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COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION

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SECOND REPORT[1]

1. INTRODUCTION

This Second Report of the Committee builds on and elaborates the findings incorporated in previous reports: the First Internal Interim Report (1994), the Draft Interim Report (1995), and the First Report presented at the 1996 ILA Helsinki Conference. The focus in this Second Report is on two issues relevant

[1] The Second Report was drafted by the Assistant Rapporteur in co-operation with the Chairman. Comments on the draft were received by: D.H. Anderson, K. Bangert, G. Jaenicke, S. Mahmoudi, J.E. Noyes, T. Scovazzi, and A. Strati. Full citation of legislation is avoided in order to limit the length of the report.

to coastal State jurisdiction over vessel-source pollution. The first is an analysis of the term 'applicable' appearing in various rules of reference used in the 1982 United Nations Convention on the Law of the Sea (LOSC). Apart from treaty-interpretation and doctrinary opinion, this report will examine state practice relevant for the notions of 'applicable' and 'generally accepted' as also appearing in the LOSC. Secondly, the phrase "wilful and serious pollution" as linked to the concept of innocent passage, will be analyzed, partly also in light of relevant state practice.

2. APPLICABLE

2.1 Provisions in the LOSC

In the rules of reference for vessel-source pollution, the term "applicable" is used to qualify the phrase "international rules and standards", most commonly in enforcement provisions.[2] Contrary to the concept of 'generally accepted', 'applicable' appears in relation to all actors: flag, port, and coastal States.[3] Additional qualifications commonly used in combination with 'generally accepted', such as the phrase "shall at least have the same effect as", are not used together with the term 'applicable'.

2.2 Meaning and purpose

Neither the origin nor the intention of the term 'applicable' in the LOSC can be determined from the documents that originated during the Third United Nations Conference on the Law of the Sea (UNCLOS III).[4] The uncertainty around its meaning and purpose is aptly illustrated by the fact that in August 1980 the English language group of the Drafting Committee proposed to substitute the words 'generally accepted' for the word 'applicable' in several provisions.[5] The controversy surrounding the use of the term 'applicable' in Article 42(1)(b)[6], which concerns strait State prescriptive jurisdiction, suggests that

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[2] An exception to this is Art. 42(1)(b), also discussed below.

[3] Arts. 94(3)(b) and 217 for flag States; Arts. 218, 219, 226(b+c), and 228 for port States; and Arts. 219, 220, 226(b+c), and 228 for coastal States.

[4] *Cf.* S. Rosenne and A. Yankov (vol. eds.), N.R. Grandy (ass. ed.), M.H. Nordquist (ed.-in-chief), *United Nations Convention on the Law of the Sea 1982. A Commentary, Volume IV*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991, p. 220.

[5] *Viz.* Arts. 42(1)(b), 94(4)(c), 218(1) and 219. (Drafting Committee, Informal Paper 4/Rev. 2, p. 17).

[6] Spain proposed to insert 'generally accepted' instead of 'applicable' in Art. 42(1)(b), but without avail (UN Doc. A/CONF.62/L.136 of 28 April 1982, *Official Records*, XVI, p. 243). In its declaration upon signature of the LOSC, Spain continues to insist that 'applicable' should have been replaced by 'generally accepted'. In its declaration upon ratification of the LOSC, Spain submits that strait States can "enact and enforce in straits used for international navigation its own regulations, provided that such regulations do not interfere with the right of transit passage."

flag States should not have to submit to the enforcement of rules and standards that they have not somehow accepted. However, as that discussion relates to prescriptive rather than enforcement provisions, it would not be correct to transpose conclusions arrived at there to a more general enforcement perspective.[7]

In light of these observations it is submitted that 'applicable' as used in the LOSC is a relative term: it concerns the relation between States involved in specific enforcement cases. International rules and standards have to be 'applicable' in the mutual relationship between these States as a condition for enforcement.[8] Which rules and standards are 'applicable' depends on the various rights and obligations accepted by the States involved in enforcement cases. The purpose of 'applicable' seems simply to limit the exercise of enforcement jurisdiction to a certain body of rules and standards. In the absence of additional qualifications linked to the term 'applicable', as with 'generally accepted', it is submitted that it is not intended to denote a certain level, but rather a specific set of rules.

2.3 Assessment

In order to assess for each case the 'applicable' rules and standards, it is necessary to determine whether the States involved in the enforcement situation have accepted certain rights or obligations with respect to certain rules and standards. This is assessed for States individually before the consequences for the relationship between States are analyzed.

Acceptance of rights and obligations with respect to rules and standards can occur through various processes. Uncontroversial is acceptance through formal adherence to a legally binding instrument containing these rules and standards, through a binding decision of an international organization, or through customary international law. In addition, specifically for the context of vessel-source pollution it is possible that States accept rights and obligations with regard to generally accepted international rules and standards (GAIRAS) when they rati-

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[7] The term 'applicable' in Arts. 5(2)(3)(a+b) and 9(6)(a+b) of the United Nations Convention on Conditions for Registration of Ships (1986 Registration Convention) should be interpreted as applying only to conventions to which a Contracting State is a Party. But in light of the use of the concept of 'generally accepted' in the LOSC, this interpretation cannot be directly transposed to the LOSC.

[8] *Cf.* W. Van Reenen, *Rules of Reference in the New Convention on the Law of the Sea, in Particular in Connection with the Pollution of the Sea by Oil from Tankers*, 12 Netherlands Yearbook of International Law 3-44 (1981), p. 12. Rosenne and Yankov 1991, *supra* note 4, p. 271 seem to support this view when submitting that "[e]arly proposals to limit Article 218 to port State parties to the Convention were not adopted, on the general opinion that this could be clarified in applicable international rules and standards." Whether or not rules and standards are 'applicable' thus has to be determined on a case-by-case basis. See also pp. 301-302. K. Hakapää, *Marine Pollution in International Law. Material Obligations and Jurisdiction*, Helsinki, Suomalainen Tiedeakatemia, 1981, p. 205 submits, in relation to Art. 42(1)(b), that violations might occur which are 'applicable' "in the mutual relationship between the coastal state and the flag state".

fy or accede to the LOSC. This will hereinafter be referred to as the 'indirectly binding effect of the LOSC'.[9] Another, somewhat controversial, possibility is acceptance through the prescription of national laws and regulations that conform to the rules and standards that have been laid down in legally binding instruments, *viz.* acceptance without formal adherence.[10] However, a precondition for an exercise of rights granted under such instruments is the existence of a concurrent basis in customary international law. In the absence of such basis, such rights can only be exercised *vis-a-vis* States Parties to the treaty in which the right is incorporated.

The next step in the concrete assessment of 'applicable' international rules and standards consists of discussing the various possible enforcement situations. It is submitted that where two States involved in enforcement have matching rights and obligations regarding certain rules and standards, these rules and standards can be said to be 'applicable' for the enforcement provisions on vessel-source pollution. The process in which States have obtained these rights and obligations does not have to be identical, provided they 'match'. Rejected should thus be the interpretation which would imply that even though rights and obligations exist, they could not lead to enforcement. Where for example flag States Parties to the LOSC are required, and port and coastal States permitted, to exercise prescriptive jurisdiction with respect to GAIRAS, it would be logical to presume that GAIRAS are included within the term 'applicable'.[11] In light of this view the term 'applicable' will potentially cover a broader set of

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[9] See First Report, p. 175.

[10] Rosenne and Yankov 1991, *supra* note 4, p. 220 observe that there was general understanding that 'applicable' "referred to international rules binding on the State concerned, whether as conventional or as customary rules." Whether this excludes acceptance through national legislation and the 'indirectly binding effect of the LOSC' is uncertain to say.

[11] *Cf.* Van Reenen 1981, *supra* note 8, p. 24; B.H. Oxman, *The Duty to Respect Generally Accepted International Standards*, 24 New York University Journal of International Law and Politics 109-159 (1991), at p. 139, n. 96. T.L. McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 Journal of Maritime Law and Commerce 305-322 (1997), at p. 319 would also seem to agree with this contention. Hakapää 1981, *supra* note 8, pp. 118 and 176, n. 124 seems to submit that the term 'applicable' does not cover GAIRAS. However, on p. 205 he supports the 'indirectly binding effect of the LOSC', and interprets 'generally accepted' in Art. 39(2) in a similar manner as the present author with respect to 'applicable'. G.C. Kasoulides, *Port State Control and Jurisdiction. Evolution of the Port State Regime*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993, p. 38 seems to exclude GAIRAS from the scope of 'applicable', which can be explained by his hesitation to accept the 'indirectly binding effect of the LOSC' on p. 41 and his treatment of the meaning of 'applicable' in the 1986 Registration Convention discussed on pp. 43-46. M. Valenzuela, *IMO: Public International Law and Regulation*, in: "The Law of the Sea and Ocean Industry: New Opportunities and Restraints", Proceedings of the Law of the Sea Institute 16th Annual Conference, D.M. Johnston and N.G. Letalik (eds.), Halifax, 1982 (Honolulu: Law of the Sea Institute, University of Hawaii, 1982), pp. 141-151, at p. 145 takes a middle course by submitting that the flag State must "at least in some cases" be a Party to regulatory conventions. D. Bodansky, *Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond*, 18 Ecology Law Quarterly 719-777 (1991), at pp. 761-762 argues that the phrase "applicable international rules and standards" in Art. 218 LOSC

rules and standards than under the concept of 'generally accepted'.

Apart from the situation where a 'match' exists, it is possible to construe several other enforcement situations where such 'match' is absent. In advance it is submitted that none of these situations is admissable. The first situation occurs when port and coastal States enforce rules and standards that they have accepted, but not the flag State.[12] Support for this possibility is often seen in the no-more-favorable-treatment (NMFT-)clause contained in regulatory conventions.[13] However, it is submitted that the NMFT-clause cannot be interpreted as broadening the scope or extent of jurisdiction which a State would normally have under general international law.[14]

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does not encompass GAIRAS as between Parties to the LOSC. The main element in Bodansky's reasoning seems to be that the LOSC contains no specific prescriptive basis to enable an exercise of port State enforcement jurisdiction pursuant to Art. 218. Arguably, however, Art. 218 functions as both a prescriptive and an enforcement basis, since a basis for enforcement without a related (implicit) prescriptive basis would lead to a result that can never have been the intention of the negotiators at UNCLOS III (*cf.* McDorman 1997, *supra*, pp. 307 + 315). Another argument suggested by Bodansky in support of the view that GAIRAS cannot be applied as between Parties to the LOSC, is the absence of a reference to the enforcement of national laws and regulations. This seems not convincing since such references only appear, in the context of vessel-source pollution, in relation to the possibility of establishing norms more stringent than 'generally accepted'. The absence of such references does not, however, preclude national legislation in conformity with the level of 'generally accepted' (see also Rosenne and Yankov 1991, *supra* note 4, p. 272). Bodansky's view can perhaps be explained by the use of the word "permitting" in relation to flag State prescription on p. 761. This should have been substituted by a term reflecting the mandatory character of this competence.

