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FREEDOM OF THE SEAS AND INTERNATIONAL STRAITS: AN ANALYSIS OF CUSTOMARY LAW, TREATIES AND JUDICIAL DECISIONS

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Abstract

The law of the sea rests on a long-standing tension between two competing imperatives: the sovereign interest of coastal States in controlling waters adjacent to their territory, and the collective interest of the international community in preserving unimpeded access to the oceans for trade, communication and security. This tension is nowhere more visible than in international straits, the narrow maritime corridors that connect one part of the high seas or an exclusive economic zone to another and through which an enormous share of global shipping, energy transport and naval movement passes. This article traces the doctrinal journey of the freedom of the seas from its Grotian origins through customary practice, the 1958 Geneva Conventions, and the 1982 United Nations Convention on the Law of the Sea, with particular attention to the regime of transit passage that UNCLOS created for straits used for international navigation. It examines how the International Court of Justice, beginning with the Corfu Channel judgment, and subsequent arbitral tribunals have refined the balance between coastal sovereignty and navigational freedom. The article further considers contemporary flashpoints, including the Strait of Hormuz, the Strait of Malacca and the South China Sea, where questions of passage rights intersect with strategic rivalry. It concludes that although UNCLOS supplies a largely coherent normative framework, its practical efficacy depends heavily on State compliance, judicial reinforcement and cooperative enforcement mechanisms.

Keywords: Freedom of the seas; international straits; transit passage; UNCLOS; customary international law; innocent passage.

Introduction

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Fewprinciplesininternationallawcarryasmuchhistoricalpedigreeasthefreedomoftheseas. Since Hugo Grotius published *Mare Liberum* in 1609, arguing that the oceans could not be subjectedtoexclusivesovereigntybecausetheywereinexhaustibleandcommontoallnations, theideathat thehighseasbelong to no one and toeveryoneat oncehasshaped the conduct ofStates, the growth of global commerce and the architecture of modern international law.[3]Yet thefreedom ofthe seas has neverbeen absolute. It has always coexisted, sometimesuneasily, with the claims coastal States make over waters bordering their coasts, claims that intensified dramatically in the twentieth century as States extended territorial seas, declared exclusive economic zones and asserted control over continental shelves.International straits occupy a peculiarly sensitive position within this framework. A strait, in geographicalterms,issimplyanarrowpassageofwaterconnectingtwolargerbodiesofwater. In legal terms, however, a strait used for international navigation becomes a site where the ordinaryrulesoftheterritorialsea, which wouldotherwiseallowacoastal Statetoregulateor evendenypassagetoforeignvessels,arequalifiedbytheoverridinginterestoftheinternational community in keeping vital shipping lanes open. Straits such as Hormuz, Malacca, Gibraltar, Bab-el-Mandeb and the Turkish Straits are chokepoints of global trade and energy security; a substantialshareoftheworld'sseaborneoil,forinstance,passesthroughtheStraitofHormuz alone. Any disruption to passage through these corridors, whether through unilateral coastal State restriction, armed conflict or piracy, carries consequences far beyond the immediate littoral States.

This articleexamines howcustomaryinternational law, treaty law and judicial decisions have together constructed a regime that seeks to reconcile coastal sovereignty with navigational freedom in straits used for international navigation. It situates the 1982 United Nations Convention on the Law of the Sea, and in particular its transit passage regime under Part III, within the longer historical arc of the freedom of the seas doctrine, and it evaluates the extent to which judicial and arbitral bodies have given that regime practical content.

Relevant Legal Framework

Long before any codified convention existed, the freedom of navigation on the high seas was recognised as a matter of customary international law. Grotius's polemic against Portuguese and Spanish claims of exclusive dominion over the seas was answered, notably, by John

[3] HugoGrotius,*MareLiberum(TheFreeSea)*(RalphvanDemanMagoffintr,OxfordUniversityPress,Oxford, 1916, originally published 1609).

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Selden's *Mare Clausum*, which defended the possibility of maritime sovereignty.[4] The eventual settlement of this debate, achieved gradually through State practice over three centuries, favoured a qualified version of Grotius's position: States accepted a narrow belt of territorial sea under coastal sovereignty, beyond which the high seas remained free to all. This compromise, often summarised in the maxim that the sea is free but the shore is not, became the bedrock customary rule from which subsequent treaty law developed.

