The Freedom of Navigation in International Law and the Utility of International Society Discourse

Nkeiru Joe[1]

Abstract

In the international law of the sea, the emergence of new actors and systems influencing relations between states has lead to evolving rules and calls for the redefinition of the traditional issues such the allocation of jurisdiction and rights to states in its maritime zones. In the maritime domain, this is seen thrice in the evolution of the various maritime zones in the United Nations Conferences for the Law of the Sea (UNCLOS I, II and III). In the maritime domain, there are certain actions that are not dependent on any state's consent. One of such is the rule of freedom of navigation. This paper, argues for the possibilities of concomitance between international law and studies in international society based on the growing recognition of the importance of examining the sociological and historical element in rule development. This paper focuses on a rule in the international law of the sea with the aim of determining the extent to which norms have caused changes in rule development, if any. This method, known as the English School method of international relations, acknowledges the benefits of international law positivism in highlighting generality with the benefits of a normative discourse in highlighting alternatives and the utility of compliance. So, although the maritime domain is rooted in a state system, one where the parts interact as a whole, a branching-out analysis towards the normative discourse in the development of this rule will facilitate more understanding, as the case-specificity of most issues in the maritime domain cannot be overemphasised.

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[1] Nkeiru is a Flanders Research Foundation (FWO) Doctoral Fellow at the Department of International and European Law of the Vrije Universiteit Brussel, Belgium. She is also an advanced level instructor on the Law of International Organisations at the University of Kent at Brussels: Brussels School of International Studies. Nkeiru.Joe-njoku@vub.ac.be
Nkeiru wishes to thank Prof. Dr. Erik Franckx for his continued support on her ongoing project focusing on the Exclusive Economic Zone.

Electronic copy available at: http://ssrn.com/abstract=1585372

Introduction

In examining the principle of freedom of navigation in international law, this paper's core concern is to examine how the norms in the stages of the development of the freedom of navigation shaped outcomes in international law and International relations between states.

International society, notes Dunne is the dominant diplomatic and normative discourse in the practise of world politics[2] and may be a viable way of analysing international relations between states. International law is also part of this interaction between states and in concurrence with Bull, this paper notes that states in interacting, often highlight a common interest, and in response, form a society where they are bound by rules in their relation with one another and in the development of common institutions within.[3] This paper focuses on the diplomatic and normative discourse in the international law of the sea because this aspect is undeniably a factor in the development and codification of law of the sea principles in international law.[4]

International law is unique in the sense that there is no overarching legislature like there is in a domestic state-centric system. However, the influence of the state is undeniable as international law develops primarily through custom and state practise. States, however, have domestic systems where there are legislative bodies that make rules informed primarily by the need to ensure that its interest is best served. The issue then becomes how states can ensure that its interest is served in international law development, which is a framework where goals are primarily collective in the sense that it targets all participating states.

This paper uses the term 'collective' because the positivist approach, as a widely adopted mode of analysis, and the approach used in this article, incorporates both the argument that states are the key actors in international law and states are primarily concerned with developing rules that apply to states collectively. This is reconciled through the international sources of customary law (where acceptance through state practise and *opinio juris* applies), treaty law (where consent is key). As for the reality

[2] Dunne, Tim. 2001. "New Thinking on International Society." British Journal of Politics and International Relations 3(2):223-244. 233.

[3] Bull, Hedley. 2002. The Anarchical Society: A Study of Order in World Politics. Third Edition. Hampshire: Pelgrave Macmillan. 4

[4] The International Law of the Sea as we know has had three United Nations Conferences with various conventions under its belt. A look at the conference notes not highlights the diplomatic aspect of the development of the law of the sea but also is indicative of the normative dimension. These conferences will feature in this paper to highlight issues and arguments.

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behind this standpoint and its application, international relations theory provides arguments that swing from the standpoint of power politics,[5] to social construction.[6]
It is at this juncture that this paper notes that international law and international relations discourse, especially in relation to the law of the sea, need not develop separately. In doing this, the first section, in setting out the methodological framework applied in examining the relationship between the freedom of navigation, as an international law principle and international society, will identify the influence of norms in this rule's development and codification.
In arguing that the issue of norms and its development is best seen in state practise, this paper's levels of analysis, in the interest of simplicity, will be restricted to the international and the state levels of analysis but will not adopt a top down or bottom up approach as this study's intention is to show how a restricting of any analysis to the former or the latter can be restrictive hence the need for a third way, one that incorporates both modes with norms as the unifying factor.
In doing this, this paper concurs with the argument within the English school of international relations analysis, that international law is central to international society's normative framework.[7] This issue of International society's normative framework as epitomised by the rules of international law notes that studying rules in international law cannot be done without an examination of the normative dimension for herein lies the notion of obligation which underlies any analysis of international law rules.[8] The first section will examine the origins of the freedom of navigation and its normative underpinnings under the rubric 'equality'.

