the Preparatory Committee.¹¹⁶⁴ That is to say, coastal States cannot stop a foreign ship on lateral passage through the territorial sea simply because there happened to be on board a person wanted by their judicial authorities or by a third country with which the coastal State concerned has concluded an extradition treaty.

In the observations made by the Second Committee of the Hague Conference, it was rightly pointed out that the judicial authorities of the coastal State should, as far as possible, refrain from arresting any of the officers or crew of the ship if their absence rendered further navigation impossible.¹¹⁶⁵

Considering the enormous elasticity contained in the article, coastal States were actually accorded a lot of latitude in respect of criminal jurisdiction under the Hague model.

With some changes, the above solution to criminal jurisdiction evolved into art. 19 CTS 1958. The provisions of the article have largely stood the test of time and have been carried over, subject to several alterations, into art. 27 UNCLOS, which is quoted below in full:

1. 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;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters

3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps 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 before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

¹¹⁶⁴ The Basis of Discussion read: "A person whose arrest is sought by the judicial authorities of the coastal State may be arrested on board a foreign ship within the territorial waters of the State." LON Doc. C.74. M. 39. 1929. v., 86.

¹¹⁶⁵ Report of the Second Committee, LON Doc C. 230. M. 117. 1930. v., 9.

Before coming to an analysis of the substance, it may be necessary to note, at this stage, that art. 27 bears three main alterations in comparison with the relevant provisions in CTS 1958. At first, besides the ship's master and consular officer, a diplomatic agent may also invoke the assistance of the local authorities as per the new provisions.¹¹⁶⁶ Secondly, special reference to psychotropic substances is added to art. 27(1)(d). The third and most significant change is found in the introduction of two exceptions in art. 27(5) to the exclusion of the criminal jurisdiction of coastal States with respect to crimes committed prior to the ship entering the territorial sea. They will be reverted to a little later.

To make a better analysis of the provisions of art. 27 of UNCLOS, it would be advisable to distinguish the following different constellations.

1. Lateral passage

Para. 1 basically addresses lateral passage through the territorial sea. According to the stipulation therein, a coastal State should not rush to arrest any person or to carry out any investigation concerning any crime committed on board a foreign merchant ship merely passing through its territorial sea. However, the stipulation is subject to four exceptional circumstances, under which such arrest or investigation may well be effected by the coastal State.

The delicate formulation reflects, again, the compromise between coastal and flag State jurisdiction. Nonetheless, the expression "should not"¹¹⁶⁷ in a hortatory tone may dilute the nature of the regulation as a legal obligation under international law. So it is to be taken as a soft obligation for or a polite request to coastal States to exercise their restraint. Therefore, in the cases not falling within the specified four circumstances, coastal States would, notwithstanding the existing regulation, still have the right to take enforcement measures.¹¹⁶⁸

Apart from that, divergent legal views may arise with regard to the determination of the consequences of the crime or of the disturbance of local peace and good order. Although originally the proposal to add "in the opinion of the competent local authority" in Para. 1(b) after the word "crime" was not accepted

¹¹⁶⁶ In addition, the phraseology here used is also harmonized with that embodied in the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. See 500 *UNTS* 95 and 596 *UNTS* 261, respectively.

¹¹⁶⁷ The expression was adopted at UNCLOS I on the basis of a proposal made by the US delegation intending to reconcile the criminal jurisdiction of coastal States with their sovereignty in the territorial sea. See UNCLOS I, Official Records, vol. III, 117. Also O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 960; Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' [1986] 35 *ICLQ* 327; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 103; Hasselmann, *Die Freiheit der Handels-schiffahrt* (1987), 286.

¹¹⁶⁸ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 244; Brown, *The International Law of the Sea* (1994), 64.

at the Hague Conference,¹¹⁶⁹ it can be assumed that the discretion as to the judgment on the extent of the consequences and the disturbance caused by the crime is basically left to coastal States. Needless to say, any abuse of the discretion would not stand protests from the international community.

From the wording in Para. 1, especially the expression "save only", the list seems to be an exhaustive one.¹¹⁷⁰ On the other hand, now that drug traffic has been included in the list, there would appear no tenable reason to exclude similar universal crimes, such as terrorism, piracy and hijacking, from the same list. So in practice these crimes can arguably be given similar treatment.

Finally, as one writer has noted,¹¹⁷¹ the fact that Para. 1 refers only to "arrest any person", unlike the general term "an arrest" in Para. 2, may indicate that the permissible enforcement actions under Para. 1 would not include the detention of the delinquent ship. Such an interpretation can however hardly survive the test in practice. For example, in the cases of tanker accidents taking place in the territorial sea that may be categorized as the exceptional cases contemplated in arts. 27(1)(a) and (b), the detention of the foreign ship involved appears to be an acceptable action to ensure effective criminal jurisdiction and enforcement of the final ruling. Moreover, the detention of the ship can roughly be regarded as already being included in a general investigation.

2. Outward-bound passage

The second paragraph of art. 27 allows coastal States to take any steps authorized by their laws for the purpose of arrest or investigation aboard an outward-bound ship, irrespective of whether on innocent passage or not. In this case, coastal State enforcement jurisdiction seems unrestricted. Art. 220 does not cover this situation and thus even the requirement of "clear grounds" would not be applicable here. It is conceivable that any outgoing ships on innocent passage could be stopped and arrested by reason of even slight offences, committed either in internal waters, in the territorial sea, or elsewhere within the jurisdiction of the coastal State concerned. The broad range of enforcement jurisdiction of coastal States over outward-bound ships finds its justification in an analogy with the doctrine of hot pursuit.¹¹⁷²

3. Inward-bound passage

Art. 27 is silent on the scenario where the crime is committed aboard a foreign ship in the territorial sea, while the ship is proceeding to internal waters. On the

¹¹⁶⁹ See the Report of the Second Committee, LON Doc C. 230. M. 117. 1930. v., 8.

¹¹⁷⁰ Nandan/Rosenne, *The United Nation's Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 242.

¹¹⁷¹ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 244.

¹¹⁷² O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 955 f; Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' [1986] 35 *ICLQ* 326; Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), 287.

other hand, Para. 5 appears to indirectly empower coastal States to arrest any person or conduct any investigation in conjunction with antecedent crimes if a foreign ship is on its inward-bound way in the territorial sea. Therefore, *a fortiori*, the same enforcement measures may be taken in the territorial sea in the case of the afore-mentioned scenario.¹¹⁷³ However, in such inward-bound cases, it is of little practical significance whether some measures can be taken by coastal States in the territorial sea. Coastal States always prefer to take enforcement action after the ship enters a port, unless there exist imminent threats or danger to State security, the safety of life or the marine environment.

