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# Third United Nations Conference on the Law of the Sea

*Milenko Milić\**

## I. INTRODUCTION

**T**HE FIRST SESSION of the Third Conference on the Law of the Sea was held in New York, December 3-15, 1973, and was devoted to organizational questions and to the preparation of draft rules of procedure. The Conference formed three Main Committees to which different subjects were allocated. Substantive sessions were convened in Caracas, June 20-August 29, 1974 and in Geneva, March 17-May 9, 1975. At Caracas, the Main Committee considered draft articles for a Charter of the Oceans. The work of the Main Committees at Geneva consisted of the review of draft texts prepared by the committees at Caracas. During the review of the Caracas drafts each committee held formal and informal meetings in an attempt to encourage delegations which had maintained differing views to reach compromises or at least to set out alternative formulas. At its plenary meeting on April 18, 1975, the Conference decided to request that the chairman of each of the three Main Committees prepare a single negotiating text covering the subjects entrusted to his committee. On the eve of the closing Geneva session these negotiating texts were submitted to the Conference.<sup>1</sup> These texts were to be considered as informal in character and were not to prejudice the position of any delegation nor represent any negotiated text or accepted compromise.

The Geneva Session represents an advance over the Caracas Session in two ways. First, the Geneva Session confirmed universal support of the 12 nautical mile territorial sea and also of a 200 nautical mile economic zone. Second, the Geneva Session produced a single negotiating text, while the Caracas drafts included alternative provisions. This evidences a certain narrowing of the discussion limits, which could mean a step forward towards agreement. Furthermore, the Single Negotiating Text constitutes a

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<sup>1</sup> Informal Single Negotiating Text, U.N. Doc. A/CONF.62/WP 8/Pt. I, II, and III [hereinafter cited as Negotiating Text].

genuine draft for the future Charter of the Oceans, which makes agreement likely at the next session, to be held in New York. The author attended the Geneva Session in the capacity of observer of the World Peace Through Law Center. This paper represents his interpretations of the Geneva Session. The paper will focus primarily on issues that appeared for the first time within the discussions of the Committee on the Peaceful Uses of the Ocean Floor Beyond the Limits of National Jurisdiction, and on issues that failed to receive proper attention at the First Conference on the Law of the Sea, but which have since emerged as fundamental elements in the modern law of the sea. Such elements include the common heritage of mankind, the exclusive economic zone beyond the territorial sea, straits used for international navigation, and free access of the land-locked countries to and from the sea. Primarily, this paper is intended to identify and discuss these crucial issues in the restructuring of the international law of the sea and to determine how the formulations of these issues have been altered between the Caracas and Geneva Sessions.

## II. FROM GENEVA 1958 TO GENEVA 1973 — WORLD ECONOMIC PROBLEMS IN THE BACKGROUND OF THE THIRD CONFERENCE

Rapid technological progress, the increasing importance of submarine nonliving resources and the corresponding desire of states to claim extensive coastal state jurisdiction over them, and the desire to protect fishing interests, have made obsolete the results of the First Conference on the Law of the Sea held in Geneva in 1958. To deal with these new problems an Ad Hoc Committee was established in 1967 and, in the following years, was transformed into the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (Committee on the Peaceful Uses of the Sea-Bed). The diversity of interests among the states, as reflected in the discussions of the Committee, revealed that the problems of equitable sharing of submarine resources could not be solved without regard to the other law of the sea issues. Recognizing the interrelation between the many problems of the ocean space, the General Assembly assigned the broad range of related issues to the Committee in 1970.<sup>2</sup> At

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<sup>2</sup> The subjects were allocated to the three Main Committees as follows:

*Items considered by the First Committee:* International regime for the seabed and ocean floor beyond national jurisdiction; archeological and historical treasures on the seabed and ocean floor beyond the limits of national jurisdiction.

the same time, the General Assembly declared principles that were to guide the establishing of a new regime governing the seas.<sup>3</sup> As a preparatory committee, the Committee on the Peaceful Uses of the Sea-Bed studied these many problems and prepared a report which was submitted to the Third Conference on the Law of the Sea.

