

Freedom of Navigation: Different Strokes for Different Folks

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Freedom of Navigation (FON) is a term that has been much in the news, both globally and in India, particularly since China has forcefully asserted its claims in the South China Sea. India's Maritime Security Strategy 2015 talks of "The importance of maintaining FON and strengthening the international legal regime at sea, for all-round benefit¹". PM Modi, in his inaugural address at the Second Raisina Dialogue in January 2017, stated that, "We believe that respecting FON and adhering to international norms is essential for peace and economic growth in the larger and inter-linked marine geography of the Indo-Pacific²". Upholding the freedom of navigation finds mention in the Joint India-Japan Vision 2025 statement³, the India-US joint statement during the visit of PM Modi to USA⁴, and the press statement by the Prime Minister during the just concluded State Visit of the President of France to India⁵. Clearly, the message being conveyed is that India respects and supports FON, as set out in UNCLOS, and that its views are in consonance with those of its strategic partners.

Why then, has India been as much a target of the American FON Operations (FONOPS) programme as China or Iran⁶? Four reasons have been cited in the annual FON Reports of the Department of Defense for FONOPS against India. These are, "Prior notification for warship to enter 12 nm Territorial Sea" (in 1992, 93, 94, 96, 97, 99, 2000-03 and 2011); "Prior permission required for military exercises and manoeuvres in the EEZ" (in 1999 and every year from 2007-15); "24 NM security zone" in the report for 2000-03 and the "claim to Gulf of Mannar as historic waters" in 1993, 1994 and 2011⁷. Is India then in contravention of international law? Or is it just that FON means different things to different nations? This article explores the legal meaning of FON and its implications.

Article 38 of the Statute of the International Court of Justice⁸ recognises four sources of international law: International Conventions (such as UNCLOS, or bilateral treaties between states); international

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custom (i.e. precedent); the general principles of law recognised by civilised nations; and judicial decisions and the teachings of the most highly qualified publicists of various nations, as a subsidiary means. Since UNCLOS and other multilateral international treaties do not define FON⁹ and both general principles and teachings vary from nation to nation, one must look at international custom or precedent to obtain an accepted meaning of the term.

The origins of FON can be traced back to the Malacca Straits in the Colonial Period. The bull “Inter Caetera” issued by Pope Alexander VI on 4 May 1493 granted to Spain all lands to West and South of a pole-to-pole line 100 leagues West of the Azores and Cape Verde Islands, and to Portugal all lands to East of this line. In 1498, Vasco da Gama discovered the sea route to India, enabling bypassing of intermediaries in the Middle East for trade in much desired Indian and Chinese produce. Portugal claimed the Indian Ocean and sought to exercise the right to exclude nationals of all other (European) nations from navigating its waters, while Spain claimed similar rights in the Pacific. Effectively, Portugal and Spain sought to deny FON to ships of all other nations in the Indian and Pacific Oceans respectively, or in the Indo-Pacific!

The Dutch, engaged in their own war of independence from Spain (the Eighty Years War) from 1568 onwards, extended the conflict into the Indian Ocean when the Dutch East India Company (VOC) sought to trade in the East Indies. There being no standing navies at that time, merchant ships carried guns to defend themselves, particularly against privateers and pirates. On 25 February 1603, Dutch Captain Jakob von Heemskerck aboard the *White Lion* attacked and seized the Portuguese flagged, 1500 ton carrack *Santa Catarina*¹⁰, near what is now Singapore’s Changi airport. Her cargo of silk, gold thread, porcelain, spices, musk and other merchandise, when auctioned in Amsterdam, yielded the then massive sum of about 3.5 million Guilders, opening the eyes of the Dutch to the staggering wealth that was till then exclusively carried by Portuguese ships.



The Portuguese flagged carrack *Santa Catarina*. Photo Credit: Pinterest

But Heemskerck had seized *Santa Catarina* without a privateering commission from the Dutch Republic. His mandate permitted defending himself, but not attacking others. His action thus caused considerable disquiet amongst the shareholders of the VOC, which commissioned Hugo Grotius, then a relatively unknown solicitor, to defend the seizure of *Santa Catarina*. Grotius’ “Commentary on the Law of Prize and Booty” (*De Jure Praedae Commentarius*¹¹) was written to justify this seizure. A section of this ‘opinion’ pertaining to freedom of the seas was published as *Mare Liberum* in 1608. In the words of Rüdiger Wolfrum, a judge in the International Tribunal for the Law of the Sea (ITLOS) from 1996-2017 and its President 2005-2008, it would make FON, a legal argument freshly coined by Grotius, “one of the oldest and most recognised principles in the regime governing ocean space”¹². Wolfrum went on to argue that “This principle constitutes one of the pillars of the law of the sea and was at the origins of modern international law”¹³.