4. Lateral passage with antecedent crimes

In contrast to Para. 1, Para. 5 imposes a prohibition on the assertion of coastal State criminal jurisdiction against a foreign ship in the territorial sea with regard to crimes committed beyond the territorial sea if the ship is merely on the way of lateral transit. Nevertheless, there are two exceptions to the regulation. The first exception exists in the field of marine environmental protection. As has been previously noted, the wide-ranging enforcement jurisdiction of coastal States in this respect is upheld in arts. 220(3), (5) and (6) when the violations concerned are committed in the EEZ. The second exception concerns primarily art. 73 of Part V, which basically deals with the enforcement of duly adopted laws and regulations of coastal States in the exercise of their sovereign rights on the living resources in the EEZ. The article does not pronounce on where these laws and regulations are to be enforced. In this sense, art. 27(5) confirms that appropriate coastal State enforcement may take place on board a foreign ship passing through the territorial sea if the ship violated the relevant legislation in the EEZ.

It may be worthy of note that the expression “may not” is used in art. 27(5), while the term “should not” is employed in art. 27(1). The different formulations expose the different jurisdictional nature of the maritime zones in which the alleged offences took place.¹¹⁷⁴

The other two paragraphs in the article can be considered as safeguards in criminal jurisdiction concerning notification to the flag State and due regard to the interests of navigation.

The 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation¹¹⁷⁵ accords exclusive jurisdiction to the authorities of the flag State in collision or other navigational incidents taking place outside internal waters.¹¹⁷⁶ On the other hand, coastal States may take their liberty to “reserve to themselves the right to take proceedings in respect of offences committed within their own

¹¹⁷³ O’Connell/Shearer, *ibid.*, at 958; Shearer, *ibid.*, at 326.

¹¹⁷⁴ Brown, *The International Law of the Sea* (1994), 64.

¹¹⁷⁵ 439 UNTS 233; German BGBl. 1972 II, 668.

¹¹⁷⁶ See arts. 1 and 2 of the convention, *ibid.*

territorial waters".¹¹⁷⁷ Therefore, there is no unbridgeable discrepancy between the convention and UNCLOS.

III. State Practice

For most countries, domestic legislation does not distinguish between lateral, outward-bound and inward-bound passage in the exercise of criminal jurisdiction, but simply applies to all offences actually taking place on board foreign ships within the territorial sea.¹¹⁷⁸

Pursuant to the US Criminal Code 1948, the territory "subject to the laws includes land, ports, harbours, bays and the three-mile belt".¹¹⁷⁹ It is believed that foreign merchant ships entering the territorial sea of the US submit themselves inevitably to US criminal jurisdiction. The view had been well elucidated in cases such as *Cunard v. Mellon*¹¹⁸⁰ and *Schooner Exchange v. M'Faddon*.¹¹⁸¹ In the former case, for example, the US Supreme Court held that "a merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence just as other objects within those limits. Of course, the local sovereign may out of consideration of public policy choose to forgo the exertion of his jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in his discretion."¹¹⁸² In the case of *United States v. Postal et al.* in 1979,¹¹⁸³ the US showed its ambition to exercise criminal jurisdiction even beyond the territorial sea.

Under the Territorial Waters Jurisdiction Act 1878 of the UK, only indictable crimes committed aboard foreign merchant ships in the UK territorial sea are subject to British criminal jurisdiction. But the case of *Pianka v. The Queen* in 1977 seems to have changed the landscape in this regard by an extremely liberal interpretation. In this case, the House of Lords submitted that "since the power of the State to pass legislation affecting its territorial waters was unlimited, there was no general immunity to foreign ships from the legislation of either England or

¹¹⁷⁷ Art. 4 of the convention, *ibid.*

¹¹⁷⁸ O'Connell/Shearer came out with a list of States in this sense, in *The International Law of the Sea* (1984), vol. II, see footnote 203 at 959.

¹¹⁷⁹ See United Nations Legislative Series ST/LEG/SER.B/6, 306 and 358, cited as Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 106. It is to be assumed that the Code applies now in the US territorial sea with a width of twelve nm after the extension in 1988.

¹¹⁸⁰ [1923] 43 *Supreme Court* 504; Colombos, *The International Law of the Sea* (1967), 324.

¹¹⁸¹ 7 *Cranch* 116, 136; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 107.

¹¹⁸² Colombos, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 324.

¹¹⁸³ For more details see Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 107.

Jamaica and there was no principle of construction that would imply that a general legislative provision did not apply to foreign ships".¹¹⁸⁴ So according to the British position, any offence committed on board a foreign merchant ship in the British territorial sea, whether indictable or not, would come within Her Majesty's criminal jurisdiction despite the provisions in the related conventions.¹¹⁸⁵

In accordance with the present German *StGB*, all crimes committed in the territorial sea are under the criminal jurisdiction of Germany.¹¹⁸⁶ The elaborations made in Section 6.2, Part Two of the thesis on the *Legalitätsprinzip* and *Opportunitätsprinzip* hold good for the territorial sea too. Despite that, according to art. 324 of the same code, water pollution including marine pollution¹¹⁸⁷ is regarded as a criminal offence. It is susceptible of punishment by up to five years' imprisonment or a monetary penalty in the case of intentional offence, or by up to three years' imprisonment or a monetary penalty in the case of negligence.¹¹⁸⁸ In particularly grave situations, the penalty is imprisonment extending to ten years.¹¹⁸⁹

In the French practice of criminal jurisdiction, either in ports or in the territorial sea, the opinions of the *Conseil d'État* in the cases of *the Sally* and *the Newton* in 1806 had been dominant for a long time. The conservative view taken by France was considerably reshaped in 1978 following the disaster of *Amoco Cadiz* off the French coast. From then on, France has stepped up its jurisdiction over foreign shipping and has tended to subject foreign merchant ships to the compulsory criminal and civil jurisdiction of coastal States.¹¹⁹⁰

Russian and Chinese criminal legislation covers all crimes taking place within the whole territory including the territorial sea. So it can be inferred that any crimes on board foreign merchant ships finding themselves therein fall, in principle, under the criminal jurisdiction of the two States.¹¹⁹¹ Pursuant to the present Chinese Criminal Code, the crime of marine pollution shall be punished by up to

¹¹⁸⁴ *Pianka v. The Queen*, [1977] 3 WLR 860.

¹¹⁸⁵ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 110.