The Third Conference on the Law of the Sea is devoted to the outstanding problems of the law of the sea. It is considerably more important than the first two Conferences because it is all-embracing in its approach. Its aim is to produce a real Charter of the Oceans. Recognition of the existing global economic and political situations which dictate changes in the law of the sea is important to the success of the Third Conference. The increasing preoccupation of the developing countries with income redistribution is a predominant trend in the global political situation that cannot be ignored. While the adoption of new approaches and regulations concerning the sea has not yet occurred, there is a growing awareness of the necessity to reconcile the opposing interests of the developed and the developing countries. The settlement of essential problems and the bridging of the gap between these two categories of states represent the fundamental current problems.

In particular, the world economic situation dictates the modification of the traditional principle of the freedom of the sea. This principle can no longer serve primarily the interests of states having technological predominance. Freedom of exploitation by these states has outlived its time and is inappropriate for modern law of the sea. Furthermore, social justice on the international level requires that developing countries, including land-locked, shelf-locked and other geographically disadvantaged countries, have corresponding benefits from the living and nonliving resources of the sea. Also, all countries need security from destruction of the marine environment.

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*Items dealt with by the Second Committee:* Territorial Sea; contiguous zone; straits used for international navigation; continental shelf; exclusive economic zone beyond the territorial sea; coastal state preferential rights beyond the territorial sea; high seas; land-locked countries, shelf-locked states and states with narrow shelves or short coastlines; rights and interests of states with broad shelves; archipelagos; enclosed and semi-enclosed seas; artificial islands and installations; islands.

*Items allocated to the Third Committee:* Preservation of the marine environment; scientific research; development and transfer of technology.

<sup>3</sup> Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR Supp. 28 at 24, U.N. Doc. A/8028 (1971).

The deliberations of the Third Conference reflect the struggle for the adoption of a new economic order inspired by the spirit of international solidarity. Developing countries are today of the opinion that the moment is ripe for achieving concrete results; however, the diversity of economic interests among the states has created many differing views as to how these problems can be solved. The major challenge to the Third Conference on the Law of the Sea is the reconciliation of these conflicting interests. An analysis of the deliberations of the main elements of the international law of the sea follows.

### III. EXCLUSIVE ECONOMIC ZONE BEYOND THE TERRITORIAL SEA

#### *Conceptual Framework*

The concept of an exclusive economic zone originated from the desire to extend coastal state jurisdiction over living and non-living resources beyond the territorial sea in order to promote the development of economically weak countries. The zone should be conceived as a compromise between two competing interests: (1) those of the coastal states and (2) navigational and commercial interests of the other states. Thus, the concept of the economic zone must not only recognize the interests of the coastal states in the resources adjacent to the territorial sea, but also it must protect the interests of all states in navigation and other legitimate uses of the area.

The supporters of the economic zone considered it as the pivotal feature in the new law of the sea. However, some African and Latin American developing countries believed that it would be better simply to demand a 200 nautical mile territorial sea. Other countries opposed the zone because they believed it might endanger freedom of navigation and therefore become a source of disputes. Therefore, in defining the concept of the economic zone it was foreseen that the rights of the coastal states should be exercised without interfering with other states' legitimate uses of this area with regard to freedoms of navigation, overflight, laying cables and pipelines, and scientific research. Further, some believe that the non-coastal states' right of innocent fishing within this zone also should be guaranteed. In other words, when the coastal state does not catch the maximum allowable yield of fish stocks, nationals of other states should have the right of innocent fishing. In opposition, the argument for under-fishing was put forward in support of the rights of third countries in the economic zone. In

sum, a large majority of the countries favor the economic zone. Today, it is welcomed as a zone of functional competences in which coastal states will have sovereign rights over the resources therein.

In defining the concept of the economic zone, particular interest should be given as to whether this zone may lead to a multiplication of zones with coastal states having different rights in each zone. Whether it does depends upon the nature of the economic zone. From the juridical viewpoint, it is questionable whether this zone should be considered as some sort of extension of the territorial sea, as a part of the high seas, or as an intermediate zone having some characteristics of both. The concept of the economic zone should neither be equated with the territorial sea nor be identified with the high seas. In the economic zone the coastal state has no full sovereignty as it has in the territorial sea, but has only some sovereign rights which exist in relation to the natural resources. Restrictions on these rights are the obligations of the coastal state to ensure the rational utilization of renewable resources and the granting of innocent fishing to third states.