[12] Where authors characterize Art. 218 as 'universal port State jurisdiction', this does not automatically imply that acceptance by flag States is not required. See for example S.A. Meese, *When Jurisdictional Interests Collide: International, Domestic, and State Efforts to Prevent Vessel Source Pollution*, 12 Ocean Development and International Law 71-139 (1982), at p. 92; J. Schneider, *Protection and Preservation of the Marine Environment: What is new about the Law of the Sea Convention?*, in : "The 1982 Convention on the Law of the Sea", Proceedings of the Law of the Sea Institute 17th Annual Conference, A.W. Koers and B.H. Oxman (eds.), Oslo, 1983, (Honolulu: Law of the Sea Institute, University of Hawaii, 1984), pp. 567-573, at p. 570.

[13] For example for: Art. II(3) of the 1978 Protocol to the International Convention for the Safety of Life at Sea (SOLAS Prot. 1978); Art. I(3) SOLAS Prot. 1988; Art. I(3) of the 1988 Protocol to the International Convention on Load Lines (LL Prot. 88); Art. X(5) of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78) (concerned with control generally); Art. 4(1) of the ILO Convention No. 147 concerning Minimum Standards in Merchant Ships (ILO No. 147).

[14] *Cf.* Hakapää 1981, *supra* note 8, p. 113; E.J. Molenaar, *Residual Jurisdiction under IMO Regulatory Conventions*, in: "Competing Norms in the Law of Marine Environmental Protection", H. Ringbom (ed.), London/The Hague/Boston, Kluwer Law International, 1997, pp. 201-216, at p. 207, n. 22. M. Valenzuela, *International Maritime Transportation: Selected Issues of the Law of the Sea*, in "Implementation of The Law of the Sea Convention Through International Institutions", Proceedings of the 23rd Annual Conference of The Law of the Sea Institute, T.A. Clingan and A.H.A. Soons (eds.) Noordwijk aan Zee, 1989 (Honolulu: Law of the Sea Institute, University of Hawaii, 1990), pp. 187-215, at pp. 205-206 speaks in relation to the NMFT-clause of the "clause of universal port State control" and suggests that this has developed into a rule of customary international law. Unclear is whether Valenzuela accords the NMFT-clause a wider meaning than

A second possibility would be to permit enforcement in situations where acceptance has occurred by the violating flag State only. The absence of reciprocity implies that the enforcing State does not apply these rules and standards to its own vessels, which is inconsistent with the principle of national treatment.

A third possibility, somewhat similar to the second, allows port States to take enforcement action with respect to a violation of a third (coastal) State's legislation.[15] A variety of relationships could arise here, depending on whether or not the port, flag and third State have accepted certain rights or obligations. The objections raised with respect to the first and second situation would seem to prevent this situation, in its various forms, from being covered by the term 'applicable'.

2.4 State practice

2.4.1 General

This section attempts to analyze subsequent state practice as meant in Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties on two closely related but distinguishable issues: (1) the meaning of the concept of 'generally accepted', and (2) the status of the rules of reference.

No thorough examination of state practice on the meaning of the term 'applicable' is undertaken. Whereas this term appears frequently in relevant national legislation, it is not likely to denote the same thing as in the LOSC. In many cases 'applicable' will simply mean the standards in the legislation under scrutiny that apply under the prescribed conditions and circumstances.[16] The only useful way in which the examination of state practice on the term 'applicable' should proceed is a thorough analysis of enforcement cases. Largely due to the absence of sufficient and adequate material such an analysis is not undertaken. Nevertheless, it seems that the analysis of state practice on the status of the rule of reference has some implications for the term 'applicable' as well.

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defended by Hakapää. The Study *Implications of the Entry into Force of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, IMO Doc. LEG/MISC/2, attached to IMO Doc. C/ES.19/19(b)/1, of 6 October 1997, p. 32 observes in relation to the NMFT-clause in Art. 5(4) MARPOL 73/78 that "port States which are parties to this Convention are *entitled* to request compliance with preventive antipollution measures therein, also from ships flying the flag of non-parties [emphasis added]". The use of "entitled" suggests the existence of a right instead of an obligation. But see also p. 6.

[15] K. Gjerde and D. Freestone, *Particularly Sensitive Sea Areas - An Important Environmental Concept at a Turning-point*, 9 International Journal of Marine and Coastal Law 431-468 (1994), at p. 434 observe that the Second International Meeting of Legal Experts on Particularly Sensitive Sea Areas regarded this situation as "not ... inconsistent with the LOSC". Bodansky 1991, *supra* note 11, p. 762 objects to this possibility.

[16] See, for example, 33 U.S.C. § 1221(c)(3) of the United States.

2.4.2 The concept of 'generally accepted'

No material seems to be available which testifies of a formal attitude of States towards the concept of 'generally accepted'. States have not, for example, made declarations in which they expound their view of this concept. On the other hand, States have occasionally claimed that certain rules or instruments should be regarded as 'generally accepted'.[17] Indeed, silence on the question when certain rules and standards become 'generally accepted' does not prevent States from claiming that certain GAIRAS exist. This approach applies *mutatis mutandis* to customary law, and led Thirlway to observe that:

> the problem recalls the old riddle of how many straws make a heap, and the answer surely is the same: the fact that we cannot say precisely how many straws make a heap does not lead us to deny the possible existence of a heap of straw; nor does it oblige us to say that the heap is constituted by the placing of the first straw, - or, for that matter, the last.[18]

In this situation it seems that two aspects relative to the concept of 'generally accepted' should be clearly distinguished: (1) views on which rules and standards are currently 'generally accepted', and (2) views on the criteria which have to be met before rules and standards become 'generally accepted'.

On the first aspect, one way of determining which are GAIRAS is to look at the ratification number and tonnage percentage displayed in Table I. Based on these figures it would seem reasonable to regard LL 66, SOLAS 74, SOLAS Prot. 78, MARPOL 73/78 Annexes I and II, STCW 78, the Convention on the International Regulations for Preventing Collisions at Sea (COLREG 72) and the International Convention on Tonnage Measurement of Ships (Tonnage 69) as 'generally accepted'. Conversely, this is not so obvious for MARPOL 73/78 Annexes III and V, ILO No. 147 and for the instruments that have not entered into force.[19] Guidance is also provided by Article 5 ILO No. 147 which requires

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[17] For example, the United States with respect to the International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto (MARPOL 73/78) (U.S. Department of State, *Commentary - The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI*, 34 International Legal Materials 1393-1447 (1995), at p. 1416); the Netherlands with respect to MARPOL 73/78 (see the Explanatory Note to the 1998 Act (draft), *TK* 1996-1997, No. 25446 (R 1594), Nr. 3, p. 7).

[18] H.W.A. Thirlway, *International Customary Law and Codification*, Leiden, A.W. Sijthoff, 1972, p. 83.

[19] The 1997 IMO Study, *supra* note 14, pp. 10 and 26 seems to take the same approach since it is unclear about the 'generally accepted' status of Annexes III, IV and V. However, it takes no account of Tonnage 69. Apart from ratification number and tonnage percentage the 1997 IMO Study, p. 6 also reserves a role for the NMFT-clause. It cannot be denied that the obligation to apply the NMFT-clause with respect to non-Parties of regulatory conventions contributes to wider application above the formal adherence. Whether such wider application also increases general acceptance is uncertain to say. It seems that acceptance would under these circumstances predominantly have

that States intending to ratify have to be a Party to SOLAS 74, LL 66, and COLREG 72. This has led Valenzuela to submit that this requirement is the "first statement by States" that classifies certain rules and standards as 'generally accepted'.[20] Finally, the recently adopted IMO Resolution A.847(20) "Guidelines to Assist Flag States in the Implementation of IMO Instruments", observes in Sections 1.1 and 1.2 that the LOSC obliges flag States to give full and complete effect to SOLAS 74, MARPOL 73/78, LL 66 and STCW 78.[21]

Further guidance can be found in the regional agreements or memoranda of understanding on port State control (further: MOUs).[22] Even though, as will be extensively explained below, it is theoretically not correct to depend on practice by port States for the concept of 'generally accepted', it can nevertheless provide valuable insight. While not each of these regional agreements applies the same set of 'relevant instruments', there exists a large degree of similarity with the rough assessment just made.[23] One important difference is that they all apply in principle also MARPOL 73/78 Annexes III and V.[24] Flag States and the maritime industry do not seem to have protested against this approach. Noteworthy is that Section 3.1 Paris MOU stipulates that ships will be inspected to verify compliance with "generally accepted international rules and standards". Although not actually defined in the Paris MOU, this phrase denotes the 'relevant instruments' that have entered into force.[25]

Apart from these indieations it is very difficult to draw more precise conclusions. This would only be possible on the basis of a thorough analysis of state practice such as suggested in the First Report, *viz.* of all state practice by both States Parties and non-Parties to the regulatory instruments, with respect to certain or all rules and standards contained therein. Although it is undoubtedly correct to regard state practice as decisive and not the form in which a rule or standard might have been expressed[26], whether it is practically feasible to undertake such an analysis is a second question.

As state practice points out, coastal States only incidentally prescribe rules and standards that go beyond the regulatory instruments in situations where this would not be allowed under the LOSC.[27] Such cases should, however, be

to be based on the absence of protest, but as port State prescriptive jurisdiction is in principle unrestricted, such protest would in fact be unfounded.

[20] Valenzuela 1989, *supra* note 14, p. 193.

[21] Adopted on 27 November 1997. A footnote in Sec. 1.1 observes that "[r]eference is made to such applicable amendments as may be in force at any time".

[22] To date five MOUs exist: the 1982 Paris MOU, the 1992 Viña del Mar Agreement, the 1993 Tokyo MOU, the 1996 Caribbean MOU, and the 1997 Mediterranean MOU.

[23] The Paris MOU also applies Tonnage 69, and the Viña del Mar Agreement does not seem to apply ILO No. 147.

[24] Note that only those 'relevant instruments' are applied to which the State is a Party.

[25] Personal communication with Mr. Schiferli of the Paris MOU Secretariat. The phrase does not denote just the 'relevant instruments' since, for example, LL Prot. 88 and SOLAS Prot. 88 have not yet entered into force.

[26] First Report, p. 176.

