

MARITIME ORDER AND THE NEW LAW OF THE SEA

by Vice-Admiral Sir Roderick MACDONALD, KBE, FNI (*)

This paper has already been published in the September 1982 issue of *Seaways*, *The Journal of the Nautical Institute*, U.K., and is reproduced here with the kind permission of the Editor of this journal.

International maritime law has evolved from custom and practice. The concepts of freedom on the high seas and sovereignty over territorial waters, tempered by the right of innocent passage, have been accepted because they made sense. The structure was equitable for the purposes of safe navigation and required the minimum expenditure to uphold an acceptable standard of safety in maritime transport.

However, pressures for change have become widespread in the past two decades. Just 15 years ago, in 1967, the *Torrey Canyon* carrying 119,000 tons of Kuwait crude ran aground on the Seven Stones reef, north east of the Scillies. The government report [1] published shortly afterwards made no reference to the cause of the disaster, only to the intractable salvage and clean up operations.

In December 1976, the *Argo Merchant* ran aground on the Nantucket shoals. The ship was not only found to be sub-standard but also incompetently operated. The public in America was outraged by the episode and the effect was to bring forward United Nations' work on tanker safety at IMCO. Then the *Amoco Cadiz* ran aground in March 1978 on the Brittany coast with 200,000 tons of crude oil on board. Estimates of the environmental damage caused vary widely, but \$200 million would seem a fair assessment. With such catastrophic consequences, it is not surprising that the French Government subsequently took a less than classical view on the right of innocent passage.

(*) Ollach, Braes, Portree, Isle of Skye, U.K.

Fishery rights upheld

The rights of fishermen in distant waters were also upheld through customary law, and as recently as 1974 the International Court of Justice in the famous Fisheries Jurisdiction Case was concerned with the legality of Iceland's unilateral extension of its fishing limits to as little as 50 miles.

The Court found that the U.K., by reason of its fishing activities in the areas in question, had established rights [2]. Nevertheless, in the event – and due to the complicated nature of other parts of the Court's judgment as well as Iceland's uncompromising stand – the U.K. fishing in Icelandic waters did not survive. Those involved in the Cod Wars came to learn that international justice and the doctrine of customary practice were starting to drift apart.

There were no customary practices upon which to draw for guidance when companies started to explore and exploit the resources of the seabed and Continental Shelf. Consequently, in 1958, new provisions were included in a convention and this process has been extended into the work of the United Nations Law of the Sea Conference.

There are now some 30 rigs and 10 gas platforms in the British sector of the North Sea and the predicted output of oil is estimated as being between 85-115 million tonnes in 1983 [3]. Disputes over resources between States adjacent to each other have been kept to a minimum by compromise and sensible use of international arbitration. The current provision for maintaining law and order in the British sector of the North Sea rests with the police force and all the structures are subject to British criminal jurisdiction, immigration and safety standards. Capital investment, however, is widely shared by financial interests in many countries. In peace time it is beneficial to have well defined rules; but in times of tension, other countries may have a greater interest in a rig than the country in whose waters it is situated.

Consensus reached

Reconciling the conflicting interests to which the seas can be used has been an exhausting process, but there is now a strong consensus on the issues which affect the maritime interests of all nations. On 30 April 1982 the Third United Nations Conference on the Law of the Sea adopted its Convention by a majority of 130 votes in favour with four against (including the United States of America) and 17 abstentions. The main issue to be resolved in the last session concerned seabed mining and for the purpose of law and order this article analyses the draft convention, which remains essentially unaltered, but provides an opportunity to examine the implications of the text before the final convention is published in early 1983.

The United States of America has already announced that it will not ratify the convention on the grounds that 'the final treaty draft would not have protected U.S. strategic interests in the mineral resources of the oceans'. The spirit of the convention, however, for all other purposes is the most authoritative starting point for any country wishing to develop a maritime policy.