#### *The Economic Zone and the Continental Shelf*

With the adoption of the economic zone, agreement will be reached on the further extension of the authority of coastal states. The conceptual basis of the exclusive economic zone also underlies that of the continental shelf. Concerning the continental shelf and the future development of sovereign rights, we said in our report to the Belgrade Conference:

Whatever the future control of the continental shelf may be, it will have a profound effect upon the new legal institution of the sovereign rights for exploration and exploitation. . . . This institution was adopted in order to clarify more accurately the recognized rights of the coastal states as being narrower than those which contain the full concept of sovereignty. But to diminish the classical principle of sovereignty is to cripple it. The present urge to enlarge the zone of exploitation of submarine riches leads us to believe that the mutilated concept of sovereignty will become a thing of the past.<sup>4</sup>

There exists the possibility that the areas of the exclusive economic zone and the continental shelf would coincide. If this happens, should the concept of the continental shelf be cast aside

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<sup>4</sup> Milić, *The Exploration and Exploitation of the Resources of the Ocean Bed*, 5 WORLD L. REV. 153, 156 (1972).

as being outmoded? It would be easy to endorse such a solution if the zones coincided everywhere; however, that is not likely to happen. According to Article 46 of the Single Negotiating Text of the Second Committee, "[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured."<sup>5</sup> Article 62 of the same text assumes that the limit of the area in which the coastal state has sovereign rights of exploration and exploitation — but in no case will the limit exceed 200 nautical miles — is the outer edge of the continental margin.<sup>6</sup> Thus, owing to the varying width of their continental margins, some states could have a continental shelf narrower than 200 miles. However, this is complicated by the possibility of a coastal state having a continental shelf beyond 200 nautical miles, as is foreseen by Article 69, in which case the state shall make payments or contributions in kind to the International Authority for the exploitation of the nonliving resources. While the continental shelf may be of varying size, the economic zone has a uniform size of 200 miles for all states.

Since there is no identity of geographical areas between the economic zone and the continental shelf, neither should there be identity of legal concepts. For example, if the continental shelf includes an area beyond the economic zone, its legal concept should not be absorbed within that of the economic zone. Further, identity of legal concepts is unlikely to occur, because the extension of exclusive rights beyond the 200-mile limit is incompatible with the concept of the sea as the common heritage of mankind.

Abandonment of the continental shelf concept would be understandable, because it has generally been admitted that this concept needs revision. Moreover, the delimitation of the sovereign rights of exploration of the area and the exploitation of the natural resources could logically be found within the framework of the economic zone concept, rendering the concept of the continental shelf obsolete. But, the way from logic to reality is not always direct. From the above mentioned provisions of the negotiating text one could conclude that the dominant trend is that the continental shelf should not be subsumed under the economic zone and that both should coexist whether they be spatially distinct or not. Nevertheless, coastal states' sovereign rights of exploitation should be limited to the submarine area of the 200 miles. Otherwise, states with a continental margin beyond 200 miles would be fa-

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<sup>5</sup> Negotiating Text, pt. II at 19.

<sup>6</sup> *Id.* at 27.

vored by having under their jurisdiction very wide submarine areas, significantly diminishing the amount of natural wealth considered as the common heritage of mankind.

### *The Contiguous Zone*

For some, the economic zone concept also implied abandonment of the contiguous zone. Both have had the same *raison d'être*. The concept of the contiguous zone was introduced at the Conference for the Codification of International Law in 1930 in order to prevent the extension of the territorial sea to 12 miles; and the economic zone concept was conceived to prevent the extension of the territorial sea beyond 12 miles by giving special rights to the coastal states up to 200 miles.

The contiguous zone did not represent a duplication of the territorial sea, since the substantive rights of coastal states in that zone consisted only of certain specifically defined competences. Since the state's sovereignty was not extended by the contiguous zone, the demands of the coastal states for extension of the territorial sea have not ceased. The Second Conference on the Law of the Sea was summoned to deal with the question of the width of the territorial sea. Unable to find a solution for that question, the participants at the Second Conference devoted much attention to the introduction of a fishing zone in order to satisfy the fishing interests of coastal states. When the First Sea Law Conference adopted the legal concept of the continental shelf it seemed that the question of the exploitation of the nonliving natural resources on the bottom of the sea was resolved. Later, new aspirations for wider national appropriation of submarine areas appeared, as well as demands by some developing countries for better protection of their fishing rights in the adjacent waters to their territorial sea against distant water fishing by some maritime powers.

