Cochin University Law Review Vol. IX, 1985 p. 436-459

Territorial Sea and Contiguous Zone — Concept and Development

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It is universally accepted that a State exercises sovereignty and control within its territory which includes land and water, and the air space above such land and water. However, can a State exercise sovereign powers over a certain portion of the sea adjacent to its coast? If so, what should be the extent of this area? It may be recalled that from the very inception of the modern law of the sea, the international community had recognized the necessity of protecting the reasonable needs and interests of coastal States, and for that purpose to permit them to extend their boundaries some distance seaward.

HISTORICAL PERSPECTIVES

Notwithstanding the principle of the freedom of the seas, certain portions of the sea adjacent to the coasts of a State were universally recognised as a prolongation of its territory. Even-though the utility of the freedom of the seas came to be recognised and States were convinced of the reasonableness of the thesis of Grotius[1] and other advocates of this freedom, there was a general recognition that every maritime State had a right to exercise jurisdiction over an extent of the neighbouring sea

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1. The principle of the freedom of the seas was first placed on a legal and unassailable basis by the Dutch jurist Hugo Grotius in his work *Mare Liberum,* where claims to sovereignty over the seas found severe criticism and condemnation.

for its own protection.[2] Though Grotius argued and propounded the freedom of the seas, he conceded that a belt of the high seas could come within the dominion of the territorial State. None the less, the extent of this maritime belt was not defined by Grotius.[3]

There was no topic of international law more widely discussed or more controversial than the question of the territorial sea. Several factors including defence,[4] commercial and other activities[5] justified the demand for an extension of the sovereignty of a State outside the limits of its land territory.

Hence within the area of the sea, between the land and the high sea, adjacent to a coast, a portion of waters was recognised as territorial waters.[6] The term territorial waters indicates

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2. R. P. Anand, "Freedom of Navigation Through Territorial Waters and International Straits", 14 I.J.I.L. 169 (1974).

3. However, he seems to have been convinced, that "a State might acquire sovereignty over parts of the sea which could be commanded and controlled by artillery on shore". See Thomas W. Fulton, *The Sovereignty of the Sea* (1911), p. 538.

4. Hall upholds the necessity of the maritime belt on the ground that unless such a right to exercise control is admitted, there would not be sufficient security for the lives and property of the subjects of the State upon land. See Hall, *A Treatises on International Law* (1924), p. 190.

5. Colombos summarised them as follows:
   "(i) The security of the State demands that it should have exclusive possession of its shares and that it should be able to protect its approaches.
   (ii) For the purpose of furthering its commercial, fiscal and political interests, a State must be able to supervise all ships entering, leaving or anchoring in its territorial waters.
   (iii) The exclusive exploitation and enjoyment of the products of the sea within a State's territorial waters is necessary for the existence and welfare of the people on its coasts."
   See C. John Colombos, *International Law of the Sea,* (1967), p. 87.

6. While Grotius argued that if the sea is common to all men, no man should be prohibited from fishing in the sea, Pontanus proposed that the Grotian rule be valid only outside an area of coastal

(f. n. contd.)

that portion of the sea which extends from a line running parallel to the shore to a specified distance therefrom, which was formerly fixed by the majority of maritime States at three marine miles[7] measured from low-watermark.

The legal nature of the right of a State over its territorial waters was viewed in several ways. Some regarded it as an actual ownership as it implied an exclusive enjoyment very characteristic of ownership, while others treated it as conferring only a right of jurisdiction on the littoral State and hence a right of limited sovereignty.

As early as in 1876, there arose a conflict of judicial opinion in England as regards the legal status of territorial waters. Divergent views were expressed by the judges in the well known case of *R.* v. *Keyn.*[8] This case, although primarily concerned with the territoriality of criminal offences, raised indirectly the whole question of the extent of the territorial sea and of the nature and the extent of the jurisdiction of the littoral State.

The case was referred to the Court of Crown Cases Reserved before a bench of 13 judges. That Court held, by a majority of one, that it lacked jurisdiction to try the offence. Seven judges held that, in the absence of a statute, the Central Criminal Court had no jurisdiction over foreigners on board foreign vessels. It was not disputed that had the defendent been a British national, or had the offence been committed within

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waters which the coastal State might appropriate. Pontanus thus appears to be the originater of the modern doctrine of territorial waters.

7. The marine mile referred to is the "Admiralty" or "nautical" mile as adopted by the British Hydrographic Office being equivalent to 1853 metres, and the marine league is equal to three nautical miles or 3.453 statute miles. Colombos, *op. cit.*, p. 88.

8. (1876) 2 Ex. D. 63, A German vessel, the Franconia, collided with a British vessel, at a point some two and a half miles from the English coast. The latter vessel was sunk and a passenger drowned. The master of the Franconia, a German national, was convicted of manslaughter, according to English Law, in the Central Criminal Court.

the body of a country, the court would have had jurisdiction. The other six judges held that the sea within three miles of the coast of England was part of the territory of England, that English criminal law extended over such territory, and that the court had jurisdiction to try criminal offences committed there, even on board foreign vessels.