[27] See E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, 1998, forthcoming.

regarded as non-conformity with the LOSC, and say nothing about the body of GAIRAS. Moreover, the fact that certain rules and standards are applied or not, does not necessarily tell anything about a State's view on what are GAIRAS. A flag State could have a number of reasons for not applying rules and standards. Also, as coastal State jurisdiction is voluntary and fixed to a maximum, the fact that, for example, a number of African countries are still applying OILPOL 54 does not necessarily imply that they regard OILPOL 54 as 'generally accepted'.

On the second aspect, in searching for state practice on the criteria which have to be met before rules and standards become 'generally accepted', some preliminary observations have to be taken into account. Perhaps the most important is that coastal States that do not intend to go beyond regulatory instruments will, in light of the status of certain of these instruments, probably not deem it necessary to explain why they apply them. Such explanations could just as well be lacking in less obvious situations. As the term 'generally accepted' has not been defined in the LOSC, this may only be necessary in quite contentious situations.

Table I

Status of regulatory conventions as at 30 November 1997.
Source: bttp://www.imo.org/imo/convent.

Convention	Ratif No.	Tonnage %*
LL 66	140	98.19
LL Prot. 88[a]	28	41.69
Tonnage 69	118	97.51
COLREG 72	130	96.20
MARPOL 73/78, Annex I/II	102	93.48
MARPOL 73/78 Annex III	83	78.21
MARPOL 73/78 Annex IV[a]	68	41.47
MARPOL 73/78 Annex V	85	82.03

Convention	Ratif No.	Tonnage %*
MARPOL 73/78 Annex VI[a]	—	—
SOLAS 74	136	98.27
SOLAS Prot. 78	89	91.96
SOLAS Prot. 88[a]	28	41.73
ILO NO. 147	35[b]	?
ILO No. 147 Prot. 96[a]	0[b]	0
STCW 78	130	97.55
OPRC 90	34	39.31

* Source: Lloyd's Register of Shipping/World Fleet Statistics as at 31 December 1996.
a As at 1 December 1997 these instruments had not yet entered into force.
b Source: ILOLEX as at 1 December 1997. ILO No. 178, 179 and 180 received no ratifications yet.

In the absence of more explicit state practice, it may be possible to deduce state practice from the way in which certain types of rules and standards are applied. Several considerations have to be taken into account in undertaking such analysis. As has been mentioned before, the concept of 'generally accepted' only appears in provisions on flag and coastal State prescriptive jurisdiction. Assessing which rules and standards should be considered as 'generally accepted' should therefore not focus on the rules and standards prescribed by the port State as conditions for the entry into port. In case port States decide to make use of their unrestricted prescriptive jurisdiction based on customary international

law and confirmed by Articles 25(2) and 211(3) LOSC, this would give an inaccurate assessment.

Although practice by port States should therefore in principle be excluded, in certain situations such practice seems nevertheless relevant. One of these situations is where port States do not invoke their residual right to prescribe rules and standards which deviate from the regulatory conventions to which they are Parties[28], but only apply rules and standards agreed on at the international level. This approach is amongst others taken by MOUs. The criteria used to determine which international rules and standards are applied to foreign ships could then clarify when rules become 'generally accepted'. Maritime Authorities participating under these MOUs will apply only instruments that are in force and to which their States are Parties.[29] Also relevant is that these instruments are in essence not guided by what port States are *allowed* to do, but by what flag States are *required* to do. The principal responsibility for avoiding substandard shipping remains with the flag State.[30] Admittedly, however, this is a situation in which port States determine what flag States should regard as 'generally accepted'.

The fact that most of the 'relevant instruments' are already in force does not seem to prejudice this conclusion. Most notably, Annexes IV and VI of MARPOL 73/78, which are presently not yet in force, will be applied by the participating Maritime Authorities as soon as they are in force. Similarly, Section 2.1 Paris MOU already lists LL Prot. 88 and SOLAS Prot. 88 which are not yet in force, and Section 2.1 Mediterranean MOU considers protocols, amendments and related codes of mandatory status, once in force, as 'relevant instruments'.[31] Presumably, the other MOUs will enlarge their lists of 'relevant instruments' upon the entry into force of a relevant regulatory instrument. Moreover, the qualification that relevant instruments do not have to be applied unless the State is a Party to it, indicates that State sovereignty has been upheld. States are not likely to impose on foreign ships rules and standards contained in regulatory instruments that they have not accepted, if only because that would conflict with the principle of national treatment.[32]

Practice by flag States could also give insight in the constitutive criteria of

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[28] Molenaar 1997, *supra* note 14, p. 216 argues that regulatory conventions cannot be interpreted as supporting the exclusion of residual port State jurisdiction, exercised on a unilateral or regional basis.

[29] Sec. 2.3 Paris MOU; and Sec. 2.2 Viña del Mar Agreement; Sec. 2.2 Tokyo MOU, Sec. 2.2 Caribbean MOU; Sec. 2.3 Mediterranean MOU respectively. The same applies, *mutatis mutandis*, for amendments to these instruments.

[30] See the Preamble to the Paris MOU.

[31] This phrase is not included in any other MOU, but appears in Art. 2(1) EC Directive 95/21/EC, 19 June 1995, *OJ* 1995, L 157/1. This can be attributed to the fact that the Mediterranean MOU was established with financial aid of the EU.

[32] But see Art. 2(1) EC Directive 95/21/EC and the remarks by E.J. Molenaar, *EC Directive on Port State Control in Context*, 11 International Journal of Marine and Coastal Law 241-288 (1996), at p. 259.

GAIRAS. This would have to be based on the effect of their becoming a Party to the LOSC, since that event triggers their obligations towards GAIRAS. An assessment of this effect would have to take account of ratification of, or accession to regulatory conventions, becoming legally bound to other rules and standards, or the enactment of legislation which implements rules and standards similar to those covered by the rule of reference. Apart from the fact that this would demand enormous efforts which could not possibly be done in this context, it would not guarantee sound conclusions either. The inactivity of a State is not necessarily indicative of its interpretation of the concept of 'generally accepted'. Other reasons for such behavior could exist, for example disinterest, pre-occupation with other issues, or even knowingly ignoring obligations. Admittedly, however, ignoring the flag State view on the meaning of the concept of 'generally accepted' may also raise doubts on the adequacy of the conclusions ultimately drawn. After all, the LOSC does not charge either actor - flag, port or coastal State - with the task of giving effective content to the notion of 'generally accepted'.

After these considerations the focus will now be on practice by coastal States, which is after all the focus of the work of the Committee. Several problems are encountered here. In the first place, it will have to be ascertained that relevant legislation not only applies to national but also to foreign ships. Otherwise such legislation would in fact be an exercise of flag State jurisdiction. Secondly, it should be kept in mind that, in relation to coastal States, the concept of 'generally accepted' only appears in specific situations in the LOSC, for example for discharge standards in the EEZ, or for construction, design, equipment and manning (CDEM) standards in both the territorial sea and the EEZ. When the object is to determine which rules and standards should be considered 'generally accepted', account should be taken of these situations only. However, when the focus is exclusively on the approach towards the concept of 'generally accepted', this would seem to render the issue of geographical application irrelevant. In other words, it seems unlikely that a coastal State takes a different approach on the constitutive criteria of GAIRAS where it concerns the territorial sea, than in situations that concern the EEZ. Also irrelevant is the fact that MARPOL 73/78 uses rules and standards with a geographic differentiation which is not based on the geographical dimensions of a coastal State's maritime zones under customary international law. The concept of 'generally accepted' has in principle nothing to do with the location in which certain rules and standards apply. That these rules and standards themselves are geographically determined is an entirely different issue.

The presumption that coastal States take such a general approach to the concept of 'generally accepted' makes it therefore unnecessary to verify that rules and standards incorporated in national legislation apply exclusively in the cases where the LOSC uses the concept of 'generally accepted'. Consequently, provisions in national legislation which impose rules and standards on foreign

ships navigating in specified areas, constitute proof of a general approach to the concept of 'generally accepted'.

These considerations imply that in order to be relevant state practice on the constitutive criteria of GAIRAS, the following conditions must be fulfilled:

I. the relevant legislation must apply to foreign ships *ratione loci*; and
II. the legislation must not go beyond what has been laid down in regulatory instruments.

For this purpose legislation, usually based on MARPOL 73/78 or SOLAS 74, of a limited number of States was examined. That not more legislation is covered is due to several reasons, but mainly to the fact that not more adequate material was available. However, the number and type of States covered, and the uniformity of the results, seem sufficient to justify the conclusions built thereon. The following legislation was analyzed:

State	Instrument	State	Instrument
Australia	S. 9(1)(B), 11(1)(B), 21(1)(B), 22(1)(B), 26AB(4), 26B(2), 26D(4), 26F(4) 1983 Act	Kenya[c]	Art. 309(2) 1967 Act
		Korea (S)	Art. 3(1) 1977 Act
		Malaysia[b c]	S. 10 1984 Act; S. 250, 306B(1) 1952 Ordinance
Belgium[a]	Art. 10 1967 Decree		
Bulgaria	Arts. 23, 58 1987 Act	Netherlands	New Arts. 5, 17 1983 PPSA[d]
Canada[a]	S. 655(1)(b) 1972 CSA; S. 3 1992 Oil Regulations; S. 3 1992 Chemicals Regulations	New Zealand[b]	S. 129(b) 1994 Act
		Norway	S. 121 1903 Act
		Oman	Art. 2(1) 1974 Law
Chile[a]	Arts. 6, 9, 12, 24 1992 Regulations	Philippines[b]	S. 4 1976 Decree; S. 4(a) 1991 Memo Circular
China	Art. 2 1979 Regulations; Art. 2 1982 MEPL; Art. 2 1983 Law; Art. 2 1983 Regulations	Singapore	S. 6(1), 7(1), 10(1) 1990 Act
		Tanzania[b c]	S. 309(2) 1967 Act
Denmark[a]	S. 2 1993 Act	United Kingdom	S 313A 1995 Act; S. 2, 12, 13, 38(3) 1996 Pollution Regulations
France	Art. 7 1983 Law		
Germany	Art. 1 1989 Decree		
Greece	Arts. 2, 3 1977 Law		
Ireland	S. 10, 16 1991 Act	United States[a]	§ 2(b)(3) 1972 CWA (33 U.S.C. § 1321(b)(3)); § 3(a) 1980 Act (33 U.S.C § 1902(a)); 1983 Act (46 U.S.C. § 3303)
Israel[a]	S. 4, 7 1980 Ordinance		

a Non-Party to LOSC.
b Non-Party to MARPOL 73/78.
c Non-Party to SOLAS 74.
d No explicit reference to geographical application due to the wish to apply Art. 218 LOSC.