When the exclusive economic zone emerged as a major issue at the Third Conference, it was understandable that its main aspect would be fishing. From the provisions of the Single Negotiating Text produced by the Geneva Session it appears that the economic zone was intended to replace the concept of the fishing zone. Among the sovereign rights of the coastal state in the zone, the Geneva negotiating text includes exploitation of natural resources, whether renewable or nonrenewable, of the bed, subsoil and the superjacent waters.<sup>7</sup>

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<sup>7</sup> Negotiating Text, art. 45, pt. II at 19.

There are two conflicting opinions concerning the coexistence of the contiguous zone and the economic zone. The first is based upon the different purposes of these two zones. The contiguous zone would be narrower within the larger economic zone. In the contiguous zone, the only competence of the coastal state is the prevention and the punishment of offenses of customs, fiscal, sanitation and immigration regulations committed by a vessel or its crew on the territory or in the territorial sea of the coastal state. In the economic zone, the coastal state would have jurisdiction over natural resources and the preservation of the marine environment. The coastal state also has legislative competence over the whole zone for the above mentioned purposes; however, it does not cover offenses committed in the contiguous zone.

Those who support the opposite conception question why the coastal state should be empowered in a narrower zone for a determined category of infringements violating the maintenance of good order; while in a wider zone, it has not only competence to punish the infringements committed in the exploration and exploitation of the natural resources, but also legislative competence.

If the concept of contiguous zone is kept, there is a question about its proper location in the conventions. In the 1958 Convention on the Territorial Sea and the Contiguous Zone,<sup>8</sup> this zone was placed in the text juridically regarding the territorial sea. It is treated in the same way in the Geneva 1975 negotiating text. This placement was criticized at the First Sea Law Conference. The delegate of the United Kingdom, Mr. Gerald Fitzmaurice, was persistent in looking for a logical solution to include the contiguous zone in the Convention on the High Seas.<sup>9</sup> In support of his contention he stated that the competence of the coastal states in the contiguous zone does not embrace the concept of coastal state sovereignty. Insisting on his proposal he repeated it at the plenary meeting, but without success.<sup>10</sup>

His conception was not groundless. However, if the purpose is to include in one convention the rights of the coastal states in different areas of the sea, then it would have been, in 1958, more logical to characterize the convention as one on the rights

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<sup>8</sup> Done April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

<sup>9</sup> Done April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

<sup>10</sup> U.N. Conference on the Law of the Sea, Official Records, Vol. II (Plenary Meetings) at 69, U.N. Doc. A/CONF. 13/38 (1958).

of coastal states. Today, the criticism is anachronistic since the work of the Third Conference hopefully will result in a convention on all issues in the law of the sea.

### *The High Seas*

Once the economic zone had been defined spatially and the coastal state's rights and obligations were known within this zone, some suggestions were advanced that this zone should still be considered as a part of the high seas. The opposing view was that this zone should lie within the national maritime area. The concept of the high seas as enumerated by provisions included in the Geneva negotiating text can be considered classic. Article 47 recognizes the rights of all states to enjoy the freedoms of navigation, overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to navigation and communication. The second paragraph of Article 47 refers to the other articles concerning the high seas and their application to the exclusive economic zone. One is Article 97 concerning "hot pursuit." According to this article, hot pursuit must commence when the foreign ship or one of its boats is within the internal waters, the territorial sea, or the contiguous zone of the pursuing state, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. Since this formulation does not mention the economic zone among the areas for the commencement of the pursuit, it confirms the high seas character of the economic zone. On the other hand, those who view the economic zone as a zone of functional competences of the coastal state have considered redefining "hot pursuit." In their opinion, the economic zone would entail limitation of areas of the high seas and consequently of areas where the right of hot pursuit was traditionally exercised.

The coastal state's sovereign rights in the economic zone do not lead to unconditional extension of the sovereignty of the coastal state whereby it would be free to expropriate public areas that were previously parts of the high seas. Furthermore, the economic zone is assumed to be subject to a special regime of cooperation among all states with substantial concession to the coastal states.

While the rights of the coastal state should not include ownership rights in the economic zone, there is no reason to adhere to the term "patrimonial" instead of "economic" for this newly conceived zone. The expression "patrimonial sea" causes confu-

sion in that it could be understood as applying also to the ownership of the superjacent water. Under the concept of the exclusive economic zone, the rights of the coastal state are restricted only to nonliving resources on the seabottom and living resources in the water column. The superjacent waters remain high seas where the freedom of navigation and other freedoms are safeguarded.