The conclusion that, on examination of the historical evidence, there was an absence of precedent to support the doctrine that the realm of England extended beyond the low water mark, led directly to the passing of the Territorial Waters jurisdiction Act, in 1878.[9] This Act asserted that jurisdiction "extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions."[10]

At the international level, the Convention on the Territorial Sea adopted by the Geneva Sea Conference of 1958 (UNCLOS I) accepted that the sovereignty of a State extends. beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.[11] However, the Conference did not specify what the rules were and the exact nature of the rights. Today, the legal status of the territorial sea as enumerated under Article 2 of the Third United Nations Convention on the Law of the Sea, 1982,[12] is on the very same lines laid down under UNCLOS I.

Extent of the Territorial Sea

The question of the extent of Territorial Waters was at one time one of the most controversial issues among contesting States. Since the basis of a coastal State's claim to a belt of

9. Colombos, *op. cit.*, p. 99.

10. *Ibid.*

11. D. W. Bowett, *The Law of the Sea* (1967), p. 64.

12. For the text of the Article see, Nagendra Singh, *British Shipping Laws,* Vol. 4. (1983), p. 2646 at p. 2652.

the sea was the principle of protection, its extent was supposed to be measured by the power of the littoral sovereign.

In 1704, Bynkershock propounded the Cannon Shot Rule whereby the extent of a State's territorial dominion over the marginal sea was suggested to be measured by the range of cannon firing from the shore.

Eventhough the range of cannon extended much further through the years, the three-mile rule came to be accepted and adopted by the big maritime powers, especially by Great Britain and later by the U.S., since it was generally found to be a convenient compromise between the conflicting interests of coastal States and the international community. [13]

JUDICIAL RECOGNITION OF THE THREE-MILE RULE

The decisions rendered in the two cases of *Twee Gebroeders* [14] are, *inter alia,* of importance as containing early assertions of the three-mile limit as the boundary of territorial waters. In the first case [15] Sir William Scott found that the three-mile limit was assumed by the law of nations to be the boundary of the neutral waters. In the subsequent case, [16] he made reference to the reach of cannon shot but not to the three mile limit as an equivalent distance.

In *The Anna,* [17] a U.S. Vessel was seized by a British primatur at a place more than 3 miles from the main land limit. The U.S. claimed the restoration of the vessel on the ground that she was seized within U.S. territorial waters. Sir William Scott observed that since the introduction of firearms the boundary of territorial waters has been recognised to be about three miles from the shore and accordingly released the ship

13. See Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 7.

14. 165 E.R. 422 and 165 E.R. 485.

15. 165 E.R. 422: S.C. 1 Eng. Pr. Cas. 286.

16. 165 E.R. 485: S.C. 1 Eng. Pr. Cas. 323.

17. 165 E.R. 809.

to her American owners. This judgment, is regarded as one of the most authoritative early expositions of the three-mile territorial waters rule.

In *The Vrow Anna Catharina,*[18] Sir William Scott in his judgment held, that the sanctity of a claim of territory is undoubtedly very high.

So also, the case of *The Ann*[19] offers a typical judgment of Justice Story on the "exclusive jurisdiction" of the coastal State over the territorial sea to the distance of a cannon shot, or marine league, over the waters adjacent to its shores.

In *R* v. *Forty-nine Casks of Brandy,*[20] Sir John Nichol's explanation of the territorial right appears to be based upon considerations of international comity. According to him, the three miles beyond low-water mark is the limit of territorial right as between nations only.

Dr. Lushington's opinion in the case of *The Leda*[21] that the dominion of the Crown and the limits of the United Kingdom ended at a distance of three miles from the low-water mark was subsequently challenged in *R* v. *Keyn,*[22] when the extent of the territorial sea, apart from bays, and the true character of jurisdiction over the territorial sea came under examination.

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18. 165 E.R. 681. This was a case relating to a ship and cargo documented as Dutch Property and captured on a voyage near to the island of St. Michael. On a representation made to a Portugese Government that the seizure took place within the harbour of St. Michael claim of territory interposed by the Portuguese Consul.

19. (1815) 1 F. Cas. 926; See Simmonds, Cases on the Law of the Sea, Vol. I, 1976, pp. 148-151. The United States had tentatively, put-forward the marine league limit as the equivalent of gun shot from the shore when defining her mental status on the outbreak of the war between Britain and France in 1793.

20. 166 E.R. 401.

21. 166 E.R. 1007 at 1008.

22. *Supra,* n. 8.

The case of *General Iron Screw Collier Co.* v. *Schurmanns*[23] is noteworthy for the opinion expressed on the acceptance in international practice of the right of a State to exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shores.