The second section will examine the progression of the norm of equality and how it developed in the international law of the sea during the United Nations conferences on the law of the sea. Without going to much detail as to the various debates during the conference, this section will show that despite the influence of power politics and/or customary law, it was as if the norm of distributive justice as demonstrated by the units at play had a life of its own. So, just as freedom of navigation is underpinned

[5] Carr, H., Edward. 2001. The Twenty Years' Crises, 1919-1939: An Introduction to the Study of International Relations. Hampshire: Palgrave Macmillan Ltd. 101.
[6] See Particularly, Checkel, T., Jeffrey. 1998. "The Constructivist Turn in International Relations Theory." World Politics 50(2):324- 348.
[7] Wilson, Peter. 2009. "The English School's Approach to International Law." In Theorising International Society, ed. Cornelia Navari. Hampshire: Pelgrave Macmillan England. 198
[8] Ibid. 167.

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internationally through norms and evidenced in customary law, a new process of norm shift is identifiable at a state level. This highlights the methodological plurality that frames this rule's development and its application by states. Instead of taking this to be a detrimental factor in the development and understanding of the freedom of navigation, the methodological pluralism of the English school here becomes advantageous in capturing the rule's essence and how it might evolve in the future.[9] Therefore this section will focus on the emerging norm of distributive justice, which showed the nature of the freedom of navigation as a rule fraught with concern among the units. This is evidenced in the conference proceedings and its influence in the third United Nations Conference and its resulting treaty, namely, the 1982 United Nations Convention of the Law of the Sea.[10]

The last section, in showing how the debate is one that can widen beyond the confines of international law, will highlight the future in the development of the freedom of navigation. This is along the lines of the norm of sustainable development as is seen in international case law and politics. Sustainable development is ongoing in the absence of a codification instrument espousing this norm but the discourse of international law and the English school within the framework of the freedom of navigation can illuminate through discourse in international society and world society, as they may be useful as a bridge between agreements between states, as well as an acknowledgement of the influence of norms in the maritime domain.

Finally this paper does not seek to provide a definitive answer to developing the discourse between international law and international relations in the maritime domain but seeks to show how looking at issues separately can develop this discourse. Hence this paper's ontological position that international law is definitely a sum of its parts but without an examination of each part relative to another, any attempt at developing an interdisciplinary approach is, from the start, fraught with difficulty.

[9] Buzan, Barry. December 1999. "The English School as a Research Program: An Overview and a Proposal for Reconvening. Draft Paper of 15.9.99." In British International Studies Association Conference, ed. BISA Panel. Manchester. 18

[10] December 10, 1982. "The United Nations Convention on the Law of the Sea. United Nations Treaty Series, Vol. 1833, Page 3." Hereinafter referred to as the 1982 LOS Convention.

1. ‘Sovereign Bubbles’ and the Norm of Equality

In international law, the principle of the freedom of navigation is “one of the oldest and most recognised principles in the legal regime of ocean” zone governance.[11] This statement begs an analysis of the genesis of this rule and its acceptance by states as customary international law. Firstly, there is a need to examine this rule’s genesis for though it predates the primary instrument that codifies the international law rules of the sea, namely, the 1982 LOS Convention, identifying reasons for this rule’s recognition in the legal regime of ocean is the key to identifying the normative basis of the rule. Following this examination of the extent to which this principle is recognised as a rule in international law, this sections will highlight any concurrence, if any, in international law and international relations discourse for this article takes the view that before the international law codification of the freedom of navigation, states interacted, so, highlighting factors that framed state relations in rule development is essential in any investigative inquiry.

