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The Legal Implications of the Joint Declaration over the Strait of Dover

The states bordering the straits of Dover [1] have recognized transit passage by issuing a Joint Declaration of 2 Nov. 1988.[2] Since this Declaration is the most recent development regarding transit passage, in this article the following issues will be dealt with:

I. The legal observations over the wording of the Joint Declaration.

II. The legal effect of the Declaration.

III.The legal regime of the Straits under the Declaration.

IV. The legal status of the Straits in a non- Declaration situation.

V. The present legal regime applicable to the Strait of Dover.

I.Wording of the Declaration: legal observations

The language of the Declaration appears to purport and suggest that the legal regime of transit passage applicable to all straits of the world is Part of customary international law. The following observations may be of interest in this respect:

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1- The Strait of Dover, lying between the UK and France, is 18 nautical miles wide. This means that the strait is completely overlapped by the territorial seas of the bordering states. Accordingly, in geographic terms the Strait of Dover certainly falls within the ratione loci definition of straits under Articles 37 and 38 of the LOSC. By the 1987 Territorial Sea Act UK extended its territorial sea from 3 nm to 12 and before this date France had claimed such a width for its territorial sea in the Strait of Dover. For the former see Kasoulides, **The Territoiral Sea Act 1987,** 3 IJECL 1988, pp.164-6. See also Simmonds, **New Directions,** Vol.I, Booklet D.2.

2- See the text of this " Joint Declaration" in Simmonds, **New Directions,** Vol.I, Booklet C. 24.

(1) It may be argued that the words "generally accepted" in first Paragraph[1] seem to suggest the establishment of such regime in international law.

However, the words "the need for such a regime "[2] in the same paragraph can be read as against the proposition that it suggests the existence of an established special regime in straits, because the word "need" implies that such a regime does not exist, although it implies an expectation that as an emergent rule of customary international law it may pass into custom and become an established and generally accepted rule in international law.

(2) In the second paragraph where it reads that " in accordance with the principles governing this regime under the rules of international law, [3] such passage will be exercised in a continuous and expeditious manner", the language suggests that such principles exist in customary international law.

However, it is quite obvious that no such principles have so far existed in any international instrument other than the LOSC which are as a result of negotiations of UNCLOS III. It seems reasonable to think that the drafters at the time of drafting have had in mind the LOSC provisions regarding treaty obligations. Assuming so, how is it that the existence of such principles can be presumed?

1- Simmond , **OP.Cit,** Booklet C. 24. It reads. "The existence of a specific regime of navigation in straits is generally accepted in the current state of international law."

2- Simmonds , **OP.Cit,** Booklet C.24. It reads : "The need for such a regime is particularly clear in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation. " Emphasis added.

3- Emphasis added.

(3) Moreover, when in the second Paragraph[1] it reaches a conclusion based on the first paragraph, the fact that it employs the verb " recognize" seems to militate against the proposition mentioned.

(4) Another interesting point is in connexion with the use of word "straits" in the first Paragraph, which has been reproduced in two different versions[2] each of which has different legal implications. In other words, if the correct word is deemed to be " straits" and not "the straits" [3] then it may support the proposition that the regime of passage has been supposed to have a customary nature. But with due respect, based on the foregoing discussion, it seems that the version with the qualifier"the" is preferable.

II. What is the legal effect of the Declaration upon customary international law regrding transit passage?

II.1 Self- imposed restrictions

Before proceeding to examine the question of the value of the Joint Declaration with regard to customaty international law, it should be noted that States can restrict themselves to whatever extent they may intend and for whatever reasons they may have. This is because; a) in the last analysis, it is the consent and will of States that matters; b) no prohibitory rule exists and hence, as indicated in the Lotus Case, everything is deemed permissible unless

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1- Simmonds, **OP.Cit,** Booklet C.24. It says that " The two governments recognize rights of unimpeded transit passage for merchant vessels, State vessels and, in particular, warships following their normal mode of navigation as well as the right of overflight for aircraft, in the Straits of Dover" Emphasis added.

2- See **4 IJECL** 1988, p. 158 fn.