The 1958 Geneva Conventions

Thefirstsystematiccodificationofthelawoftheseaoccurredatthe1958GenevaConference, which produced four conventions, including the Convention on the Territorial Sea and the Contiguous Zone.[5]That convention recognised a right of innocent passage through the territorialseaforshipsofallStates,includingthroughstraitsusedforinternationalnavigation, but it did not create a distinct regime for straits; passage through them remained governed by theordinaryinnocentpassagerules,meaningthatsubmarineswererequiredtonavigateonthe surface and that coastal States retained some latitude to suspend passage temporarily for security reasons in defined areas of the territorial sea, though not within straits used for international navigation.

UNCLOS1982andtheBirthofTransitPassage

ThemostsignificantdevelopmentcamewiththeThirdUnitedNationsConferenceontheLaw oftheSea,culminatinginthe1982Convention.[6]UNCLOSextendedthemaximumbreadthof the territorial sea from three to twelve nautical miles, a change that had the practical effect of enclosing many straits that had previously contained a corridor of high seas within the territorialwatersoftheborderingStates.Topreventthisextensionfromchokingoffnavigation through vital corridors, UNCLOS Part III introduced the concept of straits used for international navigation and created, for many of them, a distinct regime of transit passage under Articles 34 to 45.[7]

Transitpassagediffersfrominnocentpassageinseveralmaterialrespects.Itappliestoallships and aircraft, including warships, and permits overflight, which is not available under the ordinary innocent passage regime.[8]It cannot be suspended by the bordering States even

[4] JohnSelden,MareClausum(OftheDominion,orOwnershipoftheSea)(1635).
[5] ConventionontheTerritorialSeaandtheContiguousZone,openedforsignature29April1958,516UNTS 205 (entered into force 10 September 1964).
[6] UnitedNationsConventionontheLawoftheSea,openedforsignature10December1982,1833UNTS3 (entered into force 16 November 1994) [hereinafter UNCLOS].
[7]UNCLOS,arts.34-45.
[8]UNCLOS,art. 38.

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temporarily.[9]Submarinesmaytransitsubmerged,sincetransitpassageisdefinedaspassagein the normal mode of navigation, whereas innocent passage requires submarines to surface and show their flag. The coastal States bordering the strait retain the power to designate sea lanes and prescribe traffic separation schemes,[10]and to adopt laws relating to safety of navigation, pollutioncontrol,fishingandcustoms,[11]buttheseregulatorypowersmaynothavethepractical effect of denying, hampering or impairing the right of transit passage itself.

UNCLOS also preserves the ordinary innocent passage regime for certain straits that do not qualifyfortransitpassage,suchasthoseformedbyanislandofaStateborderingthestraitand its mainland where a similarly convenient route exists seaward of the island,[12]and it leaves undisturbed straits already governed by long-standing international conventions, of which the Turkish Straits under the 1936 Montreux Convention are the paradigmatic example.[13]

ArchipelagicSeaLanesPassage

A related but distinct innovation of UNCLOS is archipelagic sea lanes passage, applicable to archipelagic States such as Indonesia and the Philippines. This regime allows continuous and expeditious passage through designated sea lanes traversing archipelagic waters, again permittingnormalmodesofnavigationincludingsubmergedtransitandoverflight,andreflects the same underlying philosophy as the strait regime: that the extension of coastal or archipelagic sovereignty over previously open waters must not come at the expense of the broader community's navigational interests.[14]

CriticalAnalysis

The transit passage regime represents a carefully negotiated compromise, and its architecture revealsthepoliticalbargainingthatproducedit.Majormaritimepowers,principallytheUnited States and the Soviet Union during the Third Conference negotiations, insisted on a regime broad enoughtoguaranteeunimpedednavalmobility,includingsubmergedsubmarine transit and overflight, functions essential to their strategic posture. Straits States, by contrast, sought to preserve regulatory authority over environmentally sensitive or heavily trafficked waters neartheircoasts. The resulting text grants straits States aright to regulate navigational safety, pollution and fishing, while denying them any general power to prohibit or suspend passage. This asymmetry is deliberate: it privileges systemic navigational freedom over localised

[9] UNCLOS,art. 44.
[10]UNCLOS,art. 41.
[11] UNCLOS,art. 42.
[12] UNCLOS,art.45.
[13]ConventionRegardingtheRegimeoftheStraits,signedatMontreux,20July1936,173LNTS213.
[14] UNCLOS,arts.53-54.