The freedom of navigation, as a rule in the maritime domain, finds its origin in the development of international law itself[12] and means the ability to traverse through the oceans without hindrance or interference from other states whether coastal or seafaring. Its notable genesis is found in the Grotian treatise on the rights of the Dutch to patrol the seas of the West and East Indies.[13] In noting the Grotian proposition about the nature of the seas as a domain that cannot be owned,[14] and the interconnectedness of human activity on the ocean,[15] this paper observes that the fundamental issue in relation to the freedom of navigation is that of a state’s jurisdiction over its vessels on the basis of state sovereignty.[16] It is an established proposition in international law that a state has absolute control and authority over its

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[11] 8 January 2008. "Statement by Mr Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, 'Freedom of Navigation: New Challenges'." Hamburg: The International Tribunal of the Law of the Sea. 2.

[12] Ibid.

[13] Van Deman, Magoffin, Ralph. 1916. The Freedom of the Sea or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade. A Dissertation by Hugo Grotius Translated with a Revision of the Latin Text of 1633 New York University Press.

[14] Anand, Ram., Prakash. 1982. Origin and Development of the Law of the Sea: History of International Law Revisited. The Hague: Martinus Nijhoff Publishers. 86. This was the initial proposition upon which the freedom of navigation as an international law principle founded.

[15] Ibid

[16] 7 September 1927. "The Case of the S.S "Lotus"." In PCIJ Reports Series A. - No. 10 Judgement No. 9: Permanet Court of International Justice. 19 This case is a seminal case in distinguishing the basis of jurisdiction in international law and the right accorded to vessels on the seas on this basis.

territory.[17] The Grotian position, therefore epitomises a transference of a state's laws, regulations and jurisdiction to persons, properties and acts in the maritime domain because the key concern is to ensure the safeguarding of state interests over its possessions regardless of its activity and because a vessel is considered a state's possession, the freedom of navigation is only an expression of state's sovereign interest on the seas.[18] The vessel is covered by the exclusive jurisdiction of its flag state on the seas,[19] so, just as a state control is unquestionable on land, its ability to transverse the seas is subject to no authority other the state whose flag it flies[20] making it immune to interferences on the basis of another states laws and policies.

Consequently, all states are on equal footing on the high seas, any interference of navigation is essentially interference in the activities of a state over a zone where it has extended the application of its laws and regulation *i.e.* the vessel and this is why interference is only permitted with the consent of the state of the vessel.

This section notes the norm of equality that underpinned the development of the freedom of navigation. As noted by Grotius in his treaties, all states have the right to navigate the high seas without interference for the sea belongs to no one. However, for freedom of navigation to kick in, the act of navigation must take place in a maritime zone beyond a state's territorial waters. Whereas this was initially covered by the cannon-shot rule which was later quantified as three nautical miles from the shore line,[21] the idea being that in the interest of defence, any act on the sea has the capability of reaching a state's land if it is within the three miles parameter, beyond which high seas commences and freedom of navigation prevails.

In other words, three nautical miles landwards is a state's territory and as a result is within a state's sovereignty and from three nautical miles seaward is taken to be high seas and here all states have freedom of movement because out in the high seas, vessels are 'sovereign bubbles'. This is epitomised in the concept of the nationality of

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[17] Ibid. 18

[18] A distinction must be made here between sovereignty, a sovereign right and jurisdiction. Sovereignty is simply supreme power in terms of physical dominion, control and authority; sovereign rights in relation to a subject matter only works to primarily benefit the state concerned but does not necessarily grant to the state concerned supreme power; jurisdiction is the basis upon which a state can regulate acts based on its laws and prosecute in the event of a violation.

[19] The case of the S.S "Lotus", supra note 16, 22.

[20] Ibid, 25.

[21] For more on the development of the Cannon-shot rule see Scovazzi, Tullio. 2000b. "The Slow Pace of Evolution." In The Evolution of International Law of the Sea: New Issues, New Challenges. The Hague: Martinus Nijhoff Publishers. 68-70.

ships. Ships have the nationality of the state whose flag they are flying.[22] On the high seas, all states on equal footing.

In this paper's view, there is no better resonance of the relationship between freedom of navigation and state's control over its vessels than the present law in relation to hot pursuit. The law of the sea, in the 1958 Geneva Convention of the High Seas[23] and the 1982 LOS Convention establishes that even in the event of a violation of a coastal state's laws in its territorial waters, any pursuit of the vessels ceases as soon as it enters its territory or that of another coastal state.[24] Here, the norm of equality, in the sense that an aggrieved state's interest, albeit legitimate, cannot be at the expense of another state's control over its area is evident. This maintains the norm of equality through state sovereignty within its territory in the territorial sea (and on land) and its exclusive jurisdiction over its vessels on the sea.