Of the legislation under examination only five States have incorporated provisions which say something about the standards which have to be complied with. Article 58 1987 Act of **Bulgaria** provides that it applies "the international standards recognized" by Bulgaria. Although the mode of recognition envis-

aged here is not clear, it probably refers to ratification or accession. The conventions which the 1977 Law of **Greece** seeks compliance with are defined in Article 1(o) as "international conventions which have been approved and are in force for Greece, together with their Protocols, Annexes and supplements which deal with marine pollution and with the protection of the marine environment in general." Section 128 1994 Act of **New Zealand** applies SOLAS 74, including all amendments and protocols "in force with respect to New Zealand". Similarly, Section 121(1)(6) 1903 Act of **Norway** applies rules and standards contained in an "international agreement to which Norway is a party". These four coastal States thus impose international rules and standards on foreign ships in their maritime zones, once these are in force for the coastal State itself.

The **United Kingdom** takes a less traditional view. While Section 85(1B) 1995 Act merely applies "an international agreement ratified by the United Kingdom", Section 128(2) 1995 Act stipulates that the powers "to make provision for the purpose of giving effect to an agreement include power to provide for the provision to come into force although the agreement has not come into force." It would thus be possible to apply rules and standards which are laid down in instruments which the United Kingdom has ratified, but which have not entered into force. Admittedly, the formulations used by Bulgaria, Greece, New Zealand and Norway would not necessarily exclude such an interpretation. However, the United Kingdom provision, which was already incorporated in 1979, serves the specific purpose of permitting the provisional application where there exists a protocol (etc.) of provisional application.[33] In absence of explicit evidence to the contrary, the other four States mentioned would therefore seem to adhere to the more conservative view of applying rules and standards laid down in instruments that have also entered into force on their own terms, in addition to having been ratified or acceded to by themselves.

It is important to acknowledge that although no explicit reference is made to a necessary number of ratifications before international norms are applied to foreign ships, such considerations could nevertheless have been taken into account when the legislation was drafted. Scarcity of time prevents undertaking such complex research, necessitating once more that assumptions have to be relied on.

Thus, the analysis of state practice could not indicate that States take account of anything more than that the instrurnents have entered into force, and the interpretation of GAIRAS should thus be construed accordingly. Indications that States Parties to the LOSC take a different approach than non-Parties are absent. Although most regulatory conventions have already been in force for some time, this conclusion seems particularly relevant for annexes, protocols and amendments. While this conclusion is based on coastal State practice only, acquiescence by flag States should probably be presumed as no protest against this coastal State approach seems to have been made. Furthermore, this conclu-

[33] Comment by D.H. Anderson.

sion also implies that the level of acceptance of the concept of 'generally accepted' is in fact determined by the entry into force conditions of regulatory instruments and their amendments.

2.4.3 The status of the rule of reference

The LOSC rules of reference with respect to vessel-source pollution apply in principle only between States Parties to the LOSC. In order to assess whether state practice indicates a wider scope of normative effect, based for example on customary law, the examination of the legislation in the previous section is extended to determine its scope *ratione personae*. More specifically, the question is raised whether the scope extends only to ships flying the flag of States Parties to regulatory conventions, or also to non-Parties.

Most of the legislation lacks any reference to a distinction between Parties and non-Parties to the regulatory conventions, but generally stipulates that it applies to foreign ships. Conversely, where distinctions are occasionally found, these ensue from the fact tbat non-Parties to the regulatory conventions cannot, for example, show the required certificates. Rather than exempting ships flying the flag of non-Parties from the application of the legislation, care is usually taken to impose the essentials or the rationale of the legislation.[34] Legislation of a third group of States expressly stipulates that it will also apply to ships flying the flag of non-Parties to the relevant regulatory conventions. This group consists of the following States:

State	Instrument	State	Instrument
Australia	S. 32 1983 Act (specific cases only)	France	Art. 7 1983 Law
Belgium[a]	Art. 10 1967 Decree	United States[a]	S. 3(a) 1980 Act (33 U.S.C. § 1902(a)); 1983 Act (46 U.S.C. § 3303)
Canada[a]	S. 662 1972 CSA (on enforcement); S. 46 1992 Oil Regulations; S. 46 1992 Chemicals Regulations		

a Non-party to the LOSC.

Furthermore, although not displayed in the Tables, none of the examined legislation takes any notice of the circumstance that ships are flying the flag of States Parties or non-Parties to the LOSC. The analysis gives neither any reason to conclude that States Parties to the LOSC approach the matter differently than States non-Parties to the LOSC.

[34] See, for example, Sec. 194 1967 Act of Kenya; Sec. 29 1977 Act of Malta; Sec. 129(2) 1994 Act of New Zealand; Sec. 194 1967 Act of Tanzania. The scope of Sec. 28 1991 Act of Ireland is less certain as it has been officially confirmed that following an order based on Sec. 28 "any ship registered in a country which is a party" to MARPOL 73/78 could be affected by new ministerial anti-pollution powers within Irish territorial waters. See 401 *Dail Debates*, col. 517.

This examination suggests that coastal States, both Parties and non-Parties to the LOSC, impose their legislation on every foreign ship, irrespective of flag. Presumably therefore, coastal States consider that they have a right to do so under customary international law, and not just under a treaty regime.[35] In other words, the rules of reference and the obligations linked thereto seem to have a basis in customary international law. Support for this contention can also be found in HELCOM Recommendation 19/16 (adopted 26 March 1998) which observes explicitly in paragraph I.3.3. of the Attached Guidelines that

> the Guidelines are applicable to ships flying the flags of states not being parties to MARPOL 73/78 violating or believed to have violated the discharge provisions of Annexes I, II and V to MARPOL 73/78 in the internal waters, territorial seas and exclusive economic zones of the Contracting Parties, as well as the sewage discharge provisions and prohibitions of ship-generated wastes on board ships stipulated in Regulation 9B of Annex IV of the 1974 Helsinki Convention in the internal waters and territorial seas of the Contracting Parties.

Being a Party to the LOSC is apparently not a relevant consideration. The separate treatment of the sewage discharge provisions based on Annex IV to MARPOL 73/78 may be seen to proceed from the understanding that these are not 'generally accepted' and that, in their case, customary law does not authorize investigation as provided for in the Recommendation irrespective of flag beyond the territorial sea.'

The absence of a distinction between States Parties and non-Parties to the regulatory conventions can perhaps be explained by the fact that the only provision relevant for coastal State jurisdiction with a direct geographical scope, Article 4(2) MARPOL 73/78, is through Article 9 linked to general international law. The absence of a distinction between Parties and non-Parties to the LOSC could be due to a variety of reasons. States non-Parties to the LOSC would of course not be likely to make such a distinction. Applying their legislation irrespective of flag would therefore seem to indicate belief in a right under customary international law to do so. Similar is the case of legislation drafted considerable time before the LOSC entered into force, perhaps even on the understanding that the LOSC would never come into force at all. Such anticipatory implementation of the LOSC would also proceed from the understanding that applying legislation irrespective of flag could be based on customary international law.

On the other hand, coastal States could nevertheless recognize such a distinction in more general legislation, or apply such a distinction in the enforcement phase, or in adjudication. Also, the absence of a distinction could partly be explained by the fact that under customary international law and the 1958

[35] The legislation examined here is presumed to satisfy both the objective and subjective constitutive criterion for customary international law.

Geneva Convention on the Territorial Sea and the Contiguous Zone (TSC) coastal States have within the territorial sea full prescriptive jurisdiction, only limited by the obligation not to hamper innocent passage. This regime could be relied on by coastal States if the LOSC does not apply as treaty law. With respect to legislation that applies to the EEZ, such argumentation would not hold. However, as argued above, coastal States seem to take a uniform approach in applying their legislation, and do not differentiate between the different maritime zones, at least not in this respect. That this uniform approach indeed exists is reflected by the fact that all examined legislation applies to foreign ships irrespective of flag.

Despite these uncertainties, there seems reason to believe that coastal States are applying rules and standards contained in regulatory instruments upon entry into force, and in apparent disregard for the *pacta tertiis* principle.[36] This happens both within the sphere of regulatory conventions and within the sphere of the LOSC. Where the LOSC links the facultative exercise of prescriptive jurisdiction to a rule of reference, coastal States thus seem to regard this as a right under customary international law, which allows them to prescribe and enforce GAIRAS within their maritime zones. Thus, while GAIRAS themselves cannot be equated with customary law[37], it seems that the rules of reference in which they are incorporated and the obligations linked thereto *do* have such customary status. This raises interesting questions on the relation between the legal status of the rules of reference and the obligations linked thereto on the one hand, and the legal status of GAIRAS on the other. These questions could perhaps be addressed in a following report.

It might also be possible that coastal States justify these policies on the NMFT-clause commonly incorporated in regulatory conventions. Although the NMFT-clause does not purport to broaden the scope or extent of jurisdiction which a State would normally have under customary international law, coastal States could nevertheless have attributed such a meaning to it. Alternatively, coastal States that believe that customary international law allows them to prescribe and enforce GAIRAS irrespective of flag within their maritime zones, might argue that the NMFT-clause applies to such situations as well. Such an argument would only, if at all, be possible for MARPOL 73/78 which is the only regulatory convention with a basis for coastal State jurisdiction (Article 4(2)). Moreover, there is no indication that States regard this as an obligation, which is after all the essence of the NMFT-clause.

If these conclusions are correct, it seems that within coastal State enforcement situations[38] GAIRAS are always 'applicable', *viz.* irrespective of flag. Upon entry into force, rules and standards in regulatory conventions become 'generally accepted'. Subsequently, customary international law allows coastal States

[36] Art. 34 of the 1969 Vienna Convention on the Law of Treaties.

[37] *Cf.* First Report, p. 174.

[38] Since practice by port States is not examined, the following conclusions do not apply to Art. 218.

to apply these rules and standards irrespective of flag, and they thus become 'applicable' in the relationship between the coastal and the flag State.

These observations imply that the initial view that upon becoming Parties to the LOSC, flag States are faced with the 'indirectly binding effect of the LOSC', needs to be modified. As coastal States seem to proceed from the understanding that customary international law allows them to prescribe and enforce GAIRAS irrespective of flag within their maritime zones, flag States presumably have a corresponding obligation under customary international law to make sure that ships flying their flag observe GAIRAS at least within the maritime zones of a coastal State, and perhaps even anywhere. From a flag State perspective the 'indirectly binding effect of the LOSC' *upon becoming a Party to the LOSC* seems therefore to have lost much of its significance. The same can be said of the effect of a higher number of LOSC-ratifications on achieving a universal regime of rules and standards for vessel-source pollution. Ships flying the flag of States non-Parties to the regulatory conventions are already faced with coastal State laws and regulations that are considered to be 'generally accepted'. Becoming a Party to the LOSC does not fundamentally change that situation. However, this should not in any way be interpreted as a denial of the fundamental role which the 'indirectly binding effect of the LOSC' as such has played in the development of state practice.