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sovereign discretion, precisely because straits, unlike ordinary stretches of territorial sea, function as global public infrastructure.[15]

A close reading of the transit passage articles nonetheless leaves some ambiguity. Article 39 requiresshipsandaircraftintransitpassagetoproceedwithoutdelay,torefrainfromanythreat or use of force, and to comply with generally accepted international regulations on safety and pollution,[16]but it does not spell out enforcement mechanisms available to a straits State faced with non-compliant vessels. Nor does UNCLOS resolve, with complete clarity, the precise legalstatusofnavalexercises,weaponstestingorintelligence-gatheringactivityconductedby warshipswhileintransitpassage,anomissionthathasgeneratedrecurringfriction,particularly instraitsborderingStateswithdivergentviewsonpermissiblemilitaryactivityintheexclusive economic zone and territorial sea, such as China and the United States.[17]

Anotherpointof tension concerns the relationshipbetweentransit passage andenvironmental protection. Straits such as Malacca and Singapore experience some of the highest densities of shipping traffic in the world, raising acute risks of collision, oil spillage and ecological degradation. UNCLOS permits littoral States to adopt laws giving effect to applicable international regulations regarding the discharge of oil and other noxious substances, but it forecloses unilateral and more stringent environmental regulation that would impair transit passage, leaving straits States dependent on the slower processes of International Maritime Organizationrule-makingtoaddressenvironmentalrisk.[18]Thisstructurallimitationillustrates the broader critical point that the transit passage regime, in prioritising navigational freedom, necessarily constrains the regulatory autonomy of the States that bear the most direct environmental and security exposure from strait traffic.

Thegeopoliticalsalienceoftheselegalcategoriescannotbeoverstated.TheStraitofHormuz, borderedbyIranandOman,hasrepeatedlybeenthesiteofnavalconfrontationandthreatened closure,testingwhethertransitpassagecanbereconciledwithalittoralState'sassertedsecurity prerogatives during periods of heightened tension. Iran has historically taken the positionthat only States party to UNCLOS enjoy transit passage rights, a view inconsistent with the now widely accepted proposition that the transit passage regime reflects customary international lawbindingonallStatesregardlessofratification.[19]TheStraitofMalacca,borderedbyIndonesia, Malaysia and Singapore, presents a different set of challenges centred on congestion, piracy and environmental vulnerability ratherthan contested sovereignty, and has

[15] R.R.ChurchillandA.V.Lowe,*TheLawoftheSea*102-110(3rdedn.,ManchesterUniversityPress, Manchester, 1999.
[16]UNCLOS,art.39.
[17]YoshifumiTanaka,*TheInternationalLawoftheSea*112-125(4thedn.,CambridgeUniversityPress, Cambridge, 2023).
[18] DonaldR.RothwellandTimStephens, *TheInternationalLawoftheSea* 245-260(3rdedn.,HartPublishing, Oxford, 2023).
[19]JamesKraskaandRaulPedrozo,*InternationalMaritimeSecurityLaw*(MartinusNijhoff,Leiden,2013).

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beenmanagedcomparativelysuccessfullythroughcooperativemechanismsamongthelittoral States and user Statesunder IMO auspices.[20]The South China Sea disputes, though not confined to strait passage as such, illustrate how artificial land reclamation and expansive maritimeclaimscanindirectlythreatennavigationalfreedomsacrossanentiremaritimeregion, prompting the 2016 arbitral award discussed below.[21]

ImportantCasesandDisputeDecisions

CorfuChannelCase(UnitedKingdomvAlbania)[1949]ICJRep4

The first contentious case decided by the International Court of Justice arose after British warships were damaged by mines while exercising a right of passage through the Corfu Channel,astraitborderedbyAlbanianandGreekterritorialwatersconnectingtwopartsofthe highseas.TheCourtheldthatStatesenjoyarightofinnocentpassagethroughstraitsusedfor internationalnavigationbetweentwopartsofthehighseasintimeofpeace,andthatthisright could not be made conditional on the prior authorisation of the coastal State.[22] The judgment is widely regarded as the doctrinal ancestor of the transit passage regime later codified in UNCLOS, since it recognised the special status of international straits well before any treaty did so.

Anglo-Norwwegian Fisheries Case (United Kingdom V Norway)[1951]ICJ Rep 116

Although concerned principally with the method of drawing straight baselines along a deeply indented coastline, this case bears directly on freedom of navigation because the location of the baseline determines where the territorial sea, and therefore any strait regime, begins. The Court accepted Norway's system of straight baselines as consistent with international law, provided the baselines did not depart radically from the general direction of the coast, thereby confirming that coastal States retain a degree of discretion in delimiting the waters within which navigational freedoms operate.[23]

NorthSeaContinentalShelfCases[1969]ICJRep3

Although primarily a continental shelf delimitation dispute, this judgment is foundational to the law of the sea generally because it articulated the modern test for the formation of customaryinternationallawfromatreatyprovision,requiringextensive andvirtuallyuniform State

[20]InternationalMaritimeOrganization,GuidelinesonTrafficSeparationSchemesandShips'Routeing(IMO Resolution).
[21]RobinChurchill,"TheImpactoftheUNCLOSRegimeonNavigationalRightsandFreedoms"inDavid
[22]CorfuChannelCase(UnitedKingdomvAlbania)(Merits)[1949]ICJRep4, 28.
[23]Anglo-NorwegianFisheriesCase(UnitedKingdomvNorway)(Judgment)[1951]ICJRep116,128-133.