In the case of *Gann* v. *Free Fishers of Wistable*[24] Lord Chelmsford held:

> "The three-mile limit depended upon a rule of international law by which every independent State is considered to have territorial property and jurisdiction in the seas which wash its coast within the assumed assistance of a cannon-shot from the shore."[25]

Dr. Lushington went a step further in *The Annapolis*.[26] The British Merchant Shipping Acts of that period did not generally state in specific terms the extent to which they were intended to apply to foreign vessels. According to him, within British jurisdiction, namely British territory and at sea within three miles from the coast, he apprehends that the British Parliament has an undoubted right to legislate.

In *The Apollon*,[27] Justice Story held that the United State's Revenue Act of 1799 conferred upon the United States a right of visitation, which could be exercised within four leagues of her coasts not only over American vessels but also over foreign vessels bound for United States Ports.

In the year 1893, in the *Behring Sea Fur Seal*[28] dispute the question arose whether the United States, being successors to Russia, from which they had purchased Alaska in 1867, were

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23. (1861) 1 J & H 180; See Simmonds, *op. cit.*, Vol. II, 1977, p. 1.
24. (1865) 11 H.L. Cas. 192.
25. *Id.*, p. 218.
26. 167 E.R. 150.
27. 22 U.S. (9 Wheaton) 362 (1824).
28. *Behring Sea Arbitration,* British case, *Parl. Papers, United States,* No. 1, See Simmonds, *op. cit.*, Vol. III, 1980, p. v.

entitled to exercise jurisdiction over vessels engaged in the fur seal fishery beyond the three mile distance of territorial waters. In rejecting the claim of the United States, the Arbitral Tribunal held that the United States, did not have the right of protection or property in the fur seals outside the ordinary three mile limit.

However, inspite of a catena of decisions supporting the three mile limit, it must be pointed out that three miles was not the universally accepted limit of territorial waters.[29] For a long time, Scandinavian countries especially Norway and Sweden supported a four miles distance. Belgium, France and Poland accepted the three mile limit but claimed an extended zone of three to twelve miles for special purposes such as customs supervision and defence. Greece adopted a six mile limit in the year 1936. So also six miles was claimed by Spain, Portugal, Saudi Arabia, Turkey and Yugoslavia. Mexico claimed nine miles as territorial waters. In the year 1912, the Russian Government declared its proposal to maintain as a permanent policy, a twelve mile distance for its territorial waters. On the other hand, Italian legislations adopted limits ranging from gunshot range to ten marine miles. Egypt, by a Presidential Decree dated February 17, 1958 extended its territorial waters to twelve nautical miles. The United States Government, however, emphatically argued that there is no basis in international law on claims to a territorial sea in excess of three nautical miles from the base-line which is normally the low-water mark on the coast. The American protest was followed immediately by the British Government which refused to admit Iran's claims to a territorial sea of twelve miles.

VIEWS EXPRESSED BY INTERNATIONAL BODIES

The views of International associations bring to light the evolution of scientific opinion on the question of territorial waters.

The Institute of International Law, at its Paris session of 1894 adopted the distance of six marine miles and subsequently

29. See Colombos, *op. cit.*, p. 101.

in 1928, a three mile limit was agreed upon. The International Law Association approved the three mile distance at its Vienna Conference in 1926.

Owing to the divergence of views relating to territorial waters, the League of Nations endeavoured for a negotiation on the subject by an International Convention, through its committee for the codification of international law which led to the Hague Codification Conference in 1930. The Draft presented by the Conference constitutes an important document in the history of international law and a landmark in the long process of codification. The greatest difficulties faced by the conference, in coming to an agreement were related to the breadth of the territorial sea, and the right of a State to take measures outside this breadth in an adjacent and contiguous area. The proposal for a three mile limit was opposed by several States. Though the Conference was attended by only about forty States, it failed to agree by the necessary two-thirds majority to adopt a three mile limit or zone beyond.[30]

After the establishment of the United Nations in 1945, the International Law Commission at its third session at Geneva in 1951 included the regime of the territorial sea amongst those topics for which codification was considered necessary and feasible. On the question of the breadth of the territorial sea, the commission failed to agree on any generally acceptable limit but stated that international law does not permit an extension of the territorial sea beyond twelve miles.[31]

GENEVA SEA CONFERENCE OF 1958 (UNCLOS I)

The United Nations convened its first conference on the Law of the Sea at Geneva in 1958. It was attended by eighty-two States. However, the conference failed to settle two highly important questions— the breadth of the territorial sea and the

30. P. W. Birnie, "The Law of the Sea Before and After UNCLOS I and UNCLOS II" Barston and Patricia (Eds.) *The Maritime Dimension* (1980), p. 10.