In light of the above it is clear that the role of IMO in the regulation of vessel-source pollution has in practice become that of a universal legislator. Upon entry into force, rules and standards adopted by the IMO can, in any case potentially, be applied to every ship, irrespective of flag, and regardless of whether this occurs through a newly adopted convention or the tacit amendment procedure. This situation satisfies the need for universal coverage so indispensable in a regulatory framework for vessel-source pollution that is predominantly based on uniformity. A key characteristic of this situation is that States can no longer invoke their sovereignty for each individual decision. Conflict with the *pacta tertiis* principle is avoided due to the prior consent that States have given in this field. For some, prior consent is implicit in their formal adherence to the regulatory convention in which the relevant rules and standards have been laid down, for others this can be construed by their becoming a Party to the LOSC. For others yet, prior consent must be presumed in light of their acquiescence in the coastal State practice of applying GAIRAS irrespective of flag within maritime zones.

3. WILFUL AND SERIOUS POLLUTION

3.1 As activity rendering passage non-innocent

The concept of the right of innocent passage is of key importance to coastal State jurisdiction over vessel-source pollution, both as regards prescription and enforcement. Concurrent flag and coastal State interests in the territorial sea are

accommodated in the framework of the regime of innocent passage. Although this Second Report focusses on prescription rather than enforcement, it is important to note here that enforcement action over innocent vessels is subject to Articles 24(1), 27, and 220(2) LOSC, and the notion of 'reasonableness'. Conversely, with respect to non-innocent vessels coastal States regain full jurisdiction pursuant to Article 25(1) LOSC, including the right of exclusion from the territorial sea.

Article 17 LOSC provides that "ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea." This is made subject to the provisions in the LOSC, in particular Articles 18 and 19, which contain different elements of the concept of the right of innocent passage. Ships must first of all be in 'passage' within the meaning of Article 18, which covers navigation by ships in transit through the territorial sea, and navigation by ships that come from or head to a port or internal waters. Ships 'cruising', 'hovering' or merely 'lying in' the territorial sea, cannot claim their passage to be "continuous and expeditious", and consequently cannot claim a right of innocent passage, except under the circumstances of paragraph (2), for example *force majeure*.[39]

In addition to falling under the definition of 'passage', navigation must also be 'innocent'. While the definition of innocent passage included in Article 14(4) TSC simply stipulates that passage is innocent as long as "it is not prejudicial to the peace, good order or security of the coastal state", Article 19(2) LOSC adds thereto a list of activities which render passage non-innocent. Subparagraph (h) mentions as one of these activities engaging in "any act of wilful and serious pollution contrary to this Convention".

It is difficult to say whether the right of innocent passage has, in comparison with the TSC, become broader or narrower. The fact that only examples of *activities* are given would seem to suggest that nothing but *activities* could deprive passage of its innocent character. Ultimately this line of reasoning leads to the conclusion that something which cannot be regarded as an activity, could in principle never be brought under the heading "prejudicial to the peace, good order or security of the coastal State." Such a conclusion is admittedly too categorical and ignores the powers coastal States have in certain situations, for example the right of intervention (see below). Violations of 'passive' requirements such as CDEM standards or the mere presence or passage of a ship cannot make passage non-innocent.[40] This indicates a broadening of the right, leaving less discretion to the coastal State. On the other hand, the retention of Article

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[39] *Cf.* L.T. Lee, *Jurisdiction over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea*, 55 American Journal of International Law 77-96 (1961), at p. 80; R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Manchester, Manchester University Press, New rev. ed. 1988, at p. 69; Bodansky 1991, *supra* note 11, p. 751.

[40] *Cf.* Hakapää 1981, *supra* note 8, p. 184; Smith, *Innocent Passage as a Rule of Decision: Navigation V. Environmental Protection*, 21 Columbia Journal of Transnational Law 49-102 (1983), at pp. 66 + 75; Churchill and Lowe 1988, *supra* note 37, p. 72.

19(1) and the phrasing of Article 19(2)(l) seem to imply that the list of activities in Article 19 is non-exhaustive[41], which narrow the right.

Discharges, if both 'serious' and 'wilful', can remove the innocent character of passage.[42] These cumulative criteria represent a significant threshold, in particular the element of intent. 'Wilful' implies that the act of pollution has to be intentional, but does not reveal which type of intent is required, for example malicious intent. While the seriousness of the act of pollution is certainly consistent with the notion that innocence should only disappear in cases which are "prejudicial etc." to the coastal State, no definition of 'serious' is provided.[43] Since the requirements are cumulative, it is important to realize that intentional operational discharges will in general not also be 'serious'. Admittedly, however, the vagueness of this term gives the coastal State much room for interpretation. Apart from the possibility of 'stretching' this term, it is not unlikely that under certain conditions operational discharges should be considered 'serious', for example in already heavily polluted enclosed seas.[44] The fact that the coastal State does not have to invoke a specific category of interests which it seeks to protect, for example its coastline, and the fact that the term 'pollution' has only been defined in a general sense in the LOSC[45], contributes to a larger measure of discretion. Finally, while accidental discharges could often be 'serious', they cannot meet the criterion of intention.

Thus, non-innocence only arises in cases of actual infliction of damage, but apparently not where a threat thereto exists. The various proposals made at UNCLOS III that incorporated an element of threat did not secure the necessary support.[46] It seems therefore that passage by ships carrying hazardous cargoes cannot, based on the type of cargo, be labelled as non-innocent.[47] An exception

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[41] *Cf.* D.W. Abecassis and R.J. Jarashow 2nd ed. with R. Jarvis ..[et al.], *Oil Pollution from Ships: International, United Kingdom and the United States Law and Practice*, London, Stevens and Sons, 1985, pp. 103-104; Churchill and Lowe 1988, *supra* note 37, p. 72. *Contra* J.P.A. Bernhardt, *A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference*, 20 Virginia Journal of International Law 265-311 (1980), at p. 277.

[42] The drafting history of Art. 19(2)(h) has been analyzed in the Draft Interim Report (1995), pp. 17-19.

[43] Note that under Art. 21(11) of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, a list of examples of 'serious violations' has been included.

[44] *Cf.* Smith 1982, *supra* note 40, p. 87.

[45] Art. 1(1)(4).

[46] See Hakapää 1981, *supra* note 8, p. 185.

[47] *Cf.* Smith 1982, *supra* note 40, p. 88; and L. Pineschi, *The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones*, in: "International Responsibility for Environmental Harm", F. Francioni and T. Scovazzi (eds.), London/Dordrecht/Boston, Graham & Trotman, 1991, pp. 299-316, at p. 308 who, however, at the same time seems to suggest that non-observance of Art. 23 would render passage non-innocent. *Contra* J.M. Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 Ocean Development and International Law 399-430 (1993), at p. 408 who observes that "[t]he transportation of a cargo that is so risky that it could be considered akin to a wilful act of serious pollution would thus be prohibited under" Art. 19.

should be made for threats to pollution of the territorial sea resulting from maritime casualties that take place in the territorial sea or beyond. Although not explicitly referred to in the LOSC, a coastal State retains in principle a right vested in general international law and based on its sovereignty over the territorial sea, to take and enforce measures to protect its interests. Such measures must at all times be reasonable, which requires taking account of such general principles as necessity and proportionality.[48] It seems acceptable not to regard maritime casualties any longer as "passage" under Article 18 or, alternatively, as something short of having a "direct bearing on passage" under Article 19(2)(l). In either case, a ship involved in a maritime casualty and polluting or threatening to pollute the territorial waters of a coastal State would lose its right of innocent passage.

So-called 'leper ships', *viz.* ships not involved in a maritime casualty, but that are nevertheless likely to cause a serious incident with major harmful consequences *inter alia* to the marine environment, would not be able to exercise the right of innocent passage either. This does not mean that a coastal State can deny lateral passage to such ships under *all* circumstances, for example in cases of distress. Even then, however, the interests of the ship have to be balanced with the interests of the port/coastal State involved.[49]

Given that the list of activities in Article 19 is non-exhaustive, it is important to note that no mention is made of activities relating to ships' routeing systems, ship reporting systems (SRSs), or vessel traffic services (VTSs). However, as ships' routeing systems in the form of sea lanes and traffic separation systems (TSSs) are dealt with in Article 22 LOSC, it may be presumed that their violation does not affect the vital interests of the coastal State, and cannot be presumed to be an "activity not having a direct bearing on passage" under Article 19(2)(l), or otherwise be considered as an activity rendering passage non-innocent.[50] It would seem that if this had been desired, reference accordingly should have been inserted in the list of Article 19(2). The matter, however, is subject to interpretation and, in any case, the coastal State may prescribe the ('safe') sea lane to be used; in case of non-compliance no other route for innocent passage

[48] Art. 221 LOSC confirms the coastal State right with respect to maritime casualties that occur beyond the territorial sea. Implicit therein is a similar or more extensive right for maritime casualties in its territorial sea.

[49] State practice shows many examples of 'leper ships' that are denied entry into the territorial sea for fear of harm to the interests of the coastal State. Examples include the *Cristos Bitas* (1978), *Andros Patria* (1978), *Prinsendam* (1980), *Eastern Mariner I* (1981), and *Stanislaw Dubois* (1981), all noted in G.C. Kasoulides, *Vessels in Distress. 'Safe Havens' for Crippled Tankers*, 11 Marine Policy 184-195 (1987), at pp. 185-186. Recent cases include the *Toledo* (1990) which led to a judgment by the Irish High Court (*Act Shipping (PTE) Limited v. The Minister for the Marine, Ireland*, 7 February 1995, Doc. no. 2749J (ANK)), and the *Long Lin* (1992) leading to a judgment by the Netherlands' Judicial Division of the Council of State (10 April 1995, R01.92.1060, commentary in *Nederlands Juristen Blad*, No. 23, 299 (1995)).

[50] *Cf.* H. Ringbom, *Environmental Protection and Shipping. Prescriptive Coastal State Jurisdiction in the 1990's*, Oslo, Marius Nr. 224, 1996, p. 19, n. 36.

may be available.[51]

The issue of SRSs and VTSs is different since these were dealt with only superficially during UNCLOS III[52], and there is no explicit reference to them in the LOSC. Nevertheless, in this particular context it seems justified to regard violations of SRSs and VTSs of the same order as violations of ships' routeing systems, arguably not leading to non-innocent passage. Again, this does not leave the coastal State empty-handed as it can still use its powers under Articles 27 and 220(2), but not the power under Article 25(1) to exclude ships from its territorial sea.