¹¹⁸⁶ See art. 3 of the German *StGB* in the version of 13 November 1998, BGBl. 1998 I, 3322, available at: <<http://dejure.org/gesetze/StGB/329.html>> (last visited: March 5, 2003).

¹¹⁸⁷ See art. 330d(1) of the *StGB*, *ibid.*, waters (*Gewässer*) encompass sea as well; also Lagoni, 'Case Study of Germany' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction, The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (2001), 265.

¹¹⁸⁸ Arts. 324(1) and (3) of the *StGB*.

¹¹⁸⁹ Art. 330 of the *StGB*.

¹¹⁹⁰ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 111.

¹¹⁹¹ For Russian legislation see United Nations Legislative Series ST/LEG/SER.B/6, 353; for Chinese legislation, see art. 6(1) of the Criminal Code in the version of 14 March 1997, available at: <<http://law.people.com.cn/bike/note.html?id=44925>> (last visited: March 5, 2003).

three years' imprisonment or a fine. In extremely serious cases, the penalty of imprisonment for between three to seven years may be imposed.¹¹⁹²

Some other countries have addressed criminal jurisdiction in the territorial sea in their special legislation on maritime zones. First of all, some States, such as Antigua and Barbuda,¹¹⁹³ St. Kitts and Nevis,¹¹⁹⁴ St. Lucia¹¹⁹⁵ and Jamaica¹¹⁹⁶ have modeled their legislation on UNCLOS by introducing the provisions of arts. 27 and 220 of the Convention in their relevant national enactments. Iran also belongs to this group, since it has copied art. 27 of the Convention as art. 10 of its 1993 Act on the Marine Areas.¹¹⁹⁷

In contrast, Bulgaria claims broader criminal jurisdiction over foreign shipping by covering the following cases: crimes committed by Bulgarians; crimes disturbing local peace and good order; crimes prejudicial to the interests of Bulgaria or its nationals; illicit trafficking in drugs or radioactive substances; unlawful detention; and crimes against peace and mankind.¹¹⁹⁸

It is prescribed in the Indian Territorial Sea, Contiguous Zone and Other maritime Zones Act 1976 that "whoever contravenes any provision of this Act or of any notification thereunder shall be punishable with imprisonment which extend to three years, or with fine, or with both".¹¹⁹⁹ Obviously hereunder fall also any offences in respect of foreign merchant ships. A quite similar provision is found in Pakistani legislation.¹²⁰⁰ In Myanmar legislation, the relevant penalty for offences committed aboard foreign ships can be extended to ten years with possible fines separate from or combined with imprisonment.¹²⁰¹ The legislation goes further and states expressly that "Any foreign merchant ship involved in contravention shall be liable to confiscation together with its equipment and instruments as well as everything aboard that ship".¹²⁰² However, a safeguard is also attached there since any prosecution against foreign ships is conditioned upon the prior sanction of the Council of Ministers.¹²⁰³

For offences involving foreign ships, Romanian legislation provides for only fines to be imposed. Nonetheless, in particularly serious situations, authorities may confiscate the delinquent ship, including installation, fishing gear and

¹¹⁹² Art. 338 of the Criminal Code of China, *ibid.*

¹¹⁹³ Section 20a of the Maritime Areas Act 1982, in *National Legislation over Territorial sea, Innocent Passage and Contiguous Zone* (1995), Legal Office, the UN, 25 f.

¹¹⁹⁴ Section 24 of the Maritime Areas Act 1984, *ibid.*, at 315 f.

¹¹⁹⁵ Almost the same provisions in its Maritime Areas Act 1984 as those of St. Kitts and Nevis, *ibid.*, at 326 ff.

¹¹⁹⁶ Jamaica has largely combined arts. 27 and 220 of the Convention in its national legislation with delicate formulation. See Section 14 of the Jamaica Maritime Areas Act 1996, [1997] 34 *LOS* 34 ff.

¹¹⁹⁷ Loc. cit. note 1193, 167.

¹¹⁹⁸ See art. 32 of the Bulgarian Act of 1987 governing the Ocean Space, *ibid.*, at 67.

¹¹⁹⁹ Section 11 of the Act, 161.

¹²⁰⁰ See Section 10 of the Territorial Waters and Maritime Zones Act 1976, *ibid.*, at 258.

¹²⁰¹ Para. 21 of the Myanmar Territorial Sea and Maritime Zones Law 1977, *ibid.*, at 231.

¹²⁰² Para. 22 of the Law, *ibid.*

¹²⁰³ Para. 23 of the Law, *ibid.*

apparatus.¹²⁰⁴ Ireland stakes out its claim to full criminal jurisdiction over every offence committed within the territorial sea on board or by means of a foreign ship. On the other hand, the related legislation only provides that “a person who commits such offence may be arrested, tried and punished accordingly”.¹²⁰⁵ Presumably the arrest of a foreign ship is excluded, but apprehension of the ship involved for the purpose of investigation seems to be inevitable in practice.

Finally, it should be pointed out that some national legislation needs to be amended to ensure its conformity with UNCLOS. For example, art. 20 of Italian Law No. 979 of 1982 tends to be at variance with art. 230(2) of the Convention, since it prescribes a jail sentence for the master of a foreign ship illegally discharging in the Italian territorial sea, regardless of whether it constitutes serious and willful pollution or not.¹²⁰⁶ At any rate, the discrepancy is presumed to have been automatically abrogated upon the Convention being binding on Italy and thus the criminal courts having to take UNCLOS into account. In this connection, Sweden deserves credit for its Act on the Limitation of Application of Swedish Laws to Certain Crimes/Offences Committed by Foreign Vessels in 1996.¹²⁰⁷ This law removed the blanket applicability of imprisonment for offences against Swedish laws on pollution by foreign ships in maritime zones outside internal waters.

F. Civil Jurisdiction over Foreign Ships in the Territorial Sea

I. Introduction

Like criminal jurisdiction, civil jurisdiction over foreign merchant ships is also a traditional competence of coastal States. The issue used to be dealt with by the rules of private international law. In the 1920s, some codification efforts made by learned societies, such as the distinguished IDI and the Harvard Research in International Law, seem to have mainly differed on whether previous liabilities incurred by foreign ships were under coastal State civil jurisdiction in the territorial sea. They concurred, nonetheless, on the civil jurisdiction of the coastal State over events taking place during passage through the territorial sea.¹²⁰⁸

¹²⁰⁴ See arts. 35 and 36 of the Romanian 1990 Act concerning Legislative Regime of the Internal Waters, Territorial Sea and Contiguous Zone, *ibid.*, at 292 f.

¹²⁰⁵ Ireland Maritime Jurisdiction Acts, 1959 to 1988, *ibid.*, at 171.