31. *Ibid.*

breadth of any exclusive fishery zones. Though the 1958 Conference adopted four Conventions, one being 'The Convention on the Territorial Sea and the Contiguous Zone',[32] it is significant to note that this Convention, for lack of consensus, failed to set any outer limit for the territorial sea. However, it introduced important innovations as well as codified existing customary law.[33]

Earnest efforts were made by various States to arrive at a consensus on the question of the breadth of the territorial waters though it eventually proved unsuccessful. The British delegation put forward a proposal for a territorial sea not exceeding six miles, specifying that such extension should not affect existing rights of passage for aircraft and vessels, including warships, outside three miles. However, this proposal was rejected by an everwhelming majority. As observed by Colombos:

> "Had it been adopted, it would have undermined the traditional rule of a three mile limit of territorial waters for which so many generations of eminent British statesmen and jurists have strenously fought for over a century." [34]

So also the U.S. and Canadian proposals for an extended terrritorial sea failed to win a two-thirds majority.[35]

The result was that the traditionally accepted limit of a three mile territorial sea remained unimpaired and unaffected

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32. The other three being,
    (i) The Convention on the High Seas.
    (ii) Convention on Fishing and Conservation of the Living Resources of the High Seas.
    (iii) Convention on the Continental Shelf.

33. Articles 1 to 23.

34. Colombos, *op. cit.*, p. 107.

35. The U.S. suggestion was for a six mile territorial sea besides a six mile contiguous zone for fishing and exploitation of the living resources. Whereas, the Canadians claimed a six mile limit with a twelve mile fishery zone.

by the various proposals at the conference due to the failure of consensus.[36]

GENEVA SEA CONFERENCE OF 1960 - UNCLOS II

A renewed attempt was made to resolve the two questions left undecided by the 1958 conference when the United Nations summoned a second conference at Geneva from March 17 to April 27, 1960, which was represented by eighty eight States.[37] Here again, the proposals put forward by Canada and the United States for a six mile territorial sea and a twelve mile fishery limit attracted the greatest attention. However, this proposal failed by one vote to secure the necessary majority. Here again, at the end of the conference, there were reaffirmations by the British and the United States that in the absence of an international agreement, the respective Governments would maintain their former position, viz., a three mile limit. In fact at the close of the conference the Chairman of the United States delegation as against their earlier claims rightly pointed out:

> "Unilateral claims to greater breadth conflicted with the universally accepted principle of the freedom of the seas and ought therefore to be rejected."[38]

The fact that the 1960 conference equally failed to produce an agreeable solution to these problems meant that codification of the law of the sea remained incomplete.

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36. In fact, the British and American Governments made declarations to that effect, reiterating the principle that international law sanctions no greater limit than three miles of territorial waters and that all waters outside that limit are high seas. According to Jessup, the extensive claims put forward by some of the States amounted to a mockery of the law of territorial waters and the freedom of the sea. See Philip C. Jessup, *The Use of International Law* (1959), p. 14.

37. D. W. Bowett, "The Second United Nations Conference on the Law of the Sea", 9 I.C.L.Q. 415 (1960).

38. Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for the Freedom of the Sea", 54 A.J.I.L. 751 (1960) at p. 789.

THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1973-1982. (UNCLOS III)

The United Nations General Assembly convened a new conference on the Law of the Sea in 1973[39] alternating between Geneva and New York. Its object was to achieve a comprehensive agreement on the international law of the sea. The conference was attended by over 1,000 delegates. It was "the most ambitious and complex of contemporary attempts at multilateral diplomacy."[40]

The most important reason why States were pressing forward with the conference was due to widespread dissatisfaction with the existing legal regime or lack of it in the oceans.[41] Some believed that respect for certain aspects of the traditional law of the sea was breaking down, and that interests protected by that traditional law were being jeopardized, a reaction for instance to unilateral extensions of the territorial sea.[42] All the same, some were of the view that the traditional law did not adequately protect current or anticipated interests. As succinctly pointed out by E. D. Brown:

> "The history of the modern international laws of the sea can perhaps be best understand by perceiving it as a continual conflict between two opposing, yet complementary, fundamental principles - territorial sovereignty and the freedom of the high seas."[43]

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39. For a detailed account, see Simmonds, *United Nations Conference on the Law of the Sea* 1982 (1983) B 27; Also see Nagendra Singh, *British Shipping Laws: International Maritime Law Conventions*, Vol. 4 (1983), pp. 2652-2751.

40. R. P. Barston, "The Law of the Sea Conference: The Search for New Regimes", in Barston and Patricia (Eds.) *op. cit.*, p. 154.

41. John R. Stevenson and Bernard H. Oxman, "The Preparations for the Law of the Sea Conference", 68 A.J.I.L. 2 (1974).

42. See for a detailed discussion on the various claims of different States, *ibid.*

43. E. D. Brown, "Maritime Zones: A Survey of Claims", in R. Churchil *et. al.* (Eds.), *New Directions in the Law of the Sea*, Vol. III (1973), p. 157.