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practice together with a sense of legal obligation.[24] The test has since been applied by courts and tribunals assessing whether the navigational provisions of UNCLOS, including those on straits, reflect customary law binding on non-parties such as the United States.

FisheriesJurisdictionCase(UnitedKingdomvIceland)[1974]ICJRep3

Iceland'sunilateralextensionofitsexclusivefisherieszonepromptedtheCourttoexaminethe balance between a coastal State's special interest in conserving fish stocks and the historic navigationalandfishingfreedomsofotherStatesonthehighseas.[25]TheCourt'sinsistencethat Iceland's preferential rights did not extinguish the established fishing rights of the United Kingdom illustrates the broader principle that expansions of coastal jurisdiction must accommodate, rather than displace, the freedoms enjoyed by the wider international community.

TheM/V"SAIGA"(No2)Case(SaintVincentandtheGrenadinesvGuinea),ITLOS (1999)

ThiswasamongthefirstmeritsjudgmentsoftheInternationalTribunalfortheLawoftheSea, arisingfromGuinea'sarrestofatankerbunkeringfishingvesselsnear,butoutside,itsterritorial sea. The Tribunal held that Guinea's application of its customs laws beyond the territorial sea was unlawful and infringed the freedom of navigation guaranteed on the high seas and in the exclusive economic zone, awarding compensation to the flag State.[26] The decision confirms that coastal State enforcement jurisdiction, even for legitimate fiscal purposes, cannot be extended seaward beyond the zones in which UNCLOS specifically permits it.

South China Sea Arbitration (Philippines v China), PCA Case No 2013-19 (2016)

ConstitutedunderAnnexVIIofUNCLOS,thisTribunalconsidered,amongotherissues, whetherChina'sexpansivehistoricclaimswithintheso-callednine-dashlinewerecompatible withtheConvention.TheTribunalfoundthatUNCLOSsupersededanyhistoricrightsto resources that were inconsistent with the exclusive economic zones of other States, and that certainofChina'sactivities,includinglarge-scaleislandconstruction,hadunlawfullyinterfered with the traditional fishing and navigational rights of the Philippines and other States in theregion.[27] The award, thoughunenforcedbyChina,remainsthemost significantcontemporary test of freedom of navigation in a heavily contested and militarised maritime space.

[24]NorthSeaContinentalShelfCases(n8).

[25]FisheriesJurisdictionCase(UnitedKingdomvIceland)(Merits)[1974]ICJRep3,paras44-52

[26]TheM/V"SAIGA"(No2)Case(SaintVincentandtheGrenadinesvGuinea)(Judgment)ITLOSCaseNo2(1 July 1999) paras 133-138.

[27]SouthChinaSeaArbitration(PhilippinesvChina)(Award)PCACaseNo2013-19(12July2016)paras573-576.

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TerritorialandMaritimeDispute(NicaraguavColombia)[2012]ICJRep624

In delimiting maritime boundaries around a cluster of Caribbean islands and cays, the Court had to consider the effect of its chosen boundary line on existing rights of passage and on the continued freedom of navigation of vessels of third States through the area.[28] The judgment illustrates how delimitation decisions, even where navigation is not the central dispute, must becrafted so as not to unduly compress the navigational space available to shipping using the relevant sea lanes.

MaritimeDelimitationandTerritorialQuestionsbetweenQatarandBahrain[2001]ICJ Rep 40

Thisjudgment,resolvingalong-standingdisputeoverislands,shoalsandmaritimeboundaries intheGulf,requiredtheCourttoapplythelawofbaselines,territorialsealimitsandthestatus oflow-tideelevations,allofwhichdeterminethegeographicscopewithinwhichpassagerights through the Gulf's narrow waters operate.[29] The case is frequently cited for its careful applicationofequidistanceprinciplesanditstreatmentofhistoricpearlingandfishingpractices as relevant, though not determinative, factors in delimitation.