¹²⁰⁶ Meriardi, ‘Case Study of Italy’ in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 296.

¹²⁰⁷ Mahmoudi, ‘Case Study of Sweden’, *ibid.*, at 332.

¹²⁰⁸ For more information, see Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 113.

However, prior to the Hague Codification Conference, there was little established authority at international level in this regard, although some countries had already claimed the right to arrest foreign ships in the territorial sea for damage caused to the host country or to its nationals, be it previous or current.¹²⁰⁹

II. Evolution of Civil Jurisdiction in International Fora

The issue of coastal State civil jurisdiction was reviewed at the Hague Conference as well. Already during working out the bases of discussion, the Preparatory Committee was of the opinion that the exercise of civil jurisdiction, unlike that of criminal jurisdiction, did not seem to seriously threaten the innocent passage of foreign ships. So it formulated a basis of discussion that would have permitted the coastal State to arrest a person on board a foreign merchant ship within the territorial sea.¹²¹⁰ In the meantime, taking account of fears of interference with the right of innocent passage, the Committee prepared another basis of discussion which was intended to restrict the possibility of such arrest.¹²¹¹ After the debates at the Conference, the first basis of discussion was brushed aside, while the second was incorporated into art. 9 of the draft articles on the legal status of the territorial sea that ran as follows:

A Coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A Coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in course of or for the purpose of its voyage through the waters of the coastal State.

The above provisions are without prejudice to the right of the Coastal State in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the state, for the purpose of any civil proceedings.¹²¹²

The draft provisions had clearly followed the basic vein of that for criminal jurisdiction. The text was reproduced in the 1956 draft of the ILC and subsequently adopted at UNCLOS I in 1958 with some literal changes. The most significant one was the substitution of “should not” for “may not” in the first paragraph as proposed by the US delegation, by the same token, to make the

¹²⁰⁹ E.g. the UK's claim under its Merchant Shipping Acts 1854, 1894, cited as O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 868.

¹²¹⁰ See Basis of Discussion No. 23, LON Doc. C. 74. M. 39. 1929, V., 86.

¹²¹¹ See Basis of Discussion No. 24, *ibid.*

¹²¹² See art. 9 of the draft articles on the Legal Status of the Territorial Sea, Final Act of the Conference for the Codification of International Law, LON Doc. C. 228. M.115. 1930.V., 16; the text was mainly based on a British proposal framed to distinguish between lateral and outbound passage, O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 869.

stipulation compatible with that in relation to criminal jurisdiction.¹²¹³ The provisions contained in art. 20 of CTS 1958 have been finally carried into UNCLOS almost verbatim as its art. 28, which is quoted below:

1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.
2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.
3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Para. 1 of the article accords recognition, though in an exhortative way, to the established practice that a foreign merchant ship merely on lateral passage through the territorial sea should not be susceptible of any stop or diversion by the coastal State only for the sake of exercising civil jurisdiction in respect of a person on board. So the provision is largely about civil jurisdiction over persons on board a foreign ship within the territorial sea.

In contrast, the provision envisaged for civil jurisdiction over the foreign ship itself, namely, civil enforcement measures like execution against or arrest of the ship, is found in Para. 2 of art. 28. Pursuant to the paragraph, any execution against or arrest of a foreign merchant ship sailing in the territorial sea is only confined to the cases concerning obligations or liabilities assumed or incurred by the ship itself from certain events, including collision, salvage, pilotage and towage, during the current passage through the waters. In other words, what is not allowed is any execution against or arrest of the ship with regard to such civil obligations or liabilities as may have come forward previously, i.e. not during the ongoing passage.

To help understand the provision better, it is necessary to take a look at the term “the waters” used in the paragraph. Some eminent writers, such as O’Connell,¹²¹⁴ Shearer¹²¹⁵ and Nandan/Rosenne,¹²¹⁶ appear to have come to the conclusion that the term refers only to the territorial sea. Nevertheless, the term “the waters” may well encompass both the territorial sea and the parts of internal waters where the right of innocent passage of foreign ships is left intact according

¹²¹³ UNCLOS I, Official Records, vol. III, US proposal, 243, Doc. A/CONF. 13/C.I/L.42.

¹²¹⁴ See the elaboration on this expression of O’Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 874.

¹²¹⁵ Shearer, ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ [1986] 35 *ICLQ* 329.

¹²¹⁶ Nandan/Rosenne, *The United Nation’s Convention on the Law of the Sea 1982 – A Commentary* (1993), vol. II, 246.

to art. 8(2) of UNCLOS.¹²¹⁷ At all events, the term would hardly point merely to the territorial sea, otherwise the drafters would have simply employed that expression without any problem.

Literally, Para. 2 might cover all three constellations, to wit, lateral, outbound and inbound passage. The second one can be ruled out due to the existence of Para. 3, whereas the third constellation yields little practical importance because coastal States always choose to take their enforcement actions after the ship concerned has entered the port, whether for current or previous liabilities. Therefore, Para. 2 is really more relevant to lateral passage. However, compared with the hortatory tone in Para. 1, Para. 2 places an obligation in a strict legal sense on coastal States. Consequently, the rule embodied therein may change the landscape of customary international law in this respect, as declared notably in the case of *The David*¹²¹⁸ in 1933. The case was about the arrest of a Panamanian ship by a US marshal in September 1925 within the US territorial sea. The arrest was made by reason of a collision that occurred between *The David* and the American steamer *Yorba Linda* in the US territorial sea in May 1923. The US-Panama General Claims Arbitration Tribunal ruled in the end that a coastal State might arrest a foreign ship passing through the territorial sea, under the rules of international law, in respect of antecedent liabilities arising out of torts on the previous passage.¹²¹⁹

The third paragraph of art. 28 portrays the situation in which a foreign merchant ship lies in the territorial sea or navigates therein on an outbound trip. In the former case, which represents a peculiar case in respect of civil jurisdiction, the ship may self-evidently not invoke the right of innocent passage. The latter case comes out as the parallel to art. 27(2). As a result, in these two cases, coastal States have far wider powers to exercise their civil jurisdiction on board or against foreign ships within the territorial sea. Nonetheless, it may be argued that exceptional stopping and anchoring, as prescribed in art. 18 in the case of emergency, should not be taken as "lying in the territorial sea" in the sense of art. 28(3).

Lastly, unlike art. 27, there is no notification or consular clause in art. 28. But diplomatic protection is not deemed less warranted under international law, if not more, in maritime actions than in criminal prosecution. On the other hand, this omission in the Convention can be forgiven on the ground that such matters are generally regulated in bilateral consular or maritime transport treaties.