However, today, "the law of territorial sea is the least controversial of the new law".[44] Not too long ago, the question of the breadth of the territorial sea generated the bitterest controversy among States, but today coastal States are in general agreement as to the breadth of the territorial sea as the problem of limits of the territorial sea which defied codification thrice during the last twenty five years is now settled.[45]

The seabed committee had allocated topics to three of its subcommittees and subcommittee II had the broadest and most complex mandate of all, being concerned with most of the traditional law of the sea issues, including the territorial sea. At this conference unlike the other two conferences there was broader agreement on the inclusion of a twelve mile maximum limit for the territorial sea than on any other issue. Besides proposals which contemplated a twelve mile limit, various controversal suggestions were put forward by contesting States.[46]

However, "In the relatively short period of 12 years since the Geneva Conference in 1960 there has been no less than a 25 percent increase in the number of States claiming a twelve mile territorial sea, an increase from 22 to 47 percent of all recorded claims."[47] The idea of a territorial sea of twelve miles was at least this time one of the key-stones of the compromise solution forced by the majority of the States participating in

44. M. K. Nawaz, "Towards a New Law of the Sea: From Freedom of Navigation to Resource-Development", A.I.R. 1977 (Journal), p. 89.

45. *Ibid.*

46. The articles submitted by Brazil went to the extent of establishing a territorial sea of 200 nautical miles with control over navigation and overflight; Uruguay made a similar proposal but limiting general control over navigation and overflight to 12 nautical miles; the 200 mile zone of sovereignty and jurisdiction in the proposal of Ecuader, Panama and Peru similarly included a narrower zone of unspecified breadth for navigational controls; and the 200 mile zone of national ocean space proposed by Malta also distinguished a 12 mile zone for navigation purposes; the Chinese proposal did not specify a precise maximum limit for the territorial sea.

47. E. D. Brown, in R. Churchil *et. al.* (Eds.), *op. cit.*, p. 161.

the conference, as was apparent from the general debate at The Plenary meeting and the discussion held in the committee.[48] Hence, the long-standing controversy was set right by the UNCLOS III. Article 3 of the Convention unequivocally provided that,

> "Every State has the right to establish the breadth of its territorial sea upto a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this convention."

So far as the extent of the territorial sea is concerned, UNCLOS III satisfactorily settled the conflicting demands. But, the latter part of the Article raises another question, viz., how the limit of the territorial waters is to be measured.

Delimitation of the Territorial Sea

There would probably be no difficulty in determining the starting point of the limit in the case of a coast in which the line of demarcation between sea and land can be clearly outlined. The difficulty arises when a shore is surrounded or fringed by islands or rocks. This question came up for consideration before the International Court of Justice in the *Anglo-Norwegian Fisheries* Case.[49]

Owing to complaints from the King of Norway and Denmark, British fishermen refrained from fishing in Norwegian coastal waters from 1616 to 1906. From 1908, the Norwegian Government was forced to take measures prohibiting entry of foreign vessels within specified limits and in 1911, a British trawller was ceased for violating these limits. Negotiations ensued between the two Governments. In 1933, U.K. protested that Norway had made use of unjustifiable baselines in delimiting its territorial sea. In 1935, a Norwegian Royal Decree was

48. John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas session," 69 A.J.I.L. 1 (1975) at p. 13.

49. *U.K.* v. *Norway,* (1951) I.C.J. Rep. 116; also see (1951) *International Law Reports,* Vol. 18, p. 86.

enacted delimiting the Norwegian Fisheries zone North of 66° 28.8' North. The said Decree laid down the considerations on which its provisions were based, viz., "well-established national titles of right; the geographical conditions prevailing on the Norwegian coasts, the safeguard of the vital interests of the inhabitants of the northern most parts of the country"[50] and further relied on the Royal Decrees of 1812, 1869, 1881 and 1889. The Decree provided inter alia that the lines of delimitation towards the high sea of the 'four mile zone' should be parallel with straight baselines drawn between fixed points on the mainland, on islands or rocks. U.K. instituted proceedings before the International Court of Justice challenging the validity of the 1935 Decree and to declare the principles of international law to be applied in defining the baselines.

According to U.K.'s claim, for the proper delimitation of territorial waters the baseline must be the low water mark on permanently dry land and in the case of bays the closing line must be drawn between the natural geographical entrance points where the indentation ceases to have the configuration of a bay. In view of the special configuration of the Norwegian coast, U.K. advocated the 'arcs of circles' method i.e., by drawing arcs, with a radius of 4 miles in the case of Norway, from every permissible base point along the coast and of treating the line thus formed by all the intersecting arcs as the outer limit of the State's territorial waters.