The 1981 Draft Convention on the Law of the Sea gives the right to every State to extend its territorial sea up to 12 miles from its coast or straight baseline where these are applicable (Art. 3). The right of innocent passage has been defined (Art. 19) as passage which is not prejudicial to the peace, good order or security of the coastal State, and acts which are considered prejudicial are exhaustively described. They include acts of espionage, propaganda, weapon or aircraft launch, wilful pollution and 'any other activity not having a direct bearing on passage'.

The balancing Article 21 lays down what laws and regulations the coastal State may make relating to innocent passage. They include safety of navigation, navigational aids, the conservation of living resources, the protection of cables and pipelines, and the prevention of infringement of the coastal States' customs, fiscal, immigration or sanitary regulations. As a general rule (Art. 24) the coastal State may not hamper innocent passage.

Article 22 gives coastal States the right to define sea lanes and traffic separation schemes in their territorial waters. Those countries like the United Kingdom will, if they adopt a 12-mile territorial sea, accept jurisdiction over an area many times larger than that included under the current three-mile limit.

Further provisions are being provided for control over a contiguous zone which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. These refer to the infringement of customs, fiscal, immigration or sanitary laws (Art. 33). This is a dimension which could assume a major importance in the waters of the EEC [4]. Also interrelated are disputes over airspace between adjacent coastal States as, for instance, in the Aegean.

EEZ concept

More fundamentally, however, if the UNCLOS III is ratified, there will be a new concept introduced entitled the Exclusive Economic Zone which shall not extend beyond 200 nautical miles from the baseline from which the territorial sea is measured.

In this zone (Art. 56) the coastal State has sovereign rights for the purpose of exploring and exploiting the living and non-living resources of the seabed, subsoil and superjacent waters. The high seas freedoms of navigation and overflight, and of laying submarine cables and pipelines, still apply to all users, as do the great majority of the rules of international law concerning the high seas (Art. 58). The coastal State has jurisdiction with regard to the establishment and use of artificial islands and installations, marine scientific research and the protection and preservation of the marine environment.

These rights, duties and jurisdictions are much expanded in subsequent articles. For example, Article 60 on artificial islands and installations runs to eight clauses and lays down limits for safety zones, the status of installations, and the rules of setting them up and removing them. Article 62 on the utilisation of living resources allows the coastal State to make laws and regulations concerning licensing of fishermen, fixing catch quotas, regulating catching seasons, conducting fishing research programmes, regulating landings and procedures for enforcement.

All this depends on the allowable catch which under Article 61 lies under the sole determination of the coastal State, taking into account the best scientific advice available.

Traditional freedoms remain

The convention gives the coastal State sovereign rights for the purpose of exploring and exploiting its natural resources on the Continental Shelf to a distance beyond 200 miles where the geographical features, exhaustively defined in Article 76, allow. The absolute limit is 350 miles or 100 nautical miles from the 2,500 metre line – whichever, presumably, is furthest to seaward. Moving further on to the high seas, the traditional freedoms remain. Piracy is defined as ‘any illegal acts of violence of detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship and directed on the high seas against another ship’.

The new international court will have to decide how to deal with, for example, the various activities endemic in the North and South China Seas, such as the hijacking for robbery of a ship by her passengers, the looting of stranded or broken down ships, or seaborne raids by the inhabitants of one coastal State on another, particularly in the case of an archipelago where the territorial seas of both countries are limited and adjacent.

Protection and preservation of the marine environment receives a section of its own and those involved with shipping will be well aware of the measures adopted through IMCO to minimize marine pollution from tankers and vessels carrying noxious cargoes [5]. There are particular provisions (Art. 211) for control of vessel-source pollution in economic zones, and these are very complex, but broadly speaking international (that is to say, IMO) and not national rules and standards apply [6]. In the territorial sea they may be national, but must not hamper innocent passage. The global problems also include pollution from oil rigs, effluence and the dumping of toxic substances.

These are some of the major provisions of this vast and detailed convention. Coastal States can, within its framework, seek to optimize their resources to provide security forces, search and rescue facilities, fishery protection, law enforcement on rigs and structures, orderly conduct of vessels visiting and passing through its waters, including pleasure craft, customs and immigration control. The sea area claimed by a coastal State, however, may well be beyond her resources to control.