¹²¹⁷ Similar view held by Hasselmann, *Die Freiheit der Handelsschifffahrt* (1987), see footnote 211 at 289.

¹²¹⁸ *Compania de Navegacion Nacional (Panama) v. United States*, [1933] 6 RIAA 382.

¹²¹⁹ For more information see O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 870 f.

III. State Practice

Within the domestic framework, civil jurisdiction over foreign ships in the territorial sea is addressed either in special maritime legislation or in general civil enactments.

The right to exercise civil jurisdiction concerning property damage aboard or against foreign merchant ships in the territorial sea had existed in English law at least since the promulgation of the Merchant Shipping Act (MSA) 1854. In relation to the *R. v. Keyn* case, a suit regarding personal damages was dismissed by the Court of Common Pleas in 1877, in whose opinion MSA 1854 did not extend beyond damage to property.¹²²⁰ The relevant stipulation persisted into MSA 1894. But it was totally revised by the Administration of Justice Act 1956, under which British courts were deprived of the power to arrest foreign ships within the territorial sea.¹²²¹ Nevertheless, after the UK accession to UNCLOS in 1997, civil jurisdiction may have been brought into line with the said Convention.

Some other States deal with the question of civil jurisdiction also in maritime legislation. Antigua and Barbuda, Iran, St. Kitts and Nevis, St. Lucia and Jamaica have almost reproduced art. 28 of UNCLOS in their respective enactments.¹²²² Romania addresses this issue in its maritime legislation as well.¹²²³ In art. 31 of its Act of 1987 governing Ocean Space, Bulgaria puts up its general but ambitious claim to civil jurisdiction within maritime zones as quoted below:

1. In the case of damage caused by an act of *quasi delicti* occurring in internal waters or in the territorial sea as well as in the case of damage resulting from a violation of the rights and jurisdiction of the People's Republic of Bulgaria in the contiguous zone, on the continental shelf or in the exclusive economic zone, national jurisdiction shall be applicable and the Bulgarian courts shall be competent in matters of litigation.¹²²⁴

In many other countries, the issue of civil jurisdiction concerned is generally regulated in civil codes or other civil legislation.

As for specific judicial practice, the field of the marine environment may deserve more attention. A growing trend has been witnessed in recent years for coastal States to exercise civil jurisdiction on pollution damage notably to

¹²²⁰ *Ibid.*, at 867.

¹²²¹ *Ibid.*, at 868.

¹²²² For Antigua and Barbuda, see Section 20b of the Maritime Areas Act 1982; for Iran, art. 11 of its Act on the Marine Areas 1993; for St. Kitts and Nevis, see Section 27 of the Maritime Areas Act 1984; for St. Lucia, the provisions in its Maritime Areas Act 1984 are almost the same as those of St. Kitts and Nevis; for Jamaica case, see Section 15 of its Maritime Areas Act 1996, 36.

¹²²³ See art. 20 of its Act concerning Legislative Regime of the Internal Waters, Territorial sea and Contiguous Zone, 290.

¹²²⁴ *Ibid.*, at 67. It is interesting to note that the remaining three paragraphs in the same article appear, however, to stick closely to the provisions of art. 28 UNCLOS.

fisheries and/or the coastal tourism industry incurred by international shipping in the territorial sea.¹²²⁵

In the context of civil jurisdiction, two international conventions should be here adverted to. The first is the International Convention on Arrest of Ships 1999 (Arrest Convention 1999),¹²²⁶ which has been elaborated with some length in Section 6.3 of Part Two. The elaborations basically apply to the territorial sea as well. Here it may suffice to say that this convention accords much wider powers to coastal States in respect of the arrest of foreign merchant ships in the territorial sea than UNCLOS does, provided that the term "jurisdiction" can be interpreted as including the territorial sea.¹²²⁷ While a similar deviation in the Brussels Convention 1952 from CTS 1958 constituted no legal misgivings,¹²²⁸ such an inconsistency in the Arrest Convention 1999 with UNCLOS would affect the former's coming into force.¹²²⁹ However, it is hardly conceivable that the inconsistency could render the Arrest Convention 1999 void at all, given the background that the convention has been concluded under the joint auspices of the UNCTAD and the IMO. Therefore, the reasonable solution to this issue would be to tolerate its existence as a *lex specialis*. Anyway, the final solution will only become apparent in State practice in the years to come.

The second convention which may be important in this connection is the 1952 International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision.¹²³⁰ The convention is aimed at settling jurisdiction disputes in collision suits by indicating three alternative fora, namely, the place of the defendant's habitual residence or business, the place of collision – limited how-

¹²²⁵ There are numerous cases in this regard. In the Netherlands alone, from 1987 to 1992 four such cases were heard by Dutch courts. See Molenaar/Dotinga, 'Case Study of the Netherlands' in Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction* (2001), 320.

¹²²⁶ This convention is an update of the 1952 Brussels Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, see 439 *UNTS* 193. For the text of the Arrest Convention 1999 see the website available at: <<http://www.unctad.org/en/docs/imo99d6.pdf>> (last visited: March 10, 2003).

¹²²⁷ Under the Arrest Convention 1999, coastal States may arrest foreign merchant ships in respect of any specified maritime claims within their jurisdiction for any current or antecedent torts. Furthermore, sister-ships can also be arrested in some cases. Nonetheless, the interpretation of "jurisdiction" appearing in art. 8(3) of the Arrest Convention 1999 and art. 2 of the Brussels Convention 1952 respectively, is divided on whether it covers the territorial sea or refers merely to ports, roadsteads and internal waters. See Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' [1986] 35 *ICLQ* 329; O'Connell/Shearer, *The International Law of the Sea* (1984), vol. II, 873.

¹²²⁸ Art. 25 of the convention read: "The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them."

¹²²⁹ Art. 311(2) UNCLOS maintains the validity of other international conventions only when these conventions are compatible with UNCLOS.

¹²³⁰ 439 *UNTS* 217; German BGBl. 1972 II, 663.

ever only to ports or other parts of internal waters – and the place of ship arrest.¹²³¹ That is to say, the coastal State may, under these provisions, still seize civil jurisdiction over collisions having occurred in the territorial sea, so long as it can duly effect the arrest therein. Therefore, there seems to be no implacable inconformity between this convention and UNCLOS.

G. Conclusion

Coastal States have a wide range of jurisdiction to regulate and jurisdiction to enforce in the territorial sea under international law. Strengthened coastal State jurisdiction appears to have brought about increasing pressure on the right of innocent passage.