The court arrived at the conclusion that the method adopted by the Norwegian Government in the 1935 Decree was not contrary to international law. Three methods have been contemplated to effect the application of the low-water mark rule. The first method, the *trace parallel,* consists of drawing the outer line of the belt of territorial waters by following the coast in all its sinuosities. The court observed that this method may be applied without difficulty to an ordinary coast which is not too broken. Where a coast is deeply indented and cut into and where it is bordered by an archipelago such as the *'skjaergaard'*[51]

50. *Id.,* 88.

51. Literally means rock rampart.

such a method is not possible. The arcs of circles method which U.K. considered to be correct was found by the court to be not obligatory by law. The straight baselines method which Norway adopted of selecting appropriate points on the low water mark and drawing straight lines between them was accepted by the court.

All the same, it is interesting to note that in a dissenting judgment, Sir Arnold McNair, J. observed:

> "there was an overwhelming consensus of opinion amongst maritime states to the effect that the baseline of territorial waters is a line which follows the coast line along low water mark and not a series of imaginary lines drawn by the coastal state and that the 1935 Norwegian Decree is in conflict with international law and that its effect will be to injure the principle of the freedom of the seas and to encourage further encroachments upon the high seas by coastal States".[52]

Another aspect which was brought to light in this case is that unilateral acts of states have contributed to a great extent to the traditional law of the sea. "Yet there is an important link between the exercise of the unilateral competence of the states and its relatability to the international community interests obtaining at a given point of time".[53] After considering the validity of the 1935 Decree in international law, the court proceeded to examine the international character of the delimitation of sea areas. The court observed:[54]

> "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 law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to

52. I.C.J. Rep., (1951), pp. 131, 132.

53. V. S. Mani, "India's Maritime Zones and International Law: A Preliminary Inquiry" 21 J.I.L.I. 336 (1979).

54. (1951) *International Law Reports,* Vol. 18, p. 86 at p. 95.

undertake it, the validity of the delimitation with regard to other states depends upon international law".

Judge McNair in his dissenting opinion[55] expressed the view that delimitation must be done in accordance with law and not according to the discretion of each state.[56]

Another significant aspect is that *The Anglo-Norwegian Fisheries Case*[57] is a typical instance where geographical and economic factors influenced the State in determining State policy on an issue of international law and the judgment of the court was moulded on these realities.

Here again, Judge McNair in his dissenting opinion obserued[58] that manipulations of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law. According to him, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard. He also pointed out the peculiarity of the Norwegian coast. Judge Reed also expressed the opinion[59] that it is dangerous to the structure of international law to base a decision on the exceptional character of a certain coastline.

However, today welfare state ideas and economic standards of society, justify a delimitation giving due regard to geographical and economic conditions. In 1958, only seven years after the *Anglo-Norwegian Fisheries Case,* the Geneva Law of the Sea Conference in Articles 3 to 7[60] codified the

55. *Id.*, p. 115.

56. The same proposition was exposed by the Supreme Court of the United States in *The United States* v. *State of California,* (1946) 332 U.S. 19 at p. 35 and reaffirmed in *The United States* v. *State of Texas,* (1949) 339 U.S. 707 at 718.

57. *Supra,* n. 49.

58. *Id.*, p. 121.

59. *Id.*, p. 136.

60. For text of the Articles, see Bowett, *op. cit.*, pp. 64-66. The Convention on the Territorial Sea and the Contiguous zone.

criteria laid down in the above case with the result that "the straight baseline formula is fully recognized under international law and is more generally applied throughout the world."[61]

In fact, the principles laid down by the International Court of Justice in the said case on the question of delimitation of the territorial sea also found a place in Articles 5 to 7[62] of the Convention on the Territorial Sea and the Contiguous Zone at the Third United Nations Conference on the Law of the Sea 1973-1982.

The judgment of the International Court of Justice, in the *Anglo-Norwegian Fisheries* case, went much further than to settle in favour of the coastal State the uncertainties surrounding the criteria for delimiting territorial waters. To this extent it reflected the pressures brougth to bear on the traditional conception of the sea by the urgent need for regulation and conservation of marine resources on the part of States most directly interested. For that matter, the sociological content of the decision is one of its most interesting and significant aspects.[63] In fact, the decision to a great extent liberalised the whole law of the marginal sea, and as anticipated by Justice McNair though in a dissenting opinion, its effect was "to injure the principle of the freedom of the seas and to encourage further encroachments upon the high seas by coastal States".[64]

However, there is now general consensus among States that the territorial sea is a part of the sea in which the coastal state could exercise sovereignty subject to the right of innocent

61. Barry Hart Dubner, *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States* (1976), p. 10.

62. Under Article 5, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast. According to Article 7(1), in localities where the coastline is deeply indented or where there is a fringe of islands along the coast the method of straight baselines may be employed. See also Nagendra Singh, *op. cit*, p. 2653.