The term "patrimonial" might also be confused with the concept of common heritage of mankind. Both could be understood as approaches that emphasize ownership. However, only the common heritage of mankind works out a regime of common patrimony of mankind; the patrimonial sea expresses the tendency to extend the national jurisdiction over a limited field of activity of the coastal states. For these reasons, the term "patrimonial sea" is not appropriate for the new zone.

#### IV. LAND-LOCKED COUNTRIES AND REGIONALISM

##### *Provision for Free Access to the Sea by Land-Locked Countries*

At the First Law of the Sea Conference, free access to and from the sea was presented by the land-locked countries as a question requiring theoretical and systematic solution. Insurmountable difficulties arose in trying to define the problem. Those who advocated a separate legal concept suggested recognizing it as a new politico-legal concept that would be wider than the previous and still existing economic-technical concept of transit. Free access to and from the sea by the land-locked countries failed to receive proper treatment in the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas. Article 14 of the former provides that "subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through territorial sea." In the Convention on the High Seas, Articles 2, 3 and 4 relate to the rights of non-coastal states.

Nevertheless, as the aim of the Third Conference is to create an equitable order on the seas for all countries, it is necessary to be precise about the role of land-locked, shelf-locked and other geographically disadvantaged countries in the new system. Some land-locked countries presented draft articles to the Preparatory Committee, and later to the Conference, that the new norms of the international law of the sea should ensure free access by land-

locked countries to and from the sea, free access to the international seabed area, participation on an equal footing in the International Authority, and sharing in the benefits derived from exploitation of the natural resources considered as the common heritage of mankind.

The concerned countries estimated that by the Third Conference the time had come to accommodate their legitimate interests and to include in the new convention detailed provisions with regard to the proposals submitted by the land-locked countries in the Kampala Declaration.<sup>11</sup> Under these proposals the land-locked countries would no longer be dependent on the discretion of the transit states and would have free and unrestricted access and transit to and from the sea.

The Geneva Single Negotiating Text presented by the Second Committee includes provisions that relate to the land-locked countries.<sup>12</sup> While Article 108 mentions the exercising of freedom of transit under conditions determined by bilateral, subregional, or regional agreements, the text does not formally provide a substantive guarantee of such a right.

### *Regional Solutions*

The interests of the land-locked countries have been taken into account in defining the concept of the economic zone within regional arrangements. Because of the solidarity of interests among states within a region, it is easier for the states of each region to resolve their own problems rather than to have solutions dictated to them on a wider basis. Further, the concept of economic zone provides a solid basis for regional solutions. A broad trend in favor of subregional agreements has emerged as well as that of a "regional economic zone." Regional solutions reconciling interests in the economic zone of riparians are more likely among the coastal states and neighboring land-locked countries which have comparable economic levels. If the regulation-making should be delegated to the regions or subregions, a preliminary examination of the economic conditions on a geographic basis would facilitate the finding of sensible provisions.

The concept of "matrimonial sea" was proposed by Caribbean Sea riparians. It is a concept by which land-locked countries would benefit from the economic zone or patrimonial sea of the

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<sup>11</sup> U.N. Doc. A/CONF.62/23 (May 2, 1974).

<sup>12</sup> Negotiating Text, arts. 108-116, Pt. II at 40-41.

riparians. The matrimonial sea is characterized juridically by undivided property among coastal states and economically by the formation of an agency. The agency is associated with joint ventures and is capable of engaging in technical, industrial and commercial activities relating to the exploration of the zone and the exploitation of its resources.<sup>13</sup>

The land-locked countries firmly supported the concept of the exclusive economic zone of all variants and believed that they had found a guarantee of their right to participate in the exploitation of the renewable and nonrenewable resources of the neighboring economic zone on an equal footing with the coastal states.

## V. STRAITS USED FOR INTERNATIONAL NAVIGATION

One of the key issues for which an equitable solution was sought was how to establish a generally accepted regime for straits used in international navigation, a matter of continuing concern to the international community. Closely linked to this question has been the problem of defining this category of straits. In the *Corfu Channel* case the International Court of Justice adopted the elements of usage and geography in its definition: an international strait is one that connects two parts of the high seas and is used for international navigation.<sup>14</sup> The Convention on the Territorial Sea and the Contiguous Zone of 1958 transplanted this definition with one alteration. In the Convention the right of unimpeded transit includes for users of the straits a corresponding right of innocent passage.<sup>15</sup> Until recently, such a definition was not opposed, because the limit of the territorial sea was 3 miles, making innocent passage applicable through international straits of less than 6 miles. But extension of the territorial sea to a width of 12 nautical miles would result in a large number of new international straits up to 24 miles wide. With the proposed new width the regime of the high seas would cease to exist in approximately 100 straits. Therefore, a new regime concerning straits would be needed that would fairly balance the interests of coastal states and flag states.