3.2 Relation with penalties

Despite their incorporation in a separate section 7 of Part XII, safeguards unquestionably form an inseparable part of the distribution of enforcement powers between the actors involved in vessel-source pollution, and as such an essential component of the environment/navigation balance in the LOSC. The close interrelationship between enforcement and safeguard provisions is illustrated by the numerous references to section 7 in the enforcement provisions.

Article 230(2) is directly linked to the phrase "wilful and serious pollution" by providing that:

> Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.

First of all it is important to realize that the scope of this provision is limited to the issue of the "prevention, reduction and control of pollution of the marine environment". In case of relevant violations committed beyond the territorial sea, paragraph (1) of Article 230 allows for the imposition of monetary penalties only. Paragraph (2) stipulates that this also applies to violations committed in the territorial sea, except for "a wilful and serious act of pollution"[53], and passage thus becomes non-innocent. Violations other than discharge violations, for example of CDEM standards, can under Article 230(2) not lead to non-monetary penalties, since they cannot be considered 'acts' of pollution. Article 230(2) does not enumerate which non-monetary penalties can be imposed, although imprisonment comes first to mind.[54] Moreover, the provision does not

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[51] See Hakapää 1981, *supra* note 8, p. 186.

[52] See E. Gold, *The Surveillance and Control of Navigation in the New Law of the Sea: A Comment*, 3 Ocean Yearbook 126-134 (1982).

[53] The fact that Art. 230(2) uses "a" with respect to "act", whereas Art. 19(2)(h) uses "any", seems insignificant.

[54] Rosenne and Yankov 1991, *supra* note 4, p. 370 observe, however, that "[a]lthough it is not stated expressly (as in article 73). it is taken for granted that the penalties imposed by the coastal State may not include "any other form of corporal punishment"."

limit coastal States with respect to the type of jurisdiction. Reference is only made to the type of penalties, and the choice of procedure, criminal or administrative, is left to the discretion of the coastal State.

3.3 State practice

3.3.1 Innocent passage in national legislation

State practice on the right of innocent passage for foreign ships traversing the territorial sea is categorized in six different groups of States. No account is taken of declarations upon signature/ratification/accession of the LOSC, as the focus is not so much on the recognition of the right of innocent passage as such, but rather on the way in which States have incorporated this right in their legislation. Consequently, States which have enacted broadly formulated provisions which ensure conformity with applicable international conventional and customary rules, thereby presumably covering the right of innocent passage, have neither been listed.

The first group of 4 States has enacted legislation which closely follows or copies Articles 18 and 19 LOSC, includes a list of activities modelled on Article 19(2), and uses the exact wording of subparagraph (h) of that provision:

State	Instrument	State	Instrument
Bulgaria	Arts. 19 and 20 1987 Act	Indonesia	Art. 12(2) 1996 Act[a]
France	Arts. 1-3 1985 Decree	Trinidad and Tobago	S. 11 + 12 1986 Act[b]

a The right of innocent passage is lost if the vessel engages in one of the activities prohibited by the LOSC "and/or by another international law." This seems thus non-exhaustive. The Elucidation to Art. 12(2) 1996 Act refers to and copies Art. 19(2) LOSC.

b Note that the right of innocent passage applies in archipelagic waters, and only implicitly in the territorial sea.

In addition, this group may also be recognized to include a country like **Finland** which has not introduced specific legislation on innocent passage but, on the other hand, has incorporated the LOSC as a whole in its legislation.[55]

The following 15 States have modelled their legislation on Articles 18 and 19 LOSC, have incorporated a list of activities modelled on Article 19(2), but use different wording with respect to subparagraph (h) of that provision:

55 1996 Act and Decree of Finland.

State	Instrument	State	Instrument
Antigua and Barbuda	S. 15(1)(f) 1982 Act[a]	Korea (South)	Art. 5 1977 TSA[f]
Bahamas	S. 2 + 5 1993 Act[a]	Poland	Arts. 7-9 1991 Act[g]
Barbados	Art. 7 1977 Act[b]	Romania	Arts. 8-9 1990 Act[h]
Belize	Arts. 11 and 12 1992 Act[a]	St. Kitts and Nevis	S. 15 + 16 1984 Act[a]
Equatorial Guinea	Art. 7 1984 Act[c]	St. Lucia	S. 15 + 16 1984 Act[a]
Grenada	S. 17 1989 Act[b]	St. Vincent & Grenadines	S. 10 + 11 1983 Act[b]
Iran	Arts. 5 + 6(g) 1993 Act[d]	Yemen	Art. 6 1977 Act[i]
Jamaica	S. 13 + 18 1996 Act[e]		

a "Any wilful act of pollution calculated or likely to cause damage or harm to [State], its resources or its marine environment."
b "Any act of pollution calculated to or likely to cause damage or harm to [State], its resources or its marine environment."
c "Any act of serious international pollution contrary to international law;"
d "Any act of pollution of the marine environment contrary to the rules and regulations of" Iran. See protest by the United States in *LOSB*, No. 25 (1994), p. 101; response by Iran in *LOSB*, No. 26 (1994), p. 35; protest on behalf of the European Union in *LOSB*, No. 30, (1996), p. 60; and Iranian Note No. 641/1206 in *LOSB*, No. 31 (1996), p. 37; protest by Qatar in *LOSB*, No. 32 (1996), p. 89.
e "the wilful discharge of any substance which causes pollution, in contravention of the" LOSC.
f "The discharge of pollutants exceeding the standards as provided for in the Presidential Decree" (see below).
g "Any act of wilful pollution".
h "Wilful and serious pollution, of any kind, of the water and the atmosphere".
i "Any act of wilful and serious pollution prejudicial to human health, living resources or the marine environment".

Of particular interest here is the case of **South Korea**. Article 6 1978 Decree stipulates that the standards mentioned in Article 5 1977 TSA are provided by Articles 5, 11, 14(1), and 16(1+2) 1977 Act. Since these discharge standards are probably comparable or identical to those prescribed in MARPOL 73/78, their violation will make passage non-innocent. Mere violations of MARPOL 73/78 discharge standards were surely not intended to amount to wilful and serious acts of pollution.

The further four categories have been displayed in Table II without references to the legislation, as the phrase "wilful and serious pollution" is nowhere incorporated *verbatim* or even with modifications. The 16 States in group **III** explicitly confirm the right of innocent passage in their legislation, but without incorporating the list of activities of Article 19(2) LOSC. One aspect in which they distinguish themselves from group **IV** is that a definition of innocent passage which is consistent with Article 19(1) has been embodied. Group **IV** thus embodies 26 States that explicitly acknowledge a right of innocent passage, but without providing a definition or a list of activities that render passage non-innocent. Many of these States use references such as "the right of innocent passage in accordance with international law". The legislation of the 8 States list-

ed in group **V** does not speak of a "right of innocent passage" but use words which seem to have the intention to grant such a right to foreign ships navigating in their territorial sea. Finally, whereas all the foregoing States *explicitly* recognize the right of innocent passage, the 11 States in group **VI** do so *implicitly*.

Table II
The right of innocent passage in national legislation.

Group III	Group IV		Group V	Group VI
Brazil	Argentina	Qatar	Angola	Canada
China	Bangladesh	Russian	Egypt	Chile
Comoros	Cape Verde	Federation	Honduras	Denmark
Djibouti	Colombia	Senegal[a]	Ivory Coast	Germany
Dominica	Costa Rica	Seychelles	Kiribati	Ireland
Guyana	Estonia	Solomon	Lithuania	Morocco
India	Fiji	Islands	Marshall	Portugal
Maldives	Guatemala	Thailand[a]	Islands	Sao Tome &
Myanmar	Iraq	United Arab	Tuvalu	Principe
Pakistan	Mauritania	Emirates		Spain
Somalia	Mauritius	United		Sweden
South Africa	Mexico	Kingdom[a]		Tunisia
Sri Lanka	Nicaragua	United States[a]		
Sudan	Norway	Uruguay		
Syria	Oman	Vanuatu		
Ukraine				

a Formulations expressing conformity with the 1982 Convention.

Responses of the ILA Committee members

Of the nine respondents (from **Canada**, **Chile**, **China**, **Denmark**, **Finland**, **France**, **Ghana**, **Japan** and **Sweden**), only one reports that, within the legislation of the State for which they report, the requirement of innocent passage is explicitly applied in the context of vessel-source pollution. As has been indicated above, **France** has incorporated Article 19(2)(h) LOSC verbatim in Article 3(8) 1985 Decree. The situation in **Finland** is difficult to categorize as it in fact incorporates the entire text of the LOSC into its national legislation.[56] None of these States has defined the elements of 'wilful' and 'serious'.

Concluding, of the 151 States that currently have a territorial sea[57] a number of 81 States has thus been identified that explicitly or implicitly recognize the right of innocent passage in their legislation. Admittedly, however, the state

[56] See footnote 55 and accompanying text.

[57] J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1996 (2nd ed.), p. 149.

practice grouped in category VI is not always equally persuasive. Implicit recognition is more than once founded on the presumption that a State regards the right of innocent passage as one of the "established rules of international law" or similar formulations.

Conversely, what state practice *does* point out is that only very few States stick closely to the text of Articles 18 and 19 LOSC. Whereas a mere 5 States (including Finland) seem to copy subparagraph (h) of Article 19(2), 15 others use terminology which deviates in more or less considerable ways from that provision. When applied accordingly, these deviations would bring a different set of activities under the scope of Article 19. Caribbean States dominate within this group although minor differences exist between them as well. Even these 20 States, however, do not specifically define the terms 'serious' and 'wilful'.

The incorporation of the definition of Article 19(1) in the state practice in group III could reflect adherence to the approach under the TSC instead of the LOSC. Alternatively, the list of activities and specifically subparagraph (h), could have been laid down in more detailed implementing legislation, or applied on a case by case basis.

3.3.2 Penalty provisions in national legislation

Controversies on the correct interpretation of Article 230 seem largely absent or at least not related to the purpose of our examination.[58] Worth mentioning is that **France** in its declaration upon signature of the LOSC observes that:

> The provisions of article 230, paragraph (2), of the Convention shall not preclude interim or preventive measures against the parties responsible for the operation of foreign vessels, such as immobilization of the vessel. (...)

This declaration emphasizes correctly that the prohibition to impose non-monetary penalties in cases other than non-innocent passage, in no way affects other enforcement powers such as detention, subject to applicable procedures of bonding.

The main problem with the analysis of state practice on safeguards is that these are not necessarily found in the principal laws governing vessel-source pollution, but often in Penal Codes or enactments containing rules of criminal procedure or the like. The ensuing analysis of state practice on paragraphs (1) and (2) of Article 230 (referred to as Article 230) focusses on provisions in legislation that provide penalties for violations related to vessel-source pollution.