3- As suggested by the editor of the IJECL; He notes that " Cm 557 in what is clearly a misprint reads " the straits", (editors' emphasis). 4 IJECL 1988, p. 158.

otherwise prohibited by a rule of international law; c) as held by the PCIJ in the Free Zones Case (1932), " It cannot be lightly presumed that stipulations favourable to a third state have been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign States from having this object and this effect." [1]

Therefore there is nothing in international law prohibiting such a self-imposed restriction. It is in this context that reference should be made to unilateral and bilateral legal actions creative of rights for other nations. Accordingly, it is legally possible for straits states to recognize a right of transit passage for other states, and it is in this context that some authors have suggested that maritime powers can enjoy transit passage outside the LOSC through bilateral agreements with straits states. [2]

II.2 The Joint Declaration and customary law concerning transit passage.

What is the value of the Joint Declaration with regard to customary international law? Does it constitute state practice? Is it possible for the Declaration to contribute to the transformation of transit passage into customary international lawin spiteof the "Package deal and the right being as a product of **quid pro quo** during the UNCLOS III?

It should be noted that such a declaration as the practice of two states has some value in view of creating customary international law. [3] Since it is

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1- Emphasis added. See the Free Zones Case (1932) **PCIJ,** Series A/B, No . 46, PP. 147-8,

2- Miles, **"The implementation Problem in the Law of the Sea Convenion"** in Churchil & Brown, **UN Convention** (eds). Oceana Publications INC. 1987, p. 606.

3- For example, for a ciscussion of the Danish - Swedish Declaration of 1932 concerning the regime of passage in the Danish Straits. see Bruel, **International Law of the sea** Longmans, 5th ed., 1962, p. 183.

said that State Practice covers both acts and statements of states,[1] then the Declartion is regarded as state Practice accompanied by opinio juris and hence of customary international law. Moreover, when unilateral acts[2] of goverments such as recognition and protest are considered by authors[3] as a general concept of "legal acts" based upon the manifestation of will by a legal person, a *fortiori,* bilateral acts,[4] such as the case at issue, are legal acts and have their own legal effect in turn. What is more, the fact that the Declaration

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1- Note the controversy over this issue specially between the two leading publicists, i.e. Akehurst and D' Amato. See Akehurst, **Custom as a Source of International Law,** 47 BYLL 1974-5, p.8. Ibid, **A Modern Introduction to International Law,** 1987 , p.29. See also D' Amato, **The Concept of Custom in International Law,** 1971, p. 88. See further Judge Read's opinion in the Anglo-Norwegian Fisheries Case in Harris, op. cit., p.23. In the **Nuclear Tests Cases,** the ICJ held that "The public communications of the French President are acts of the French State." See Harris, **Cases and Materials on Interantional Law,** 1983, p. 572; also **ICJ Rep.** 1974, pp.267-71, 472- 5. Moreover, in the **Nicaragua Case,** The US voting in the UN was regarded as State Practice, see **ICJ Rep,** 1986, pp.99-104, 106-8. See D'Amato's criticism of the Court Judgment in this Case in D' Amato, **Trashing Customary International Law,** 81 AJIL 1987, p.102.

2- As in the **Nuclear Tests Cases** (1974), Australia v. France, the ICJ regarded France as legally bound by the publicly given undertakings, made on behalf of the French government, to create the conduct of atmospheric nuclear tests. See Brownlie, **Principles of International law** (4th ed.), 1990 (herinafter Principles), p.638. See also the discussion about the Declaration made by the Egyptian goverment on the legal regime of Suez Canal, Ibid. See also the **Nicaragua Case,** ICJ Rep. 1986, p.132.

3- Brownlie, **principles,** the Danish - Swedish Declaration of 1932 concerning the regime of passage through the Danish Straits; See Bruel, **op. cit.** pp. 195-200.

4- For example, the Danish-Swedish Declaration of 1932 concerning the regime of passage through the Danish Straits; See Bruel, **op. cit,** pp. 195-200.

is expressed **erga omnes,** accompanied by **opinio juris** and the clear intent to be legally bound, [1] lend a particular and significant status to it.