The new rules should be applied only to new straits wider than 6 miles because of their international importance for trade and communications. Straits narrower than 6 miles should remain

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<sup>13</sup> R. DUPUY, *THE LAW OF THE SEA: CURRENT PROBLEMS*, 42-45 (1974).

<sup>14</sup> *Corfu Channel Case*, [1949] I.C.J. 4, 28.

<sup>15</sup> The Convention on the Territorial Sea and the Contiguous Zone, U.N. Doc. A/CONF.13/L.52 (1958), art. 14.

governed as they are: as being outside major international sea-ways and accepted as part of the territorial sea. For this category of straits, the regime of innocent passage is appropriate. Such a regime is recognized in the existing international law as based on treaties, custom and rules of the coastal states.

With regard to straits between 6 and 24 nautical miles, the major maritime powers have demanded the continuation of freedom of navigation. For example, the USSR considered such straits "the focal points of international shipping routes because they were the routes of the most intensive navigation. There [could] be no real freedom of international navigation or international communications without free transit" for ships through these straits.<sup>16</sup> In the opinion of the United States:

[T]he rights to establish a territorial sea up to 12 miles wide had to be accompanied by treaty provisions for a non-discriminatory right of unimpeded passage through, over and under straits for international navigation, while meeting coastal state concerns with respect to navigational safety, pollution and security.<sup>17</sup>

All delegations that supported free navigation through the new straits pointed out that there was no justification for modifying the regime of navigation or for distinguishing between merchant ships and warships in the areas which had long been considered as high seas. In their opinion, the innocent passage could give coastal states the possibility of impeding free transit through such a strait. States such as China favored maintenance of the same regime for the new straits, opining that innocent passage meant that passage would be granted to foreign vessels provided that they did not prejudice the peace, good order and security of the coastal state.

A sharp distinction was drawn between passage of merchant vessels and warships in the discussion at the Third Conference. It was unanimously agreed that the navigation of merchant ships through straits must be guaranteed without restrictions, because they serve international maritime traffic and trade and promote international cooperation. By contrast, opinions were divided concerning warships. Those who advocated requiring coastal state permission and preliminary notification for passage of warships were sensitive to safeguard the sovereignty of the coastal state.

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<sup>16</sup> U.N. Third Conference on the Law of the Sea, Official Records, Vol. I (Plenary Meetings) at 68 (1975).

<sup>17</sup> *Id.* at 160.

It was felt that the unnotified presence of warships, submarines or military aircraft posed a threat to the security of the states bordering straits.

In the Geneva Single Negotiating Text, the rights of "innocent passage" as the exception and "transit passage" as the general rule are recognized. Transit passage is defined as "the exercise . . . of the freedom of navigation and overflight for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone."<sup>18</sup> Article 38 provides that all ships and aircraft shall enjoy the right of transit passage; however, Article 39 places some obligations upon the ships and aircraft while exercising this right.

The provision on the "right of transit passage" is a compromise. On the one hand, the great maritime powers that insisted on the freedom of navigation could accept it as a satisfactory solution for them, since it removes the concept of "innocent passage" from the new straits. Although the provisions dealing with the transit passage do not expressly mention freedom of navigation, circumstances imply how the right is to be exercised. On the other hand, the coastal state, by the tacitly assumed freedom of navigation under certain circumstances, is not deprived of its rights in the new straits which were granted to it by the concept of innocent passage. The deliberations in New York should reveal whether the proposed formula of "transit passage" has struck the balance between the interests of the coastal states in safeguarding their security and other legitimate interests on the one hand, and the interests of commercial navigation on the other.