ChagosMarineProtectedAreaArbitration(MauritiusvUnitedKingdom),PCACase No 2011-03 (2015)

Mauritius challenged the United Kingdom's declaration of a marine protected area around the ChagosArchipelago,arguingthatitdisregarded Mauritius'srights,includingfishingrights,in waters it claimed following decolonisation. The Tribunal found that the United Kingdom had breached its obligations under UNCLOS by failing to have due regard to Mauritius's rights, underscoring that environmental measures, however legitimate in purpose, cannot be used to extinguish established navigational and resource rights of other States without proper consultation.[30]

Guyanav Suriname,PCA CaseNo 2004-04 (2007)

ThisAnnexVIIarbitration,arisingfromamaritimeboundarydisputeinanareawithactiveoil exploration, also addressed Suriname's use of naval vessels to expel a Guyanese-licensed oil rig from disputed waters. The Tribunal held that Suriname's threat of force violated the UN

[28]TerritorialandMaritimeDispute(NicaraguavColombia)(Judgment)[2012]ICJRep624,paras174-177.
[29] MaritimeDelimitationandTerritorialQuestionsbetweenQatarandBahrain(QatarvBahrain)(Merits)[2001] ICJ Rep 40, paras 222-224.
[30]ChagosMarineProtectedAreaArbitration(MauritiusvUnitedKingdom)(Award)PCACaseNo2011-03(18 March 2015) paras 519-521.

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Charter and the Convention's dispute settlement provisions, and, in delimiting the boundary, took care to preserve navigational access for vessels of both States, reflecting the broader principle that maritime boundary disputes must be resolved without unduly compromising freedom of navigation in the area concerned.[31]

FindingsandSuggestions

Thisanalysissuggestsfourprincipalfindings.First,thetransitpassageregimeunderUNCLOS represents a genuine, and largely successful, advance over the innocent passage regime of the 1958 Conventions, since it removes the possibility of suspension for the world's most strategically significant straits.[32]Second, the customary status of the navigational provisions of UNCLOS, confirmed by the methodology of the North Sea Continental Shelf Cases, has allowedthe regime tobindevennon-partiessuchasthe United States,thoughthisreliance oncustom leavesthe regime exposedwhereverState practice becomesinconsistent,astheSouth China Sea disputes illustrate.[33]

Third,judicialandarbitralbodies,fromtheInternationalCourtofJusticetoITLOSandAnnex VII tribunals, have consistently favoured an interpretation of coastal State powers that is protectiveofnavigationalfreedom,permittingregulationonlywhereitdoesnothamper,deny or discriminate against passage.[34] This suggests that the judicial trend, taken as a whole, functions as an informal safeguard against the erosion ofnavigational rights throughcreeping coastal jurisdiction.

Fourth, unresolved gaps remain, particularly regarding the environmental regulation of shippinginecologicallysensitivestraits,thepassageofnuclear-poweredandhazardous-cargo vessels, and the legal treatment of unmanned or autonomous vessels, none of which were contemplated when UNCLOS was concluded in 1982.[35] It is suggested that the international communityconsiderasupplementaryimplementingagreement,similarinstructuretothe1994 Part XI Implementation Agreement or the 2023 Agreement on Biodiversity Beyond National Jurisdiction, to clarify environmental and technological questions specific to straits used for international navigation, without reopening the delicate balance struck in Part III of the Convention itself.

Conclusion

[31]GuyanavSuriname(Award)PCACaseNo2004-04(17September2007)paras470-477.
[32] UNCLOS (n 6) arts 38, 44
[33]SouthChinaSeaArbitration(PhilippinesvChina)(Award)PCACaseNo2013-19(12July2016)paras573-576.
[34]TheM/V"SAIGA"(No2)Case(n 30).
[35]Tanaka(n23).

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The freedom of the seas, once a matter of natural law argument between Grotius and Selden, hasmaturedoverfourcenturiesintoadetailedbodyoftreatylaw,customaryrulesandjudicial interpretation. The regime of transit passage through international straits stands as one of the more carefully engineered compromises of the Third UN Conference on the Law of the Sea, reconciling coastal sovereignty with the navigational needs of the international community in amannerthe1958Conventionscouldnotachieve.[36]Thetendecisionsexaminedinthisarticle demonstratethatinternationalcourtsandtribunalshave,onthewhole,appliedandrefinedthis compromiseinamannerprotectiveofnavigationalfreedom,whileremainingsensitivetothelegitima te regulatory interests of coastal States. Nonetheless, the durability of the regime cannotbetakenforgranted:continuingmilitarisationofcontestedstraits,thegrowingurgency of marine environmental protection, and the persistent gap between treaty membership and customary obligation all indicate that the law of freedom of navigation through straits will remain an active and consequential field of international legal development.

[36]UNCLOS(n6)arts34-45.

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