63. D. P. O. Connell, *International Law*, Vol. I (2nd ed. 1970), p. 479.

64. *Supra*, n. 52.

passage,[65] to other States. Therefore, any extension of the breadth of the territorial sea would materially reduce the area of the high seas — the common heritage of mankind.

THE RIGHT OF INNOCENT PASSAGE

Ships of all States whether coastal or land-locked, can enjoy the right of innocent passage[66] through the territorial sea. However passage is deemed to be innocent only so long as it is not prejudicial to the peace, good order or security of the coastal State.[67] It is further provided that in the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.[68]

Article 21 of UNCLOS III States that the coastal State could make laws and regulations, in conformity with the provisions of the Convention and other rules of international law, with respect to innocent passage through the territorial sea. Under Article 22, the coastal State can require foreign ships exercising the right of innocent passage to use such sea lanes and traffic separation schemes as it may designate.

Under Article 23, foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances should when exercising the right of innocent passage,

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65. Article 19 of UNCLOS III states that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. For a text of the Article, see Nagendra Singh, *op. cit.*, pp. 2655, 2656.

66. Article 17 of UNCLOS III. See *The Ship D. C. Whitney* v. *The St. Clair Navigation Co. and Another*, (1907) 38 S.C.R. 303. Here, the rights of a coastal State, to exercise jurisdiction over a foreign vessel, which infringes the local law, whilst on innocent passage through the territorial sea were examined. Also see Manjula Shyam, "International Straits and Ocean Law", 15 I.J.I.L. 17 (1975) at pp. 19-24.

67. Article 19. See Article 19(2) (a) to (1) explains the position as to when such passage becomes prejudicial.

68. Article 20. However, Article 5 of the 1958 Geneva Convention stated that there must exist a genuine link between the State and the ship.

carry documents and observe special precautional measures established by international agreements. All the same, Article 24 emphatically states that the coastal State shall not hamper the innocent passage of foreign ships through the territorial sea. Simultaneously, under Article 25 the coastal State may take the necessary steps to prevent passage which is not innocent.[69]

RULES APPLICABLE TO MERCHANT SHIPS AND GOVERNMENT SHIPS OPERATED FOR COMMERCIAL PURPOSES.

The criminal jurisdiction[70] of the coastal State cannot be exercised on board a foreign ship passing through the territorial sea except (1) if the consequences of the crime extend to the coastal State,[71] (2) if the crime disturbs the peace of the country or the good order of the territorial sea and (3) if the assistance of the local authorrities has been sought for and (4) if such measures are necessary for the suppression of illicit traffic.

69. *The S. S. Wimbledon,* (1923) 1 W.C.R. 163, The Permanent Court of International Justice had to consider the effects of Article 380 of the Treaty of Versailles guaranting that the Kiel Canal should be "free and open" to vessels of all nations at peace with Germany; German officials stopped the Wimbledon a British vessel carrying amunitions through the Kiel Canal to Poland, then at war with Russia on the ground that a customary rule of international law did not allow the passage of armaments of war through the territory of a neutral state to the territory of a belligerent. The Court held that the treaty provision must take precedence: the stopping of a vessel sailing under the flag of a State at peace with Germany was a breach of Germany's obligation under the treaty of versailles. See L. C. Green, *International Law Through the Cases* (1970), p. 343.

70. Article 27, UNCLOS III. See Gerhard Von Glahn, *Law Among Nations* (1967), pp. 345-359 for an account of jurisdiction over vessels.

71. See *R.* v. *Keyn,* (1876) 2 Ex. D. 63, for a detailed discussion. See also *Cunard Steam Ship Co.* v. *Mellon,* 262 U.S. 100 (1923); *The S. S. Lotus,* (1927) P.C.I.J., Series A No. 10; and *The Nottebohm* case, (1955), I.C.J. Rep. p. 4. For a detailed discussion of the cases see D. J. Harris, *Cases and Materials on International Law* (1973).

THE CONTIGUOUS ZONE

The concept of the "Contiguous Zone" had found recognition in the Geneva Convention on the Territorial Sea and Contiguous Zone of April 28, 1958.[72] This Convention recognized the right of a State to exercise a certain measure of control in a zone of the High Seas contiguous to its territorial waters.[73] Over this zone, beyond its territorial sea, the coastal State does not have full sovereignty but it does exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration and sanitary regulations within its territory or territorial sea.[74]

Several countries extend the operation of their revenue and sanitary laws to foreign ships approaching their territorial waters and this practice has been in existence for over a hundred years.[75]

This zone is a part of the high seas, and the coastal State is not entitled to exercise any greater control over this zone than is strictly necessary for the purpose of preventing the violation of its regulations within its territory or territorial sea.[76] After such an infringement if the vessel escapes to the high seas, she is liable to be pursued[77] and seized. The pursuit may be ordered by the coastal State, even if the vessel is within the contiguous zone, provided there has been a violation of the rights for the protection of which the zone was established.[78]

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72. D. W. Bowett, *op. cit.*, p. 64.