## VI. INTERNATIONAL SEABED AUTHORITY

While the seabed and its mineral resources beyond the limits of national jurisdiction were recognized to be the common heritage of mankind, many interrelated issues appeared with regard to this new form of international cooperation. The common heritage of mankind represents the legal institution of an undivided legacy of joint heirs. In other words, all nations equally participate in the distribution of the natural wealth of the ocean floor in their capacity as joint heirs.<sup>19</sup> It was initially presumed that the new regime

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<sup>18</sup> Negotiating Text, art. 38, pt. II at 16.

<sup>19</sup> See M. MILIĆ, COMMON HERITAGE OF MANKIND, (unpublished paper presented on behalf of the World Peace Through Law Center to the Geneva Session on the Law of the Sea, 1975).

on the ocean floor in the international area should be embodied in an Authority, the machinery of which would be representative and democratic without favoring technologically advanced countries. But an obstacle to agreement emerged on the question of how exploitation should be operated and who should exploit the area. Developed countries insisted on an International Seabed Authority that would grant licenses to contracting states, which in turn would authorize physical or juridical persons for exploitation of minerals. In addition to oil, vital minerals like copper, cobalt, nickel and manganese nodules are plentifully situated on the ocean bottom. For this reason, it was not surprising to see that the discussion on the operational system of deep sea mining generated disputes between the developed and the developing states. The developing countries expressed their concern that the industrialized powers, by the licensee system, would take advantage of their advanced technology and appropriate directly or indirectly the seabed resources before the developing countries reached a technological level enabling them to exploit the resources by their own means. Developing countries have hoped to prevent this by delaying effective exploitation, envisaging exclusive economic exploitation of resources by the Authority.

However, if the Authority were enabled to explore and exploit the area on its own, it would initially meet difficulties of a financial and technological nature and would be obliged to call upon companies which were capable of undertaking those activities.

In the Conference's First Committee at the Caracas Session, the Group of 77 introduced a compromise proposal. It provided that all activities in the international area should be conducted directly by the Authority, which could allocate certain tasks to juridical or natural persons. Consequently, the Authority would be the sole representative of mankind and the sole exploiter of the seabed resources. However, lacking financial and technical means at present and being determined to commence functioning immediately, the Authority would act through those who possessed the requisite finance and technology. Due weight was given to such a compromise formula in the Informal Single Negotiating Text presented by the chairman of the First Committee at the Geneva Session.

Articles 22 and 23 of the Geneva negotiating text refer to the functions of the Authority.<sup>20</sup> Under Article 22, paragraph 1, all activities in the areas of the seabed, ocean floor and subsoil

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<sup>20</sup> Negotiating Text, pt. 1, at 9-10.

thereof shall be conducted directly by the Authority. Following the suggestion of the Group of 77, paragraph 2 of the same Article provides flexibility in carrying out such activities.<sup>21</sup> Under Article 23, discrimination in the granting of opportunities for activities is to be avoided. However, special consideration by the Authority for the interests and needs of the developing countries, and particularly the land-locked countries, is not to be deemed discriminatory. Finally, the Authority shall ensure the equitable sharing by states in the benefits derived from activities in the Area. Article 24 establishes as the principal organs of the Authority an Assembly, a Council, a Tribunal, an Enterprise and a Secretariat. The Enterprise is charged with the responsibility of preparing and executing the activities of the Authority in the Area, pursuant to Article 22, (i.e., to take commercial partners for joint ventures, joint financing and service contracts). The most important objective is the equitable sharing of revenues. To attain this objective, sufficient profits should accrue to the Authority for the economically disadvantaged countries.

Confidence in the International Authority will depend upon its success in balancing revenues and expenses. From the negotiating text it appears that the Authority would need vast funds for numerous staff, technical equipment, laboratories, factories, other installations and the sustaining of its own ships. Furthermore, the enterprises engaged in joint ventures or as national partners will have to receive in exchange an equitable return on their investments. Those opposing a 200-mile economic zone did not hesitate to contend that the concept of the common heritage of mankind would remain valid only if the Area is sufficiently vast and if profitable exploitation of seabed resources is reserved to the international community. Even more pessimistic opinions expressed that if the continental shelf were beyond the economic zone, the Area would be circumscribed to the abysmal depths. The Area would be reduced to the parts of the submarine lands which would be unexplorable for a long time. Therefore, the new concept would lose most of its weight in a political as well as a legal sense.<sup>22</sup> At the close of the Geneva Session, the delegation from Czechoslovakia introduced draft articles that prescribed the distribution of the revenue collected by the International Authority: 10 percent shall be accumulated as a fund for price stabilization schemes; 35 percent shall be distributed among all

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<sup>21</sup> See U.N. Doc. A/CONF.62/C.1/L.7 (Aug. 16, 1974).