Essentially, the idea of the 'sovereign bubbles' is clear if the maritime domain is separable from activities in the state's territory but sometimes this is not so clear-cut. For there can be instances where acts in the 'sovereign bubble' can impact areas within state's sovereignty. Moreover, the relationship between freedom of navigation and state control over its possession is seen in a vessel's connection to a state.

Noting this, this section posits that a vessel's act can influence factors that resonate in a state, as acts in the sea are not exclusive to the maritime domain. This can have the potential of affecting the nature of rule development in the law of the sea and its acceptance and applicability in international law. This connectivity is rooted in state politics but is also a determining factor in determining where a coastal state's sovereignty and/or jurisdiction begin and ends. This relationship and how it influences the allocation of jurisdiction and rights meant that the norm of equality, central to international law development had to be re-examined in the diplomatic conferences of the law of the sea.

[22] 1982 LOS Convention, Supra note 10, Article 91.

[23] 1958. "United Nations Convention on the High Seas: United Nations, Treaty Series, vol. 450, p. 11, p. 82." Geneva. Article 23.

[24] 1982 LOS Convention, supra note 10, Article 111(3).

2. The Connection: The Norm of Distributive Justice[25]

By noting the connection of acts in the maritime domain on a state, this paper refers to the influence of rule development on state policies and its acceptance in state relations. This section argues that the connectivity of these issues to the maritime domain is the reason for the extension of the initial norm of equality towards distributive justice. For in fostering equality in relation to ocean usage, leads, in practise, to a situation of 'first come, first served', but where some states are incapable of 'first-coming' or coming at all, 'serving' ultimately benefits some states at the detriment of others.

There is no better example of this connection than the way in which new developments in the technological domain led to the Truman proclamation of sovereign rights to resources. Although at first glance one can argue that this is not connected to the freedom of navigation. It is arguable that where states feel that they must extend the rights they have over their land towards the sea, the extent of rules like the freedom of navigation is re-examined. This is because rule development in the international law of the sea is directly connected to the allocation of jurisdiction, rights and duties of states in the various maritime zones. For, with each rule comes an allocated right to states in relation to the maritime zone.

In the territorial sea, prior to the 1982 LOS Convention, the law was quite cut and dried in the sense that beyond the three mile limit, freedom of the seas applied. Currently, this has disappeared, as the general view during the United Nations conferences was that acts on the sea, due to technological advancement resonate in land even beyond the three-mile limit.[26]

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[25] Armstrong, David. 1999. "Law, Justice and the Idea of a World Society." international Affairs 75(3):547-561. This paper employs Armstrong's usage of the norm of distributive justice but differs from his application in relation to the right to development in the environmental fora employed in examining the concept of a world society

[26] The First United Nations Conference on the Law of the Sea was interested in codifying already existing customary law based on the recommendations of the International Law Commission (ILC). The resultant conventions concurred with the ILC that a right to navigation essentially is the right of a flag state over its vessels but failed to agree on limits of coastal state rights.

For more on the right to navigation see ILC. 4 July 1956. "Report of the International Law Commission on the Work of its Eight Session, 23 April- 4 July 1956. Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)." In Yearbook of the International Law Commission 1956, Vol. II.

The Second United Nations Conference also failed to establish these limits hence the Third United Nations Conference and the resultant convention labelled "the constitution of the oceans".

As we noted earlier, equality, the interest of the whole as opposed to that of a few, was the initial normative foundation in this rule's development. The reason why this principle became an established rule in international prior to the United Nations Conferences was because it was generally considered that this rule preserved state control over its vessels therefore the collective benefit and ownership of open access in the light of trade outweighed any move to appropriate the seas.[27] So, in the international level there was a move to establish a principle that can respect the independence of states even in the maritime domain and in the state level. Here, states like Great Britain who initially opposed the freedom of the navigation,[28] acknowledging that in the interest of trade and development, it was necessary to ensure these freedoms existed.[29]

International relations discourse is not silent in highlighting the reasons that framed the development of this rule. In gradually becoming an established rule on the basis of customary law, international relations approaches such as Neo-realism may argue that these maritime powers intended in maintaining their control of traffic on the seas seeing as they were the primary users.[30] Regime theory may note that sea-faring states recognised that the benefits of maintaining unimpeded access far outweighed any concerns in relation to the risks that may materialise because of the necessary factor of reciprocity.[31]

In acknowledging that most approaches can justify or debunk the acceptance of this principle, this study posits that whatever the approach, an examination of the acceptance of this rule at the state level, through treaty making, especially noting the

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[27] Scovazzi, Tullio. 2000b. "The Slow Pace of Evolution." In The Evolution of International Law of the Sea: New Issues, New Challenges. The Hague: Martinus Nijhoff Publishers.65.