However, on the one hand, it may be argued that the Declaration, though it may generate a special custom for the Straits of Dover, could hardly create a general customary rule applicable to all straits, because it concerns the right of transit passage which was a product of quid pro quo during the UNCLOS III, [2] therefore the "package deal" theory can be regarded as a bar to its passage into customary international law.[3] Secondly, how

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1- Note the ratio of the **Nuclear Tests Cases** (1974) that the criteria of obligation were the intention of the states making the Declaration that they should be bound according to is terms, and that the undertaking be given publicly. Brownlie, **op. cit,** p.634.

2- See , for example, the declaration made by the Islamic Republic of Iran under Article 10 of the LOSC which rejected any third-state effect of the LOSC with regard to the enjoyment of nondeclaratory rights by non-signatories to the Convention. See also the statement by the UNCLOS III President, speaking on behalf of the Group 77, which rejected the selectivity approach and mentioned some of the innovations of the LOSC which the non-signatories could not enjoy unless they join the Convention. See UN Doc. A/CONF. 62/PV. 185, pp.3-4, 63-7. Note also that the USSR issued a declaration on 10 march to the effect that the Convention is "one and indivisible", see Butler, **The USSR, Eastern Europe and the Development of the Law of the Sea,** 1983, Booklet U.I.

3- The question is controversial as to whether the package deal can preclude the LOSC from becoming custom. However, the present author submits that since the process of the passage of a rule into custom depends basically on state practice accompanied by **opinio juris,** transit passage may pass to custom if the conditions required for the creation of a customary rule are fulfilled regardless of the Convention itself and outside the context of the UNCLOS III negotiations. See Camino & Molitor, **Progressive Development of International Law and the Package Deal,** 79 AJIL 1985, p. 871. See also Harris, **op.cit,** p.286; also Lee. The LOSC and Third States, 77 AJIL 1983, P. 567.

could it be possible for the practice of only two states to create custom while other strait states of the world have another practice and go against it.[1] Moreover, even a large majority of the parties to the Convention have also expressed their intention to the contrary. Furthermore, the fact that the right of transit passage as set out in the LOSC was based on the proposal of the UK[2] also has no bearing on the question at issue, i.e. it cannot give a more important role to the Declaration made by the UK as state practice.

On the other hand there may be a counter - argument that:

(1) According to Article 38 of the VCT[3] nothing in Articles 34 to 37 can preclude a treaty provision from becoming binding as customary international law, recognized as such, regardless of the treaty. Therefore despite the foregoing arguments the Declaration can have impact upon the creation of customary international law, provided that other conditions required are fulfilled.

(2) As far as international law- making is concerned, if it is followed by other strait states,[4] then it can contribute to the creation of a customary rule of international law. But the process of its passage to customary international law remains to be seen in the practice of states prior or subsequent to the Declaration.[5]

1- Akehurst, **A Modern Introduction to International Law,** p. 28.

2- See **UNCLOS III, Official Records,** Vol. III, p.188. Koh**, International Straits,** P. 155. See also O'Connell, **International Law.** vol II, p.329.

3- Brownlie, **Basic Documents on International Law,** 1983

4- As happened in the formation of customary international law regarding continental shelf in the wake of the proclamation made by President Truman.

5- Butler,"State practice and the Development of the International Law of the Sea" in Butler, (ed.)**The Law of the International Shipping; Anglo- Soviet Post-UNCLOS Perspectives,** 1985, p.3.

(3) As regard state practice, most strait states have so far been reluctant to affirm through their conduct the legal merits of transit passage in the contemporary international community. The above fact notwithstanding, considering that State practice includes both actions and inactions of states, it can be argued that the international community is going to accept transit passage as a customary rule. The reason is that no protest has been yet prompted by the recent development concerning transit passage in the Dover straits.

However, such a proposition is not flawless, because firstly, the recognition of transit passage as applicable to the Straits of Dover is beneficial, and not detrimental, to the international community to call for the immediate reaction of states. Moreover, they may be unwilling to reject such a development creative of rights beneficial to them. Therefore states may have no incentive to react immediately as to this development. Secondly, perhaps, they may not be aware of such development or they may have no interest in it. Consequently , the lack of interest and information which may lead to abstentions and inaction on the part of other states may be fatal to the conclusion that they have acquiesced in this recent development because no *opinio juris* can be clearly established in this regard.