<sup>22</sup> M. MILIĆ, *supra* note 19, at 6.

developing countries; 25 percent shall be distributed among all land-locked and geographically disadvantaged states (two-thirds for land-locked and one-third for geographically disadvantaged states); and 20 percent among all states.<sup>23</sup>

## VII. LEGAL ISSUES

Article 73 provides for provisional application of the Convention. It states, "pending the definitive entry into force of this Convention . . . a state may notify upon signing the Convention . . . that it will apply the Convention provisionally and that it will undertake to seek ratification . . . as rapidly as possible."<sup>24</sup> The proposal was introduced by the United States to find a provisional solution for pending U.S. draft legislation designed to provide interested members of the U.S. industrial community with a variety of assurances that the delay of the permanent solution would not cause them to lose large investments. Even more importantly, the proposal was to prevent the major powers from initiating exploitation by providing interim legislation prior to the conclusion of the Convention. The provisional application of the future Law of the Sea Convention would not be a novelty in international practice. Special situations, particularly in the economic domain, have required prompt application after signature and before ratification. Under Article 25 of the Vienna Convention on the Law of Treaties of 1969, the provisional application of international treaties received a legal basis. Previously it was treated as a customary practice. The legal nature of the provisional application was left unexplained as was the question of the retroactive effect of ratification.

A more important and difficult question also arises from the Vienna Convention: What effect is to be given to the participation in the sharing of benefits to the states which do not adhere to the Convention? Under the general rule in Article 34 of the Vienna Convention a treaty does not create either obligations or rights for a third state without its consent. The chairman of the Working Group, Mr. Pinto, found the solution in Article 36 of the Vienna Convention which provided that a right might arise for third states under a treaty in certain specified circumstances. Furthermore, Mr. Pinto mentioned that:

[S]ome held the view that, since the resources of the area were the common heritage of mankind, all States, whether or not

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<sup>23</sup> U.N. Doc. A/CONF.62/C.1/L.13 (April 28, 1975).

<sup>24</sup> Negotiating Text, pt. 1, at 28.

parties to the convention, should have the right to participate in exploration and exploitation, provided they undertook to accept the Authority's conditions.<sup>25</sup>

Moreover, if the legal nature of common heritage is viewed as an undivided legacy of joint heirs, states should be entitled to assert *jure proprio* their rights to submarine resources. Membership in the future universal organization governing submarine areas should be considered as automatic for all states. That means there will be neither formal admissions nor withdrawal notifications. Since this universal community will design its administrative machinery for equity, all states will enjoy protection of their interests whether they request it or not.<sup>26</sup>

### VIII. FINAL CONSIDERATIONS

The Third Conference is unprecedented in its search to replace a regime for the oceans and to create an equitable order keeping a balance between the economically advanced and disadvantaged countries. The second substantive session at Geneva closed without satisfying the urgent need for a convention, but there was some progress, albeit slow and limited. Three negotiating texts were drawn up by the chairmen of the Conference's main committees. These constitute a draft treaty on which agreement will be sought at the next session in New York.

Although some differences on details may persist, there is no longer justification for doubt concerning the soundness of the territorial offshore limit of a state's sovereignty, the concept of the exclusive economic zone, free access to and from the sea for land-locked, shelf-locked and other geographically disadvantaged countries, an Authority governing the exploitation of the underwater resources in the international ocean area, and prevention of pollution. In the sensitive area of navigation through straits, the great maritime powers may feel their desires for unimpeded transit are satisfied by the formula of transit passage.

A correct estimate of the Conference's success cannot be based solely upon a lawyer's contentions about juridical formulas. It is neither possible nor intended to achieve the formulation of the rules of the law of the sea without solution of the sharpened economic problems and changed political relations. The increasing preoccupation of the developing countries with income distribution

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<sup>25</sup> U.N. Third Conference on the Law of the Sea, Vol. II, Summary Records of Meetings of Committees, at 85 (1975).

<sup>26</sup> M. MILIĆ, *supra* note 19, at 23-24.

on an international basis is predominant in global political relations. The great hope for New York lies in the good will of and the recognition by all participants that their accommodation to the general interest will contribute to the success of the Law of the Sea Conference.

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