The distinction between innocent and non-innocent passage is blurred in some crucial articles in UNCLOS¹²³² and more so in domestic legislation concerning enforcement measures. Therefore, the regime of the territorial sea, as it currently stands, seems to be on balance more in favor of coastal States.

On the other hand, the examination of State practice shows that restraint has generally been exercised by coastal States. The regime of innocent passage has basically been preserved in the exercise of coastal State jurisdiction.

¹²³¹ See art. 1 of the convention, *ibid.*

¹²³² E.g. arts. 27, 28 and 220 UNCLOS.

Part 5: Conclusion and Outlook

A. Conclusion

Taking into account the enormous importance of international merchant shipping in the global economy, the interface between coastal State jurisdiction and international maritime transport always constitutes one of the core issues within the framework of the law of the sea. That may be even truer in internal waters and the territorial sea, given the high density of maritime traffic therein.

Internal waters form an integral part of the territory of a coastal State and are generally subject to the same legal regime as landmass. That is an established principle in international law, although both CTS 1958 and UNCLOS do not cover this maritime zone except for some minor points. Internal waters fall under the full jurisdiction of the coastal State. Therefore, there is in principle no general right of access to foreign ports unless otherwise granted by treaties. The existence of numerous bilateral and multilateral treaties, such as the 1923 Geneva Statute on the International Regime of Maritime Ports, whereby the right of entry into foreign ports is stipulated, does not appear to have been able to challenge the assertion. Noticeably, the freedom of entry into ports has been considerably realized within the EU. In addition, ships in distress or under the circumstances of *force majeure* may, under customary international law, sail into foreign ports to seek shelter.¹²³³

Generally speaking, foreign ships are not entitled to navigate through internal waters without the permission of coastal States. Nevertheless, it is subject to several modifications. First, since the *Fisheries* case in 1951, it has been acknowledged that a right of innocent passage also exists in those internal waters that had not previously been regarded as such before the introduction of the straight baselines.¹²³⁴ Secondly, the provisions in UNCLOS with respect to the right of access to and from the sea and freedom of transit in favour of land-locked States¹²³⁵ may represent to some extent the thrust in coastal State jurisdiction there. Several other multilateral trade instruments including GATT¹²³⁶ provide as well for the freedom

¹²³³ It has been a long-established rule in customary international law since the *Eleanor* case 1809, see more in *supra* Subsection C.I.6. of Part 2. In practice, however, there could be some perceptual divergences on the concepts of distress and *force majeure*.

¹²³⁴ Art. 5(2) CTS 1958, art. 8(2) UNCLOS.

¹²³⁵ See art. 125 of the Convention.

¹²³⁶ Art. V GATT.

of transit that covers waterways or channels in internal waters. Thirdly, three inter-oceanic canals in the world, namely, the Panama Canal, the Suez Canal and the Kiel Canal, may present another perspective to coastal State jurisdiction over foreign merchant ships in internal waters. It seems true that there is a right of passage, at least, for foreign merchant ships through these canals in peacetime. Nonetheless, it would be more sensible to call them “international canals” in a geographical sense rather than in a legal one. If the former two canals may have arguably been internationalized on account of their histories, it is doubtful if one can label the Kiel Canal in the same way. Lastly, in some multi-State historic bays or waters, the regime of innocent passage can be kept in place, as the ICJ held in the case of *Land, Island and Maritime Frontier Dispute* in 1992.¹²³⁷

Foreign merchant ships which voluntarily enter a port or other internal waters of a coastal State put themselves fully under the territorial jurisdiction of the State on the ground of the temporary allegiance that the ships owe to the territorial sovereignty. The coastal State may not only prescribe rules but also enforce them via executive or adjudicative means against the foreign merchant ships as well as the crew members, passengers and goods aboard.

On the other hand, coastal States tend to exercise their jurisdiction in a restrictive way and thus to leave matters with only internal effects on board to the authorities of the flag State. It is more so for criminal and civil jurisdiction in internal waters, which coastal States are always reluctant to exercise unless their significant interests are at stake. Under contemporary international law, the restraint shown by coastal States is more a matter of inter-State comity or coastal State discretion than a matter of law. However, the restraint in coastal State jurisdiction appears to have diminished, because the matters concerning the interests of coastal States have been expanding considerably in the last few decades, ranging from environmental protection, safety of navigation, social standards, smuggling prevention and immigration control to newly boosted antiterrorism.

Furthermore, coastal States may not exercise their territorial jurisdiction over foreign ships forced into internal waters by distress or *force majeure*. Exceptional circumstances, however, are to be narrowly interpreted in order to filter out any abuse of the exemption.

The question of the legal status of foreign ships in internal waters mirrors the subtle relationship between coastal and flag States. An unpleasant fact is that, despite several attempts made in the 1970s to update it, the 1923 Geneva Statute, which has been joined by only a handful of States, still remains as a principal international treaty dealing with the jurisdiction and treatment of foreign merchant ships in ports and internal waters.

Since the adoption of the Paris MOU 1982, port State control has gained ground rapidly and become the most vigorous field of coastal/port State jurisdiction in internal waters. The legitimacy of port State control derives, on the one hand, from the provisions of relevant international conventions and regional MOUs. On the other, it is ultimately rooted in the territorial jurisdiction of the coastal/port State in its ports. So far there are eight regional regimes on port State

¹²³⁷ [1992] *ICJ Reports* 593; Brown, *The International Law of the Sea* (1994), vol. I, 40.

control in operation.¹²³⁸ Port State control has proved to be an effective instrument for promoting navigation safety and fighting marine pollution.

Nevertheless, there still exist lacunae in this regard in some parts of the world. Apart from that, the frequent occurrence of shipping casualties, such as *Erika* and *Prestige*, may remind us of the flaws resident in the existing port State control regime. In any event, it is necessary to establish a better targeting system, to strengthen harmonization among regional arrangements in respect of standards and procedures, and to pay more attention to human factors.