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[58] Note that the 1994 US Commentary, *supra* note 17, observes that "Article 230 applies only to natural persons aboard the vessel at the time of the discharge." This may be read to imply that the safeguard contained in Art. 230(2) does not extend to foreign persons who own, operate, or are otherwise associated with the vessel. This issue is currently dealt with in the *United States of America v. Royal Caribbean Cruises Ltd.* Case (District Court of Puerto Rico, Cr. No. 96-333 (PG), Indictment 11 December 1996).

State practice is categorized on the basis of the understanding that Article 230 reserves non-monetary penalties for discharge violations committed in the territorial sea that amount to non-innocent passage. As regards the location of the violation, the analysis of state practice distinguishes between the territorial sea, the EEZ, and provisions which either do not refer to the location, or rather to several maritime zones. As regards the type of the violation, a distinction is made between discharge violations and other violations, the latter of which cover violations in general, CDEM violations, or other. With respect to the type of penalty, a distinction is made between monetary penalties only, non-monetary only, or both monetary and non-monetary.

Important to realize is that this state practice takes only legislation into account, and not actual cases where penalties are imposed. As Article 230 concerns the *imposition* of penalties, breaches can occur only then and not in a prior phase.[59] Consequently, enactments allowing for non-monetary penalties where this is not envisaged in Article 230 only give the *possibility* of a breach of Article 230.

The analysis only identified two States, **Finland** and **Sweden**, whose legislation excludes the possibility of imposing other than monetary penalties for violations of vessel-source pollution, except for an act of serious and intentional pollution within the territorial sea, which can still lead to imprisonment.[60] Even though Swedish legislation does not explicitly recognize the right of innocent passage for merchant ships in general[61], and certainly not with respect to vessel-source pollution in particular, this penalty provision indicates that a direct link exists between innocent passage and vessel-source pollution. This link is even more apparent in the Finnish situation due to the special constitutional process of treaty implementation.[62]

Apart from these examples, the overall impression is that much legislation does not exclude the possibility of a breach of Article 230. Most striking are certain statutory violations with respect to which only non-monetary penalties are envisaged, *viz.* by **Germany**, **Nigeria**, the **Philippines** and the **United States**.[63] However, Germany could in practice apply non-monetary penalties only with respect to discharges in the territorial sea. The other three States link these non-monetary penalties to non-discharge violations and would therefore seem always inconsistent with Article 230. Moreover, imposing both monetary and non-monetary penalties with respect to discharge violations committed within the EEZ, as for example **Romania** does, would be more inconsistent with

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[59] For some States, like the Netherlands, the possibility even exists that the executive intervenes to prevent that penalties imposed by the judiciary are in practice also actually enforced, for example in cases where this would lead to conflict with that State's international obligations.

[60] Sec. 28 1979 Act of Finland; Sec. 2 1996 Act of Sweden.

[61] Sec. 3 1992 Ordinance of Sweden recognizes the right of innocent passage for State vessels.

[62] See the text accompanying footnote 55.

[63] Sec. 330 and 330a 1987 Penal Code of Germany; Sec. 6 1988 Act of Nigeria; Sec. 14 1990 Act of the Philippines; and 33 U.S.C. § 2716(b)(3) of the United States.

Article 230 than where such violations are committed in the territorial sea, as for example **Malaysia** does.[64]

A possibility of breach of Article 230 even exists where States allow both monetary and non-monetary penalties for discharge violations in the territorial sea. Although it seems likely that many States, in determining the type of penalty, take account of such elements as wilfulness and seriousness, only few States explicitly say so. Interesting to note is that several of the States (**Denmark**, **Germany**, **Greece**, **Italy**, the **Netherlands**, and the **United States**[65]) which explicitly take these elements into account, allow in principle imprisonment for less serious offenses that have not been committed wilfully (for example only knowingly). As Italy and, in one case the United States, limit this to discharge violations in the territorial sea, this could be some indication of their interpretation of the elements 'wilful' and 'serious' in Article 19(2)(h).[66]

Specific attention is given to the States listed in Group I and II in section 3.3.1 above, that have incorporated the list of activities of Article 19(2), and have more or less faithfully reproduced subparagraph (h). **Belize** and **Bulgaria** do apparently not intend to impose other than monetary penalties, even though their provisions are directly linked to non-innocent passage.[67] **Antigua & Barbuda**, the **Bahamas**, **Grenada**, **Jamaica**, **St. Kitts & Nevis**, **St. Lucia**, **South Korea**, and **Trinidad & Tobago** envisage both monetary and non-monetary penalties in provisions directly linked to non-innocent passage.[68] **France**, **Poland**, **Romania**, and **Yemen** do not have a specific penalty provision linked to innocent passage, which could indicate that the entire range of penalties can be applied. Finally, **Equatorial Guinea**, **Iran**, and **St. Vincent & Grenadines** have no penalty provisions at all (at least not in the legislation under scrutiny). With respect to these latter three States this could also imply a claim to impose various types of non-monetary penalties.

Apart from these observations it is very hard to draw more specific conclusions. To some extent this is due to the fact that some of the legislation analyzed has a general nature and does not specify location and type of violation. Possibly, such distinctions nevertheless exist in more specific legislation. Perhaps these findings should also be seen in the light that States will usually avoid limitations on their enforcement powers. The possibility of imposing non-

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[64] Art. 13(b) 1986 Decree of Romania; and Sec. 27(2) 1974 Act of Malaysia.

[65] Sec. 59 1993 Act of Denmark; Sec. 324 and 326 1987 Penal Code of Germany; Art. 13 1977 Law of Greece; Art. 20(2) 1982 Law of Italy; Art. 1, 2 and 6 1950 Act of the Netherlands; and 33 U.S.C. § 1319(c) of the United States.

[66] In the *Caribbean Cruises* Case, *supra* note 58, the United States District Court of Puerto Rico observed that a 30-gallon spill cannot be regarded as serious, and that non-monetary penalties are thus excluded (Opinion and Order, p. 8).

[67] Sec. 13(2) 1992 Act of Belize; and Art. 78 1987 Act of Bulgaria.

[68] Sec. 20 1982 Act of Antigua & Barbuda; Sec. 6 1993 Act of the Bahamas; Sec. 23(2) 1989 Act of Grenada; Sec. 18(2) 1996 Act of Jamaica; Sec. 18 1984 Act of St. Kitts & Nevis; Sec. 18 1984 Act of St. Lucia; Art. 7(1) 1977 TSA of South Korea; and Sec. 30(2) 1986 Act of Trinidad & Tobago.

monetary penalties could then be regarded as fulfilling an unforeseen need.

Responses of the ILA Committee members

The respondents from **Australia**, **Belgium**, **Chile**, **China**, and **France** observe that, within the legislation of the State for which they report, only monetary penalties are applied.[69] Information supplied by the respondents of **Finland** and **Sweden** led to the observations above. The respondents from **Germany**, and the **Netherlands** confirm that their State's legislation allows in principle also imprisonment in cases other than Article 230(2). The respondent of the **United States** confirms that 'knowing' violations can lead to non-monetary penalties. The respondents from **Ghana**, **Greece**, **Italy**, **Nigeria**, the **Philippines** observe that the safeguards, amongst which Article 230, apply due to the fact that they are Party to the LOSC. This may reflect the belief that legislation that is not in conformity with the LOSC may never be applied to foreign vessels.[70]

4. CONCLUSIONS

'Generally accepted' international rules and standards (GAIRAS) form a distinct category of rules, not primarily intended to refer to rules of customary law, decisions of international organizations, or treaty law. The presumption is that the notion of 'generally accepted' has a supplementary value, ruling out redundancy, with the potential of imposing new obligations on States Parties to the LOSC.

Although the First Report did not speak out in favor of one particular interpretation of 'generally accepted', it indicated that "quantitative as well as functional majorities appear important".[71] Although the analysis of state practice suggested in the First Report is not followed, there seems to be some indication that port and coastal States take a pragmatic approach by regarding as 'generally accepted', rules and standards contained in regulatory conventions, protocols, annexes and amendments, that have entered into force. Coastal States also seem to believe they have a right under customary international law to prescribe and enforce GAIRAS irrespective of flag within their maritime zones. This suggests that the rules of reference for vessel-source pollution and the obligations linked thereto have customary status. These two findings once more illustrate that the pivotal role already accorded to IMO in the LOSC, has been further enhanced.

The term 'applicable' concerns the relation between States involved in spe-

[69]With respect to France, Arts. 2 and 3 1979 Law and Art. 7(1) 1983 Law could have been overlooked.

[70]The respondent of **Japan** argues that as its Law for the Prevention of Maritime Pollution and Maritime Disaster "is applicable with regard to foreign vessels only to activities carried out within the territorial sea", there are no specific provisions for safeguards.

[71]First Report, p. 177.

cific enforcement cases. International rules and standards have to be 'applicable' in the mutual relationship between these States as a condition for enforcement. When these States have accepted 'matching' rights and obligations with respect to certain rules and standards, then these are 'applicable' in their mutual relationship. As GAIRAS are in principle included in the term 'applicable', the latter will potentially cover a broader set of rules and standards than under the concept of 'generally accepted'. As state practice seems to indicate that the rules of reference and the obligations linked thereto have customary status, GAIRAS are presumably always also 'applicable'.

State practice with respect to Article 19(2)(h) indicates that only a small number of States incorporates an activity similar to "wilful and serious pollution" in its legislation. In addition, none of these States define or give guidelines for the interpretation or application of the elements 'wilful' and 'serious'. Also, even though several States take the elements 'wilful' and 'serious' into account in deciding on the type of penalty, and others are likely to do this as well, a direct link between the concept of innocent passage and penalties could only be identified in the case of Finland and Sweden. That such a link nevertheless exists for other States as well could become clear through an analysis of penalties actually imposed for violations. Unfortunately this cannot be undertaken here.

Something which the next Report of the Committee might take up is the relevance of the distinction between innocent and non-innocent vessels for the exercise of coastal State enforcement jurisdiction (in the phase before adjudication). A recent survey suggests that state practice does not consistently make such a distinction and that although the power of exclusion or diversion from the territorial sea is in principle reserved for non-innocent vessels, some coastal States claim this power in situations other than in cases of "wilful and serious pollution".[72]

[72]K. Hakapää and E.J. Molenaar, *Innocent Passage - Past and Present*, (forthcoming).

COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION

WORKING SESSION

WEDNESDAY, 27 MAY 1998, 11:00 AM

Chair: Professor Ivan Shearer (Australian Branch)

The Chair declared the session open and introduced the Chair of the Committee and the Assistant Rapporteur.