III. legal regime of the Straits of Dover under the Declaration

III.1 Position of strait states: UK and France

As regards state practice, the strait states, namely the UK and France, while confirming its legal status as an international strait, have recognized that at present a right of transit passage is enjoyable by all foreign ships and aircraft passing through or over the strait.

It should be noted that both the UK and France as the states bordering the Straits of Dover, by issuing the Joint Declaration of 2 Nov 1988, have

accepted that: a) the strait concerned is an international strait used for international navigation; b) a specific regime of navigation is needed for such straits; c) a right of unimpeded transit passage through the strait is recognized for all foreign ships, as wall as a right of overflight for aircraft; therefore as far as the Joint Declaration is concerned, all foreign ships and aircraft are entitled to claim and enjoy the rights of transit passage and oveflight through and over the strait of Dover and the strait states cannot prervent those foreign ships and aircraft from exercising the rights recognized by them. However, it should be mentioned that the enjoyment of the rights is not under customary international law but only on account of the Declaration.

III.2 The source of obligation for the UK and France

It is obvious that the source of obligation for the UK and France is neither customary international law nor the Conventional rules as provided dy the LOSC. Rather, they are obliged by a right of transit passage through the strait of Dover because of their Joint Declaration of 2 Nov. 1988 which, according to international law, is legally binding upon them vis-a-vis other states.[1] Nothing can preclude a state from accepting a rule as a legally binding rule of international law upon itself, because what matters is the consent and will of the state concerned as to binding itself in relation to other states.

III.3 The role of estopel

Moreover, in future the strait states cannot prevent foreign ships and aircraft from exercising the rights recognized by them. The reason is that by estopel[2] as a general principle of international law, they are prevented from

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1- Note, e.g.,the Declaration of France on nuclear tests which was regarded as binding upon her. See the **Nuclear Tests Cases,** ICJ Rep., 1974 , pp. 267-71, 472-5.

2- See *ICJ Rep.* 1962, the Temple Case, pp.39-51, 61-5. Brownlie points out that " a unilateral →

doing so because they created a right for third stated and hence they cannot destroy the rights created for them as a result of their previous act of recognition as a means of creation of rights for others in accordance with international law.

IV. Legal status of the Strait of Dover in a non-Declaration Situation

A question which may be raised concerns what legal status the Strait of Dover would have if there were no such Joint Declaration.

Considering the fact that the 12-mile territorial sea is now accepted as a customary norm of international law, and also the geographical situation of the Strait of Dover, which is less than 24 miles wide between the shores of France and the UK, by the extension of territorial seas of both strait states, The Strait would be inevitably overlapped by their territorial seas. Therefore the extension of territotial seas of both strait states, posing the problem of overlapping in the Strait, would have changed the legal status of the strait from the High Seas nature to territorial sea nature.[1] Consequently , the change in the legal status of the straits' waters has naturally changed their legal regime to a particular one, as provided by the 1958 Geneva Convention (Article 16). Accordingly, the states could not only reject transit passage

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dedication may create an estopel in favour of one or a number of states, or perhaps, states generally." not to mention a bilateral declaration, Brownlie, *Principles,* 4th ed., 1990, pp.280, 638-9, 640-1. See generally also Bowett, **Estopel before InternationalTribunals and Its Relation to Acquiescence,** 33 BYIL 1957, p. 176.

1- However, it should be noted that since the regime of passage through territorial sea of a state is totally distinct from that through straits used for international navigation, these two different legal regimes, resulting from their distinct legal statuses, should not be confused with each other and a distinction should be made in this regard.

through the Strait, but also could permit only a non-suspendable[1] right of innocent passage under paragraph 4 of the same Article. This position would be defensible in accordance with international law, for the following reasons:

(1) The absence of state practice[2] in favour of the application of the right would be a decisive element (as stated in the **North Sea Continental Shelf Cases** of 1969[3] especially the state practice of those affected[4] namely, France and the UK as the strait states and the user states whoever they are.)