As a novelty in international maritime law, port State special jurisdiction that is of an extraterritorial character has been created for the port State under UNCLOS.¹²³⁹ Yet it remains to be seen whether the newly vested competence unfolds its practical significance. The Convention also grants coastal/port States the power to prevent unseaworthy ships from sailing, which is something quite similar to port State control.¹²⁴⁰ Coastal States are no doubt entitled to proceed to punish any violation of its proper legislation as well as applicable international rules and standards regarding marine environmental protection in their internal waters.¹²⁴¹

The notion of the territorial sea witnessed a long evolution. The inchoate conception of the territorial sea may be traced back to the 14th century. Even during the time when *mare liberum* was popular, the thought of the territorial sea did not lose ground. Following a long process of consolidation of coastal State powers over coastal waters, the establishment of the territorial sea regime is believed to have been completed in 1840s.¹²⁴² Concomitant therewith, there existed a long history of controversy as to the legal status of the territorial sea, either *dominium*, *imperium*, jurisdiction, servitude or sovereignty. Not until the 1930 Hague Conference had the sovereignty doctrine over the territorial sea been generally accepted in international law. The dominance of the doctrine has persisted up to CTS 1958 and UNCLOS respectively. Thus the doctrine may dictate any analysis of the territorial sea nowadays. Another critical issue which had plagued the territorial sea regime so long is the extent of the territorial sea. The issue has basically been resolved in UNCLOS. But the process towards the uniformity of the twelve-mile limit will still take some time.

From the legal viewpoint, the only distinction between the territorial sea and internal waters lies in the fact that within the former zone there is the right of innocent passage for foreign ships. If coastal State sovereignty could be seen as the obverse of the medal of territorial sea regime, the right of innocent passage would be the reverse. The right of innocent passage in the territorial sea took its rough shape, at the latest, in the 16th century, whatever the rationale of it may be, be it a corollary of the right to trade or a right developed from the freedom to

¹²³⁸ See *supra* Subsection G.II.3 in Part 2.

¹²³⁹ Art. 218 of the Convention.

¹²⁴⁰ See art. 219 of the Convention.

¹²⁴¹ Art. 220(1) of the Convention.

¹²⁴² O'Connell/Shearer, *The International Law of the Sea* (1982), vol. I, 19, 61, 263.

navigate the high seas. However, it had not attained its full prominence until the middle of the 19th century, when the territorial sea regime became fully fledged.

Thereafter, the right of innocent passage acquired enormous momentum thanks to the new philosophy of free trade and the increasing use of steamships. The *R. v. Keyn* case in 1876 was the first case whereby the right of innocent passage was judicially upheld, while the right was first internationally acknowledged at the 1930 Hague Conference. The innocent passage regime has been further substantiated by CTS 1958 and especially by UNCLOS. However, since 1970s, the regime of innocent passage has comparatively given way to the renewed resilience of coastal State sovereignty in the territorial sea on account of various reasons.¹²⁴³ With a view to eliminating the long criticized subjectiveness of the concept of innocence and thus tightening up the discretion of coastal States, the latter Convention comes out with an apparently exhaustive list of non-innocent activities. The desire of the drafters is compromised by some ambiguous provisions, such as arts. 19(2)(l) and (a). As a result, despite the laudable efforts made in the Convention, divergent judgments on innocence of passage can still emerge. The evolution of the law of the sea and State practice appear to show that there could scarcely be any all-inclusive list of non-innocence.

Notwithstanding the division of opinions on the concept of innocent passage, the right of innocent passage is now no doubt not only a generally accepted conventional rule, but also a well-established customary rule, as a part of an extensive *jus communicationis*. Nevertheless, the right has not amounted to an exception to coastal State jurisdiction. Rather, it constitutes no more than a peculiar restriction on coastal State jurisdiction, as the embodiment of a navigational right of foreign ships in the territorial sea which might be originally derived from the principle of navigational freedom. The right of innocent passage is, in many respects, subject to coastal State jurisdiction, which remains elastic.

While enjoying the right of innocent passage, foreign ships are still subject to a series of duties laid down by conventional and customary rules, such as the duty of observing local laws and regulations, and that of compliance with sea lanes and TSS. On the other hand, coastal States likewise bear some duties towards foreign ships exercising the right of innocent passage, including the duties of abstention, non-discrimination and information. In contrast to the duties of foreign ships, coastal State duties are elusive and are of a general and preventive nature. They obviously run short of counterbalancing the numerous rights that coastal States may exercise over foreign ships on innocent passage.

Whereas UNCLOS has improved the provisions on the right of innocent passage, it has unprecedentedly corroborated coastal State jurisdiction over foreign ships in the territorial sea as well. In addition, some other conventions, e.g. MARPOL 73/78 and the Basel Convention 1989, also contribute to beefing up the muscle of coastal States. Based on the analysis, it is concluded that coastal States have a wide range of jurisdiction, both legislative and enforcement, over foreign merchant ships including those on innocent passage in the territorial sea. Enforce-

¹²⁴³ Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (1990), 195.

ment jurisdiction includes administrative jurisdiction, criminal jurisdiction and civil jurisdiction. Under administrative jurisdiction, coastal States possess a broad spectrum of competence, such as establishing and enforcing sea lanes, TSS, MSR, VTS and compulsory pilotage in the territorial sea, exercising rights of protection and collecting charges for specific services within the territorial sea. During the exercise of the above competence, innocent passage may inevitably be interfered with to varying degrees.

Special attention should be given to coastal State enforcement jurisdiction over the marine environment, considering its increasing importance in coastal State jurisdiction and also its wide intrusion into the international shipping industry. Coastal States are vested with enforcement powers in respect of pollution from ships, control of ships with hazardous substances, marine protected areas, and dumping, etc. The marine environment is a relatively better regulated field in the Convention. But all relevant provisions concerning coastal State jurisdiction plainly address pollution issues without distinguishing between ships on innocent passage and those not. Furthermore, in the enforcement of these provisions, the passage of foreign ships could be disrupted by undertaking inspection, instituting proceedings or even detaining the ships, even though the passage may still be judged as innocent according to the related rules.

Criminal and civil jurisdiction in the territorial sea is in the traditional jurisdiction of coastal States and has been constantly dealt with in international codification efforts. Basically, judicial jurisdiction over foreign ships in the territorial sea does not depart much from that in internal waters, except that the former ought to be more restrictive due to the existence of innocent passage. Under UNCLOS, coastal States are in principle invested with criminal jurisdiction over foreign ships on lateral passage through the territorial sea. Meanwhile, they are urged to refrain from assuming this jurisdiction save in certain specified circumstances. Furthermore, States are not allowed to meddle in lateral passage with antecedent crimes except where marine pollution or fisheries are concerned.¹²⁴⁴ By contrast, coastal States have full judicial authority over foreign ships on outbound or inbound passage. As for civil jurisdiction, the Convention lends its confirmation to the established practice that a foreign merchant ship on lateral passage through the territorial sea should not be susceptible of any stop or diversion only for the sake of exercising civil jurisdiction in respect of a person on board. Moreover, the Convention confines execution against or arrest of a foreign ship to those cases regarding torts incurred by the ship itself during the current passage. Without question, a foreign merchant ship lying in the territorial sea or on an outbound trip is fully subject to the civil jurisdiction of the coastal State.¹²⁴⁵

Notwithstanding the above ample jurisdiction of coastal States, enforcement actions against violations appear to be more apparent than real. It may indicate on the one hand that restraint has been exercised by coastal States. On the other, it may recall the fact that foreign merchant ships always choose to do nothing but follow whatever coastal States require. Nonetheless, it cannot be denied that ever-

¹²⁴⁴ Art. 27 UNCLOS.