Effective enforcement

In a cogent paper on the enforcement of international law and municipal legislation derived from international law [7], Captain J.R. HILL observed that the pre-requisite of any effective enforcement regime, requires the ability to *acquire data*, have adequate *communications*, sufficient *mobility* of units to cover vast areas, together with *endurance*. These units must be able to operate in a wide range of

weather conditions, have *suitable weapons* and because of the diverse nature of the total task they must be *flexible*.

There is, of course, no standard force which is appropriate to all contingencies. Captain C.W. KOBURGER [8] recently examined the relationship between coastguard activities and security forces. A para-military organization has many attractions for policing and law enforcement. On the other hand, countries with a long coastline like Canada and Australia find it impracticable to patrol their coastal waters with ships alone and make extensive use of aircraft. New high-speed launches used for drug smuggling pose their own problems of detection and capture.

The use of fixed-wing aircraft for surveillance, inspection and patrol was discussed in a recent paper by Wing Commander W.E. KIRK, RAF [9]. He observed that it is necessary to have complementary forces of ships and aircraft to enforce the law to the full. It has not yet been possible to measure accurately the size of a fish net mesh from a fixed-wing aircraft or weigh a particular catch. On the other hand, the data base of information gained from such associated surveillance can have many uses.

The application of radar surveillance on a wider scale and even the use of airships should be considered in any evaluation of cost benefits to member States; then there is the question of hydrographic surveys, the training and employment of 'security' personnel and the internal regulating process associated with port State enforcement.

These are complex issues to be resolved by different States in different ways and will frequently involve a combined approach by several government departments – for example, defence, trade, industry, energy, environment, agriculture and fisheries, home office, foreign office, customs and excise. The mariner is frequently the last person to be consulted on the way his ship is to be protected and Commander LLOYD's article in *Seaways*, April 1982, expresses the view that the seas are becoming less safe and that law and order is declining [10].

The other side of this coin is the maintenance of lawful sea use by States other than the coastal State, particularly if the coastal State is interpreting the law in an arbitrary or discriminating fashion. Such activities can have a devastating effect on the confidence of shipmasters and shipowners and consequently upon the free flow of trade. This may well become more, not less, frequent, given a very complicated convention of 320 articles which cover 125 pages of typescript. They can create an international incident in which a shipmaster may personally be involved.

The Council of The Nautical Institute believes that the effect of the new Law of the Sea Convention should be discussed at a conference to be held in the autumn of 1983, and has set up a Maritime Law and Order Working Group to prepare the groundwork. To cover fully the military and civilian aspects of the problem, we are joining forces with the journal *Navv International* and put out a call for papers.

REFERENCES

- [1] The *Torrey Canyon* : Report of the Committee of Scientists on the scientific and technological aspects of the *Torrey Canyon* disaster. HMSO Cabinet Office, 1967.
- [2] International Law as it affects the seafarer. Prof. E.D. BROWN, *Nautical Briefing*, Nautical Institute, Sept. 1979.
- [3] The development of oil and gas reserves of the United Kingdom, 1981. HMSO Department of Energy.
- [4] The role of HM Customs and Excise. A.G. HILL. Proceedings of Seminar on Maritime Commercial Malpractices, South Wales Branch of the Nautical Institute, 1981.
- [5] Some legal aspects of oil pollution. J.M.M. NOBLE. *Nautical Briefing*, Nautical Institute, 1979.
- [6] Pollution - the Legal Rights and Obligations of Master. Prof. F.J.J. CADWALLADER. *Seaways*, July 1980.
- [7] Enforcement of International Law and Municipal Legislation derived from International Law. J.R. HILL. Conference, International Shipping, the Nautical Institute, 1979.
- [8] Maritime forces as coastguards. Captain C.W. KOBURGER, Jr., USCG, Ret. *Navy International*, May 1981.
- [9] Operating fixed-wing aircraft for surveillance inspection and patrol. Wing Commander W.E. KIRK, RAF. Seminar, Air-Sea Operations, The Nautical Institute, March 1981.
- [10] The defence of the Merchant Navy. Commander C.M.R. LLOYD. *Seaways*, April 1982.