[28] The English jurist, John Selden in his paper "Mare Clausum" is particularly noteworthy as an opponent to the Grotian "Mare Liberum".

[29] Anand, Ram., Prakash. 1982. Origin and Development of the Law of the Sea: History of International Law Revisited. The Hague: Martinus Nijhoff Publishers. 129-130.

[30] Grieco, M., Joseph. 1998. "Anarchy and the Limits of Co-operation: A Neo-realist Critique of the Newest Libreal Institutionalism." International Organization 42(3):485-507. 498 In quoting K. Waltz Grieco notes the concern of states is "not to maximise power but to maintain its position".

[31] As recognised patterns of practice around which expectations converge, Regime theory pertaining to the freedom of navigation shows that states might be interested in the orderliness of function, which a regime lends to a function. For more on this issue begin with Young, R., Oran. 1980. "International Regimes: Problems of Concept Formation." World Politics 32(3):331-356.

Then see particularly, Krasner, D., Stephen. 1982. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." International Organization 36(2):185-205. 186-188.

right of neutrals on the sea, highlights that the general norm of equality resonates in the development of this principle.[32]

The discourse on international society connects the functions of the international law of the sea, as the mechanism that allocates jurisdiction, rights and duties of states in the maritime domain with reasons underpinning the determination of these allocations.

In the first, second and third United Nations conferences of the law of the sea, the freedom of navigation, through normative underpinnings underwent changes in its framework as it allocated jurisdiction, rights and duties to states or units.

Therefore structural and ontological changes within the constitutive units cannot be ignored in examining rule development in the maritime domain.

Primarily, structural issues or the creation of discrete areas of international law, or what Koskenniemi refers to as "specialisation"[33] in regimes such as environmental law, fisheries laws, etc, leads to a situation of definite overlap when one examines the freedom of navigation. In terms of this rule's applicability and acceptance in international law, whether these discrete areas affect outcomes in relation to this rule aside,[34] it cannot be denied that new sectoral interests leads to an open-ended interpretation of this rule in international law. This is only logical to accommodate the various interests in relation to this rule and its application. Therefore, any aspect of vessel navigation on the seas has to contend with various issues depending on the zone where navigation is taking place.

These concerns were highlighted in the United Nations conferences discussions in the following ways:

The first conference was primarily concerned with limit on the seas in response to already existing divergent claims of national sovereignty in high seas areas such as the Latin American claims following the Santiago Declaration[35] and the Truman proclamation of sovereign rights over the continental shelf. Examining the intentions

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[32] See particularly Singh, The Maharaj Nagendra. 1983. International Maritime Conventions: Volume 4- Maritime Law. London: Stevens & Sons Publishers. 2820 -2822. Treaties such as the one between the Argentine Republic and Chile in 1881 acknowledges that the freedom of navigation is guarantee to all flag states; Paris Peace Treaty of 1856 recognises the rights of neutrals to trade in war time.

[33] Koskenniemi, Martti. 2009. "The Politics of International Law- 20 Years Later." The European Journal of International Law 20(1):7-19. 9.

[34] Ibid.

[35] In 1952 Latin American States such as Peru on the basis of this declaration declared 200 miles territorial seas. Having noted the separate system that applies in the territorial seas the absence of freedom of navigation in terms of non-interference, this caused concern amongst sea-faring states.

behind the claims by Latin American states and the United States, the developing regime of exploitation of fisheries and other natural resources of the seas, exploitation of mineral resources and states' economic dependency on these resources was the main motivation behind the Santiago Declaration. In justifying this claim to areas of national sovereignty, these states felt that

> "Governments have an obligation to insure necessary conditions for subsistence and to pursue the means for economic development. In consequence, it is their duty to care for the conservation and protection of natural resources and regulate the exploitation of them, in order to get the best benefits for their respective countries.
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> Therefore, it is also their duty to prevent a farm of those assets beyond the reach of its jurisdiction, endanger the existence, integrity and preservation of wealth to the detriment of those peoples who, by their position geographically, have in their seas irreplaceable sources of subsistence and economic resources that are vital".[36]

US economic interests in the mineral resources, albeit one that unequivocally espoused the sanctity of navigational freedoms, is another sectoral interest, which contributed to calls for a redefinition of the freedom of navigation with renewed interest in the natural and mineral resources on the one hand and the status of the superjacent waters above the continental shelf on the other.