¹²⁴⁵ Art. 28 UNCLOS.

expanding coastal State jurisdiction seems to have begun to squeeze the right of innocent passage, if not to encroach upon it yet. This is even truer in the areas of maritime traffic control and marine environmental protection. What is more, whereas the regime of innocent passage is painstakingly consecrated in Part II of UNCLOS, it could be frustrated by virtue of the provisions elsewhere in the same Convention, such as those on rights of protection, enforcement measures regarding marine pollution, criminal and civil jurisdiction. Apart from that, the distinction between innocent and non-innocent passage is disregarded in many articles in the Convention. It is also the case in domestic legislation for most States. Therefore, the regime of the territorial sea that is intended to reconcile the interests of both coastal and maritime States turns out to be biased in favour of coastal States. As a result, the regime of innocent passage in the territorial sea seems to be confronted with the danger of being marginalized, particularly as far as enforcement jurisdiction is concerned.

Except for an abstract safeguard that coastal States may not interfere with foreign ships exercising the right of innocent passage with the practical effect of crippling that right,¹²⁴⁶ the Convention fails to establish a general touchstone to test whether coastal State jurisdiction goes so far as to unduly obtrude upon the right of innocent passage. Therefore, the answer to the crucial question of how much discretion coastal States may enjoy in duly exercising their jurisdiction in the territorial sea without incapacitating the right of innocent passage of foreign ships may well turn on careful investigation of the concrete measures undertaken by the coastal State concerned, taking into account the given circumstances.

There are a number of restrictions and safeguards placed on coastal States in the relevant conventions. It is expected that they can adequately restrain coastal States from going too far in the exercise of their competence over foreign merchant ships in the territorial sea.

In respect of coastal State jurisdiction and the right of foreign merchant ships to navigate in the territorial sea, coastal and maritime States may well come up with divergent opinions on the interpretation and application of the related international conventions. In such cases, the parties involved may resort to the proper fora for dispute resolution established under international law, including UNCLOS.

B. Outlook

Presently, coastal State jurisdiction over foreign ships in internal waters is basically governed by bilateral agreements and customary international law. Considering the remarkable extension of the maritime zone resulting from the employment of straight baselines and the existence of the right of innocent

¹²⁴⁶ See art. 24(1)(a) UNCLOS. Of course, coastal States are still subject to some other general rules of international law, such as non-discrimination, proportionality and no abuse of right.

passage in some parts thereof, international legal arrangements would seem to be needed to dispel the uncertainties and inconsistencies in State practice. The sound development of port State control may serve as a good example in this connection. The existing port State control regime can be used as the platform on which an international enforcement system can be developed in respect of applicable international rules and standards under art. 218 of the Convention. Free access to ports can be achieved at first at regional level, as has happened within the EU. It is expected that the Doha round of trade talks under the aegis of the WTO may yield some new fruits with respect to port access, jurisdiction and treatment of foreign merchant ships in internal waters, which would supersede the outdated 1923 Geneva Statute.

In the territorial sea, coastal State jurisdiction will further demonstrate its intrusiveness in international shipping. On the one hand, coastal States tend to tighten up their existing controls in domains like maritime safety and environmental protection; on the other, they are ready to step into some grey zones, such as sea-use management,¹²⁴⁷ under the pressure of the increased human dependence on and utilization of coastal waters. As a result, a continued shift of balance in favour of coastal States will be seen. That trend will be all the more obvious taking account of current world-wide security concerns. In that process, the regime of innocent passage could be marginalized, if not emptied of its legal substance, particularly as far as the enforcement competence of coastal States is concerned.

In view of its international nature and complexity, coastal State jurisdiction over foreign ships in the territorial sea will be more and more regulated in international instruments under the umbrella of UNCLOS. Unilateralism will further give way to multilateralism. In the future, coastal States will prefer to bring their own initiatives before the competent international organizations, such as the IMO, for the endorsement that may accord legitimacy to those initiatives. In this context, these organizations will play an increasingly important role in the evolution of the coastal State competence under discussion. Predictably, "soft law", including rules, standards, recommendations and codes issued by the relevant organizations, will unleash its enormous influence and utility in reshaping the law of the sea.

Despite the strict regulatory requirements imposed on foreign merchant ships, the right of innocent passage will undoubtedly be further upheld under international law. However, the loose safeguard for innocent passage in the Convention will be unlikely to prove an effective limitation on coastal States in the exercise of their myriad powers. Therefore, it is imperative to establish a series of

¹²⁴⁷ Sea use control is not covered under art. 21 of the Convention. But it seems to be lawful for the coastal State to regulate sea-use activities by introducing a permit system in coastal waters. China adopted its Sea Use Management Law on 27 October 2001. Under the law, all fixed sea-use activities lasting more than three months within the territorial sea are subject to the sea-use management regime. Although shipping activities are not included in the application scope of the law, some impact is conceivable. Available at: <<http://www.soa.gov.cn/law/1027.htm>> (in Chinese) (last visited: April 14, 2003).

more clear-cut and operable safeguards directed against coastal States through an international treaty, which is aimed at preventing any unnecessary delay caused by inspection, detention or proceedings, and securing a high degree of uniformity in formalities and other procedures in practice.

In the preservation of the right of innocent passage as it should be, international judicial institutions, especially the ITLOS, can uniquely contribute thereto quite a lot by squarely confirming the prominence of innocent passage. It is an optimistic and reasonable prospect that, in the years ahead, some disputes with regard to coastal State jurisdiction over foreign merchant ships in the territorial sea will be referred to the compulsory procedures as enshrined by UNCLOS. Then the ITLOS and other international judicial bodies would have the opportunities to rectify the tilted balance and to unfold a new dimension for the coastal State jurisdiction in question.

Finally, it may safely be stated that, in the foreseeable near future, UNCLOS will remain the cornerstone of the international law of the sea. Correspondingly, the well-entrenched rules therein concerning coastal State jurisdiction and the right of innocent passage will still serve as the benchmark for dealing with any question regarding the interface between coastal State jurisdiction and international shipping in the territorial sea, while other international instruments may of course bring additional elements thereto.

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