73. Part II, Art. 24. For the text of the article, See Nagendra Singh, *International Maritime Law Conventions* (1983), p. 2630.

74. *Ibid.* Also see S. P. Jagota, "Basic Issues for the Forth-coming Conference on the Law of the Sea", 14 I.J.I.L. 141 at p. 149 (1974).

75. Kochu Thommen, *Legal Status of Government Merchant Ships in International Law* (1962), p. 70.

76. *Id.*, pp. 141, 142.

77. The right of hot pursuit. See article III of UNCLOS III and also Nagendra Singh, *op. cit.*, p. 2683.

78. *Ibid.*

Under the 1958 convention "the contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured".[79] However, UNCLOS III confirmed the concept of the contiguous zone but fixed its limit as not exceeding 24 nautical miles.[80] The coastal States rights were never extended or limited. The States will continue to exercise the control necessary for preventing as well as punishing the infringement of customs, fiscal, immigration and sanitary regulations within their respective territory as well as territorial sea, thereby excluding the rights of other states in this regard.[81] Further, under Article 33 the breadth of the contiguous zone is measured from the same baseline from where the breadth of the territorial sea is measured and the contiguous zone goes beyond the territorial sea.

Though the concept gained acceptance as early as in 1958 it is "a new development".[82] No doubt the first major step towards recognizing such specialised competence was taken under the Geneva Convention of 1958.

Of course, the concept confined the coastal State's competence to the exercise of the 'control' necessary for the prevention and punishment of infringements of coastal States regulations committed within its territory or territorial sea and did not involve the recognition of the coastal State's fructus in those waters.[83]

In the case of the *Church v. Hubbart*[84] Chief Justice Marshall held that the authority of a nation to protect itself from

79. Article 24.

80. Article 33. See Nagendra Singh, *op. cit.*, p. 2659.

81. *Ibid.*

82. B. R. Cauhan, "Fixation and Delimitation of Maritime Frontiers" in Agrawala *et. al.* (Eds), *New Horizons of International Law and Developing Countries,* (1983), p. 286.

83. V. Nageswara Rao, "The Legal Status of the EEZ" in Agrawala *et.al.* (Eds.) *op. cit.*, p. 230.

84. 6 U.S. (2 Cranch) 187 (1804) at p. 235. Here a U.S. vessel was seized "some four or five leagues" off the coast of Brazil by the

(f. n. contd.)

injury might in certain circumstances be exercised beyond the limits of its territory. Further that a coastal State had the right to use the means necessary to prevent such injury if those means were reasonable and necessary to secure the laws from violation. Within a zone contiguous to the coastal State but beyond the territorial sea, the coastal State may take action, for example, against foreign smuggling vessels and the area of the high seas within which this right is exercised will vary according to geographical or commercial circumstances.[85]

In the case of *The Javirena*[86] relating to violation of customs laws the United States Revenue Act of 1789[87] was used to validate the seizure of the Javirena. The evidence showed that the vessel did not enter any United States Port and was therefore not liable to the penalty prescribed for departure from the customs collection district without making a report or entry.

Conclusion — Impact of UNCLOS III

The Third United Nations Conference on the Law of the Sea, was confronted with the conflict or battle between two versions of exclusive sovereignty — the old concept of "freedom of seas" permitting sovereign governments to do what they pleased outside the three-miles limit of coastal waters and the new varieties of extended territorial waters or contiguous zones or other maritime zones.

The Conference in settling conflicting views, atleast in the matter of the territorial sea and the contiguous zone, has shown a tilt in favour of coastal State's demands rather than supporting, a rigid, 'freedom of the sea' concept.

Portuguese coastal authorities for alleged illicit trade. It was argued on behalf of the plaintiff that the seizure was illegal as beyond the limits of territorial jurisdiction.

85. *Ibid.*, see also Simmonds, *Cases on the Law of the Sea,* Vol I, (1976), p. 32.

86. 67 Fed. 152 (1895); See also *U.S.* v. *Bengochea,* 279 Fed. 537 (1922).

87. See also *The Appollon, supra,* n. 27.

The recognition of the concept of the Territorial Sea in UNCLOS III and its success in fixing the breadth of the territorial sea to 12 nautical miles, which the 1958 and 1960 conferences failed to do, are its great achievements. However, the acceptance of sovereignty of a coastal State over 12 nautical miles has no doubt considerably reduced the area of the seas known as 'the open sea'.

So also, though the concept of Contiguous Zone found a place in the 1958 Geneva Sea Convention, it is only under UNCLOS III that the breadth of the Contiguous Zone was extended to 24 nautical miles. Though the coastal State is not entitled to any sovereignty over this area, the recognition of this concept also, to some extent, constitutes inroads into the 'freedom of the seas' doctrine.