This section notes that the first conference, albeit successful in defining and codifying the concept of the territorial seas and high seas was unsuccessful in determining actual limits in miles. The second conference was not successful in formulating a treaty but is noteworthy in the actual argument for rights on the basis of sectoral or distinct interest, namely, a fisheries zone. Countries such as Iceland[37] and Peru were unequivocal in their linkage of the seas to their development as a state.[38]

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[36] Declaration reproduced by Scovazzi, Tullio. 2000a. "The Age of Codification." In The Evolution of the International Law of the Sea: New Issues, New Challenges. The Hague: Martinus Nijhoff Publishers. 97

[37] Iceland Proposal A/CONF.19/C.1/L.7 of 6 April 1960 as reproduced in 17 March- 26 April 1960. "Official Records of the Second United Nations Conference on the Law of the Sea." In Summary Records of Plenary Meetings and of the Committee of the Whole (A/CONF.19/8). Geneva United Nations. 168.

[38] Peru: Draft Resolution Document A/CONF.19/L.5/Rev.1 of 22 April 1960 as reproduced in 17 March- 26 April 1960. "Official Records of the Second United Nations Conference on the Law of the Sea" supra note 37 at 171.

As for the relationship of these conferences to the freedom of navigation, these issues and interests in the seas ontologically underpin the development of the norm of distributive justice as a factor that will limit hitherto free areas of access into zones of state sovereignty and jurisdiction. The idea being that due to the emergence of former colonies as independent states with economic concerns and insufficient technological prowess, the sea proved to be a way to redraw the lines on inequality and this resonated in the conference discussions. For instance, the Latin American states were of the view that its claims were not given sufficient attention by the ILC in its draft articles[39] therefore it may be argued to be a reason for the resultant conventions' lack of limits and the referral of the third conference to the General Assembly as opposed to the ILC.

Furthermore, the influence of the norm of distributive justice on the 'everything else'[40] nomenclature of the high seas is evidenced in the 1982 LOS Convention and its subsequent explicit redefinition of area where freedom of navigation could apply.

Yet ontological inconsistencies may be argued to persist, for the normative factor in the initial 'interest of the whole' in the development of the freedom of navigation is still maintained in the aforementioned treaty stipulations with novel provisions such as the one found in the Exclusive Economic Zone (EEZ) where states are apt to determine that acts that are not resource motivated can fall within the coastal state's jurisdiction.[41]

This section therefore posits that the locus of engagement of international law and state action in relation to the freedom of navigation is one that is best framed by an examination of the normative development of this principle, for it highlights the present applicable norm there is to comply with and those that may factor into state policies and international law in the future. This stance must be distinguished with Koskenniemi's critique of the functionalist approach as one that predetermines issues of distribution of preference as a given preserve of international institutions.[42] Here, this inquiry is not just for smoothing the operation of technical issues in relation to the

[39] Ibid.

[40] UN Convention on the High Seas, supra note 23, Article 1.

[41] 1999. "The M/V "Saiga" (No. 2) Case (St Vincent and the Grenadines v. Guinea) (Merits) ": International Tribunal of the Law of the Sea. This is a case in point where bunkering was assumed by Guinea to constitute a violation of its laws and regulation even though bunkering does not constitute actual exploration or exploitation of natural resources.

[42] Koskenniemi, Martti. 2009. Supra note 33, 16.

freedom of navigation but to re-examine the rule development through a different lens.