(2) Since neither the UK nor France is a party to the LOSC under the LOSC, there would be no obligation on them with regard to the right of transit passage through the Strait.

(3) Moreover, the LOSC has not yet entered into force, and hence does not bind parties, let alone to be legally binding on non parties

(4) And what is more, even if the treaty had entered into force, and assuming that the strait states had been parties thereto, non- signatories could not enjoy the right of transit passage, firstly, because of the contrary

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1- Article 16(4) clearly and unambiguously provides that "There shall be no suspension of innocent passage through straits..."

2- Since state practice as one of the essential elements of custom,i.e. the material element, has an important role in the creation of customary international law, then if there would be any chance for the states not party to the LOSC to enjoy this right qua customary international law, it is the state practice, accompanied by **opinio juris** of course, that has the ability to provide them with such a right in future.

3- ICJ Rep. 1969, p.3., 42-3.

4- As pointed out by Oxman, " The question of which states form the **relevant group depends** upon the issue. If one is speaking about transit of straits, for example, it seems that the **relevant group** would consist primarily of the states along major straits and of the major users of the straits. " Emphasis added. Oxman, **The Two Conferences** in Oxman, caron, Buderi (ed.), **Law of the Sea; US Policy Dilemma,** (1983) p. 133.

intention of the parties to the LOSC in the sense that they intended or even will intend to create such a right for third states; secondly, because of the fact that this right had no customary nature in the past and, up to now, has not assumed such a character yet.

(5) Furthermore, the transformation of this right into customary international law does not seem to be the same as other emergent norms of international law capable of becoming custom, because the question of whether this right may pass to customary international law is, at least, a matter of controversy. The reason is that the right is a product of *quid pro quo* and hence the "package deal" theory may be regarded as a bar to the passage of this right into customary international law.[1]

V. The present legal regime applicable to the strait of Dover

Consequently, with regard to the foregoing discussion, it can be concluded that:

(1) Under the Joint Declaration, the right of transit passage can be enjoyed by all foreign ships, state vessels, or warships. The reason is that the Joint Declaration is legally binding upon the strait states vis-a-vis other states and therefore they are obliged by a right of transit passage through the Strait of Dover.

(2) In a non- declaration situation they would be bound by only a non-suspendable right of innocent passage through the Strait of Dover, because for the following reasons the right of transit passage has not generally assumed a customary nature, although it may be regarded as an emergent principle of internatioal law: a) the status of the LOSC is not clear due to its non-entry into force; and moreover, b) even if it is assumed so, the UK and

1- See Caminos & Molitor, Progressive Development of International Law and Package Deal, 79 AJIL 1985, P. 871.

France are not yet parties thereto to become bound by way of the Convention; c) there is an absence of state practice regarding this right; and d) there is contrary intent of state parties to the LOSC in respect of the enjoyment of this right by non-parties.

APPENDIX

THE JOINT DECLARATION OF THE UK AND FRANCE CONCERNING THE LEGAL REGIME OF STRAITS OF DOVER[1] (1988)

On the occasion of the signature of the Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover, the two governments agreed on the following declaration:

The existence of a specific regime of navigation in strait[2] is generally accepted in the Current state of international law. The need for such a regime is particularly clear in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation.

In consequence, the two governments recognize rights of unimpeded transit passage for merchant vessels, state vessels and, in particlar, warships following their normal mode of navigation as well as the right of overflight for aircraft, in the Straits of Dover.[3] It is understood that, in accordance with the principles governing this regime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.

The two governments will continue to co- operate closely, both bilaterally and through the International Maritime Organization, in the traffic separation scheme in the Straits of Dover will not be affected by the entry

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1- This text of the "Joint Declaration" has bee reproduced here from 4 IJECL 1988, p. 158.

2- As suggested by the editor of the IJECL; He notes That " Cm 557 in what is clearly a misprint reads " The straits" , (editor's emphasis). 4 IJECL 1988, P-158.

3 - Emphasis added

into force of the Agreement.

With due regard to the interests of the coastal states the two governments will also take, in accordance with international agreements in force and generally accepted rules and regulations, measures necessary in order to prevent, reduce and control pollution of the marine environment by vessels.