Professor Hakapää (Chair of the Committee, Finnish Branch) commented that the two years since the Helsinki Conference had been eventful ones for the Committee. Professor Soons had stepped down as Chair on his appointment as Director of Studies of the ILA and Professor Hakapää was delighted to be appointed in his place. Mr Erik Jaap Molenaar had been appointed as Assistant Rapporteur, having previously acted as Secretary. Professor Hakapää noted that Mr Molenaar had recently submitted his doctorate on the topic of coastal State jurisdiction over Vessel-Source Pollution at the University of Utrecht. He also noted that Professor Franckx had been unable to participate fully in the work of the Committee prior to this conference, but that he would be rejoining the Committee shortly. The report presented at the Taipei Conference was the result of the hard work of Mr Molenaar.

Professor Hakapää explained that the Committee had actually been working on vessel-source pollution and had not addressed the issues of coastal State jurisdiction generally. Nevertheless, it had been his preference to limit the number of issues discussed so that a few issues could be considered thoroughly. It was a central objective to produce results which could facilitate the interpretation and application in practice of the relevant parts of 1982 United Nations Convention on the Law of the Sea (LOSC).

He noted that, because of practical difficulties, it had been impossible to convene a meeting of the Committee in the period since the Helsinki Conference, but the more active part of the membership had been involved through electronic means in the preparation of the report. There would, however, be two meetings of the Committee in Taipei.

Mr Erik Jaap Molenaar (Assistant Rapporteur, Netherlands Branch) gave a brief introduction to the Second Report of the Committee. He commenced by discussing the term 'applicable' which appears in the provisions on enforcement

jurisdiction over vessel-source pollution in Part XII of the LOSC. 'Applicable' is different from the concept of 'generally accepted' in that it does not require a certain level of acceptance. Rather, it is intended to denote a specific set of rules and standards. The concept must be seen in the context of the relationship between States in specific enforcement cases. If these States have, through various possible processes, accepted 'matching' rights and obligations in respect of specific rules and standards, these rules and standards will also be 'applicable'. For example, one of the States could be a party to one of the (IMO) regulatory conventions, whilst the other could be a party to the LOSC. By these different processes a 'match' has arisen and rules and standards would be 'applicable'. It seems that 'applicable' rules and standards could be a broader category than those which are 'generally accepted' as they included rules in the specific relationship between the States involved in enforcement.

The report devotes much attention to the assessment of State practice in relation to the concepts of 'generally accepted' and 'applicable'. It is necessary to distinguish between what States regard as rules and standards that are 'generally accepted' and what they regard as the criteria that have to be met before rules and standards become 'generally accepted'. Relevant to the first aspect are the status of regulatory conventions and the approach taken by regional agreements on port State control (MOUs). With respect to the second aspect, much care should be taken to ensure that conclusions are based on situations relevant to the concepts of 'generally accepted' and 'applicable'.

The basic conclusion derived from this analysis is that States apply rules and standards in regulatory conventions from the moment of their entry into force, and if they are parties thereto. Moreover, despite uncertainties it seems possible to deduce that coastal States act as if they have a customary right to apply these rules and standards to all ships irrespective of flag in their maritime zones. This would imply that the rules of reference and the obligations linked thereto have customary status. Consequently, 'generally accepted international rules and standards' (GAIRAS) are always also 'applicable'.

The second part of the report addresses the concept of 'willful and serious' pollution in relation to the regime of innocent passage, which restricts coastal State sovereignty in the territorial sea. Only ships in non-innocent passage are once again faced with full coastal State jurisdiction. Article 19 of the LOSC enumerates activities which render passage non-innocent, one of which is 'willful and serious pollution'. In addition, it should be observed that a right of innocent passage does not exist, either for so-called 'leper' ships, or in situations where a right of intervention arises. State practice indicates that very few States explicitly incorporate the elements of 'willful and serious' in their legislation. Although many States probably take elements of intent and seriousness into account in relation to penalties, a direct link between the imposition of penal-

ties and 'willful and serious' pollution could only be ascertained in two cases.

The Chair thanked Mr Molenaar for his presentation and opened the floor to discussion.

Professor Maurice Mendelson (British Branch) raised the issue of what he perceived to be a lack of clarity in relation to the way in which GAIRAS were described. GAIRAS were not automatically rules of customary international law, but were generally accepted as a matter of conventional law. Due to the essentially technical nature of GAIRAS it is also hard to imagine that they would become customary international law. It is therefore the LOSC that triggers their application. There remains a question as to whether a State that is not party to the LOSC could apply GAIRAS where they were not otherwise entitled to do so. In Professor Mendelson's opinion, they could not.

The Chair expressed agreement with Professor Mendelson. He referred to the *North Sea Continental Shelf Cases* in which the ICJ had stated that a proposed rule of customary international law must be of a 'fundamentally norm-creating character'. Although some GAIRAS may be in that class, others were arbitrary standards.

Dr Michael White (Australian Branch) commented that in his view it was important to look more widely than the LOSC when considering coastal State jurisdiction over marine pollution. In particular, he noted that in relation to maritime casualties outside the territorial sea the Intervention Convention was applicable. Port State control could be important in relation to such conventions as MARPOL 73/78, SOLAS 74, STCW 78 as well as ILO instruments. In addition, the 5 MOUs on port State control ensured that deficient ships were tracked from port to port. One example was the Tokyo MOU in the Asia Pacific region. Finally, he noted that environmental principles and conventions could be relevant, such as, for example, Agenda 21 — which has in fact overtaken the LOSC.

Mr Molenaar, in reply to Professor Mendelson's question, explained that the point he had made was not that GAIRAS themselves were customary international law, but that the rules of reference and the obligations linked thereto, which contain GAIRAS, were customary international law. He agreed that technical rules and standards were unlikely to become customary international law. Rather than attributing this to a lack of a 'fundamentally norm-creating character', a requirement which has not reappeared in later jurisprudence of the ICJ and is not accepted as a separate requirement in literature, this seems to be due to the fact that the rules in this area change so quickly that it is difficult to develop *opinio juris* in respect of them.

In relation to Dr White's comments, Mr Molenaar noted that the Intervention

Convention was a separate issue since the work of the Committee so far had focussed on intentional pollution. In his view the LOSC had not been overtaken by Agenda 21, but complements it and has a different character.

The Chair noted that the question of liaison between Committees with overlapping mandates was a difficult one that had been considered by the members of the Committee, and it may be that there could be some overlap here with the Committee on the Formation of Customary International Law. He noted that in the LOSC, Article 46 is normative, while Article 47 contains arbitrary measurements.

Professor George Walker (American Branch) commented that the clauses in the LOSC that provide that later treaties cannot be inconsistent with the LOSC were relevant to the discussion.

Judge Alexander Yankov (Bulgarian Branch) raised the issue of the interface between the LOSC and the UNCED, and in particular Chapter 17 of Agenda 21. In his view Agenda 21 had complemented and assisted the implementation of the LOSC. As a result, the follow up of UNCED and its implications on the degradation of the marine environment deserved further examination in the report. In addition, he was of the opinion that the study of port State control and jurisdiction should be considered by the Committee. It appeared to be a new and important trend, far beyond what had been considered when Article 218 of the LOSC was drafted.

Judge Thomas Mensah (President of the Law of the Sea Tribunal) commented that there was a difference between port State and coastal State jurisdiction. While port State jurisdiction was essentially a right of control, coastal State jurisdiction was a right to regulate. He believed that port State jurisdiction preceded the LOSC by at least two decades, and gave as examples the 1954 Oil Pollution Convention and MARPOL 73/78. Port State jurisdiction was designed to complement flag State jurisdiction when the flag State was not willing or able to regulate.

Judge Dolliver Nelson (British Branch) noted that Agenda 21 did not in any way modify the terms of the LOSC, although it did introduce new ways of looking at maritime affairs such as, for example, the precautionary approach. In relation to the comments by the Chair, Judge Nelson commented that there was an issue as to whether States could change the content of the so-called 'arbitrary' provisions by later practice and custom.

Mr Yann-huei Song (Chinese (Taiwan) Branch) thought that the application of Part XII of the LOSC did not constitute a great difficulty since nearly all of the major maritime States were parties to the LOSC. He also noted that the pre-

amble to the LOSC provides that 'matters not regulated by the convention continue to be governed by the rules of general public international law'. Finally, he noted that Article 189 of the LOSC provides that States shall co-operate on a global and regional basis directly or through a competent international organisation like the IMO.

Mr Renato Gazmen (Philippine Branch) drew attention to the fact that the situation of the Philippines is exceptional, since it encompasses the coastlines of more than 7,000 islands or islets. He also thought that the Committee should consider including accidental and harmful discharges in addition to wilful and serious discharges.

Mr Molenaar agreed with the distinction made by Judge Mensah in relation to coastal State and port State jurisdiction. Research indeed suggests that port State jurisdiction is becoming far more important than coastal State jurisdiction, although obviously that conclusion depends on how port and coastal State jurisdiction is defined.

Judge Mensah raised the point that international rules are applicable if they have been accepted by the flag State or coastal State and noted the possibility that a coastal State which is a party to a regulatory convention containing the 'no-more-favourable-treatment' (NMFT) clause may impose a rule or standard on a State not party to that particular convention. Where flag States do not object to the fact that ships flying their flag, that are voluntarily in ports of the coastal State, have to comply with these regulatory conventions, this NMFT-clause would seem to have an impact on the concept of 'generally accepted'.

Ms Atsuko Kanehara (Japan Branch) commented that, in her opinion, the focus of the report in section 3, which deals with 'willful and serious' discharges, was less clear than in section 2. She was of the view that the Committee should devote more effort to the issue of determining which discharges are 'willful and serious'.

Mr Molenaar replied that the question of what constitutes 'willful and serious' was a very difficult issue. He noted that States often only take elements of intent and seriousness into account in relation to penalties. One exception was South Korea, which links the discharge standards of MARPOL 73/78 to the concept of innocent passage, thus implying that a discharge in violation of MARPOL 73/78 renders passage non-innocent. This had surely not been intended by the negotiators at UNCLOS III. In relation to the comments by Judge Mensah, he replied that the relevance of the NMFT-clause for the concept of 'generally accepted' is hard to determine as the LOSC does not use this concept in relation to port State jurisdiction. In principle, international law does not restrict port State prescriptive jurisdiction, although there may be non-legal

considerations, such as economic impact, which motivate port States not to prescribe standards that are more stringent than those in regulatory conventions.

Professor Hakapää concluded that the session had been productive and that there were a number of good ideas to take into account for future work. He emphasised that the report was merely an interim report and that the final report would take note of the comments made in the working session.

The Chair thanked the participants, and in particular Professor Hakapää and Mr Molenaar, and declared the session closed.

REPORTER: CHRISTOPHER WARD