3. The Future of the Freedom of Navigation: Sustainable Development

In re-examining the principle of freedom of navigation using ‘normative lenses’, the English School acknowledges the importance of the state in the development of a rule in international law in the sense that states represent units that altogether construct international society. In relation to the freedom of navigation, this is best exemplified in the relationship between the development of the principle and the evolution of states in international law. Domestic transformations in states have directly influenced the development of this rule and herein lies any predictions on the further development of this rule. To explain further, we noted earlier that the rule was initially proposed to be fundamental to ocean usage in the light of the maritime power of the Dutch Kingdom. This rule was then taken to be fundamental to trade as states such as Great Britain consolidated its position as a major maritime power but state sovereignty over its territory remained unflinching in the territorial sea area. Beyond the territorial sea, all states are on equal footing and as a result bound by international law not to interfere with the navigation of any vessel registered to a state. However, equalling all states in terms of the usage of the high seas was a recipe for redefinition for whereas initially this principle was taken to be essential to trade and with most trade being under the control of states such as Great Britain before the Second World War and the United States after the Second World War, its status as an essential part of relations between states in a maritime domain in practise operated in the interest of a few.

So, with the increase of independent states, particularly, the African and Latin American states, the normative basis of this freedom and consequently its acceptance in international law was re-examined. With states such as Peru claiming 200-mile territorial seas as early as 1952, before the 1958 Geneva Conventions, a normative shift was emergent, hence the development of the maritime zone of the EEZ. In other words, presently, the freedom of navigation is ongoing a change with the separation of blocs of jurisdiction and control. With areas of sovereign control[43], functional

[43] The Territorial Sea is an area that is within the coastal state’s sovereign control.

jurisdiction,[44] sovereign rights[45], and free for all usage,[46] the new law of the sea is ripe for a further normative shift.

This paper posits that this shift will be underpinned by the norm of sustainable development.[47] Currently, in the 1982 LOS Convention, with nuances that are beyond the scope of this study,[48] the principle of freedom of navigation is codified in the 1982 LOS convention in Articles 36,[49] 58,[50] 78,[51] and 87.[52] Additionally the state's sovereignty over its vessels as epitomised in the concept of flag state jurisdiction consists of rights to control and jurisdiction over ships,[53] exclusive jurisdiction of the state over its vessels on the high seas,[54] and the express probation of arrest or detention of the ship even as a measure of investigation.[55]

However, the International Court of Justice has noted, albeit obiter dicta, and this study concurs that:

> "…New norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[56]

At the international level, the United Nations Conference on Environment and Development held at Rio de Janeiro in 1992, in noting that the 1982 LOS Convention sets forth rights and obligations of states provides the international basis upon states may pursue the protection and sustainable development of its marine environment. It

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[44] The *sui generis* zone of the exclusive economic zone grants exclusive jurisdiction to the coastal state in relation to acts that exploit and explore the resources within the zone.

[45] The continental shelf is a maritime zone on the seabed where the coastal state has sovereign rights to exploit the mineral resources in the zone and the exclusive economic zone grants exclusive rights over the natural resources.

[46] The high seas are open to all nations and cannot be under any states control or jurisdiction. Here, the flag state has all control and authority.

[47] "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs"

[48] In exercising this freedom, the coastal state can influence the exercise of this right to navigation in international law. This is because of the changing maritime zone, which has come a long way from the days of the three nautical mile territorial seas. This analysis however is beyond the scope of this study.

[49] Freedom of navigation in straits used for international navigation.

[50] Freedom of navigation in the exclusive economic zone.

[51] Freedom of navigation in the high seas.

[52] Ibid.

[53] 1982 LOS Convention, supra note 10, Article 94.

[54] Ibid. Article 92.

[55] Ibid. Article 97(3).

[56] 1997. "The Gabcikovo Nagymaros Project (Hungary/ Slovakia), Judgement, I.C.J Reports 1997. P. 7." §140.

notably highlights the need for, “new approaches to marine and coastal area management and development, approaches that are integrated in content and are precautionary and anticipatory in ambit.”[57]

Declarations like the 1992 Rio Declaration,[58] albeit lacking ‘teeth’ in the sense that there are no explicit provisions for liability in the event of a violation, are symptomatic of the growing norm. Its impact on the freedom of navigation is one that can operate to either lead to a further limiting of existing high seas freedoms or generate more debate as the explicit definition and application of this rule in the international law of the sea.

Whatever the impact, the normative dimension in relation to the limitation of these freedoms in the interest of sustainable development is seen in the international level with declaration such as the Rio declaration and in case law such as the *Gabcikovo Nagymaros* case. There is growing concern, based on the sustainable development norm, that there is increasing human activities in areas beyond a coastal state’s national jurisdiction[59] and there is need for some sort of governance framework. This future is however one that cannot be legalised in the absence of the factors that induce state compliance with this rule for this article has shown that these factors lie in international law itself and in the state through the unifying factor of normative development.

Conclusion

Substantively, in the international law of the sea, the function of international law vis-à-vis the rule of the freedom of navigation is best evidenced in the system of allocation of jurisdiction, rights and duties to states in the maritime zones. As international law has and “continues to conduct distinct societal functions”[60] best evidenced in societal roles and policies,[61] the basis for rule formation and

[57] 3 -14 June 1992 Agenda 21: The United Nations Programme of Action from Rio. Available online at http://www.un.org/esa/dsd/agenda21/. Chapter 17.1

[58] "Declaration of the United Nations Conference on Environment and Development UN DOC A/CONF.151/26 (Vol. I) 14 June 1992."

[59] This was the primary concern of the Plenary Panel 6 at the recent Global Forum on Coasts, Oceans and Islands. See 7 -8 April 2008. "The Global Forum on Oceans, Coasts and Islands. Hanoi, Vietnam. As available on the internet at http://www.globaloceans.org/globalconferences/2008/index.html."

[60] Yasuaki, Onuma. 2003. "International Law in and with International Politics: The Functions of International Law in International Society." European Journal of International Law 14:105-139. 107

[61] Ibid.

development is a factor that cannot be overemphasised. This is because in the development of the law of the sea, these maritime zones have changed in limits and its functions have changed in remit. International law customary law is, however, insufficient in explaining the reasons behind changing limits, changing functional remits and its impact on rule development. The reasons underpinning the determination of these allocations and the changing limits and functions are best evidenced in a normative discourse. International society discourse is the connection between the functions of international law and the changing functions of this rule in international law and this paper has followed this rule's development through normative lenses.

The first section showed how the rule development was founded on the need to ensure that just as international law is founded on the concept of all states being equal, any rule of international law must also show this in practise. The freedom of navigation is one of such rules for in the maritime domain, beyond the territorial sea, all vessels are governed by flag-state jurisdiction and as a result, enjoy unhampered access.

The second section saw a normative shift, as there was a need to define the nature of what constitutes unhampered access. This is evidenced in the debate relating to limits of access as well as control over the resources available in the seas. Equality was taken to be insufficient for it perpetuated a situation of technological inequality hence calls for a rule that will take into account developing states with the aim of redrawing the resource-benefit map. If the norm of equality was essential to maintenance of access to and fro trade routes without interference, the norm of distributive justice was essential to ensuring that navigational freedoms were connected to the economic development of states with particular emphasis on developing states. This period saw the establishment of the exclusive economic zone, the continental shelf and the concept of delimitation based on equitable principles.

The final section captures the essence of the English School discourse method. Here, the paper notes the next direction in rule development on normative basis as one that focuses on the issue of sustainable development. The alteration of the freedom of navigation on these lines is foreseeable, as authors like Van Dyke have noted.[62] However, consistent rule development in international law must be against a backdrop

[62] Van Dyke, Jon. 2005. "The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone." Marine Policy 29:107-121.

of political consensus and willingness among states to employ the rule.[63] The normative dimensions of a rule's development highlight the political consensus and willingness. One cannot exist without the other in understanding rules in international law for these norms emphasise jurisdiction[64] amidst issues of allocation, claims and competing claims of areas of jurisdiction, which is essentially the nature of rule development in the international law of the sea. The future is one that will extend to codification based on this norm with a view to redefining the rule of freedom of navigation. An example of calls for the redefinition of applicable rules in areas where freedom of navigation exist is seen in the suggestion by Freestone for United Nations General Assembly declaration of principles applicable in areas beyond national jurisdiction.[65]

Finally, this paper has attempted to show that through international society discourse, an in-depth understanding of international law rules is best achieved by examining the dominant diplomatic and normative discourse that existed concomitantly with rule development. This is distinct to other approaches as it makes a distinction between the international system as one that is epiphenomenal and international society as a tradition of enquiry where the units, through normative and diplomatic interaction, causally influence outcomes and rule development.

[63] Diehl, F., Paul, Charlotte Ku and Zamora Daniel. 2003. "The Dynamics of International Law: The Interaction of Normative and Operating Systems." International Organization 57(1):43-75. 43.

[64] Aceves, J., William. 1996. "The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics." Hastings International and Comparative Law Review 19:259-326. 259-260

[65] Supra note 59, Freestone David's presentation titled "Governance of Areas Beyond National Jurisdiction: Issues and Options- Towards Integrated Governance"?

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