Grotius’ argument in *Mare Liberum*¹⁴ was based on two principles. First, that since the sea was the fundamental avenue for communication and cooperation between states and could be used without deterioration or depletion, it should remain common property and not be controlled by any one state. Second, that a state could only claim what it could administer and control effectively: since no state could permanently and effectively control the sea, it could not become the property of any one state. Although John Selden would publish a counter (*Mare Clausum*) relying on precedent that had existed since the Roman Empire, his argument focused on ownership of ocean wealth, as opposed to Grotius’ argument that all were free to traverse the seas (or navigate the seas, hence freedom of navigation). In effect, Grotius focused on the use of the seas for connectivity, while Selden focused on the material resources derived from the sea. In a carefully crafted balancing act, the arguments of both found a place in UNCLOS 1982 without infringing on each other; the former in the absolute right to FON and thus connectivity, and the latter in the concept of ownership by the coastal nation of resources in the Territorial Waters and Exclusive Economic Zones.

Grotius and his argument about FON (and thus assured connectivity) prevailed even in the 17th century, with FON becoming a guiding principle for maritime nations. It is a different matter that colonised territories were not granted this right; they were not considered

independent nations at the time. But if connectivity by sea was the common right of all, it followed that each nation had the right to use it for both commercial and military purposes.

Shortly after the United States of America attained independence, its shipping in the Mediterranean came under attack from the Barbary Pirates. Operating from Morocco and what are now the towns of Tripoli, Algiers and Tunis, these pirates had historically preyed upon shipping passing through the Mediterranean, exacting tribute from nations whose merchant ships plied the Mediterranean, or capturing them and either enslaving their crew or ransoming them. In July 1785, Moroccan pirates seized the American ships *Maria* and *Dauphin*. Their crew remained captive for over a decade, along with others captured subsequently, while diplomatic efforts to get them released eventually culminated in an agreement between USA and Algiers to release 115 American sailors in return for payment of \$ 800,000, a sixth of the entire American budget for that year. USA would continue to budget and pay around a million dollars per year as tribute to ensure safe passage for its ships till the turn of the century. During this period, the American Congress approved and the US created its first standing Navy. On Jefferson's inauguration as the third US President in 1801, the Pasha of Tripoli demanded \$ 225,000 as 'protection money' from his administration. Jefferson refused to pay and sent newly built American frigates to blockade Tripoli instead, leading to the first Barbary War (only the second action fought by the USN). This war, dictated by the need to protect commercial FON, alerted the US to the vital need for preserving military FON – not having to seek connectivity to execute its military requirements. This freedom would become part of USN and USMC history, making FON an abiding national belief.

On January 8, 1918, President Woodrow Wilson made his famous 'Fourteen Points' speech to the US Congress, spelling out his vision of what America must insist on to ensure world peace. The second of his points read, "Absolute FON upon the seas, outside territorial waters, alike in peace and war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants". It is relevant that at this time, territorial waters extended to only three nautical miles from the coast, hence the "three-mile limit". On September 11, 1941, following the torpedo attack by a German Submarine on USS *Greer*, President Franklin Delano Roosevelt, in a radio address to the nation, said, "Generation after generation, America has battled for the general policy of the freedom of the seas. And that policy is a very simple one, but a basic, a fundamental one. It means that no nation has the right to make the broad oceans of the world at great distances from the actual theater (sic) of land war unsafe for the commerce of others". This speech would lead to an American

policy to protect all trade in the Western hemisphere against Germany's unrestricted submarine warfare – in effect protecting FON, both commercial and military, for all allies.

The long drawn out negotiations on UNCLOS and the new regime it brought into force, extending state jurisdiction in territorial waters and resource jurisdiction in the EEZ and continental shelf, may in some minds have created doubt about the rights of coastal states to restrict FON, particularly as pertaining to military vessels. On March 10, 1983, following opening of UNCLOS for signature, President Reagan said that the US would not sign UNCLOS since "several major problems in the Convention's deep sea bed mining provisions are contrary to the interests and principles of industrialised nations and would not help attain the aspirations of developing countries"¹⁵. However, he committed the US to accepting and acting "in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight" and recognising the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law were recognised by such coastal states. He also declared the American intention of asserting its navigation and overflight rights and freedoms on a worldwide basis "in a manner that is consistent with the balance of interests reflected in the Convention", while at the same time not acquiescing "in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other high seas uses", effectively launching the FONOPS programme.

FON is thus long-standing policy, one that the US is deeply committed to. FON for military vessels enables the US to deploy its Carrier Task Force anywhere in the globe to protect its interests and those of its allies and partners, a freedom it cannot be accepted to surrender easily.

It is this programme that led the USN to target India, along with many other countries, in FONOPS. Evidently, at least in American perceptions, India unilaterally sought to change a legal status that has been internationally approved in UNCLOS. Given India's public commitment to FON, as enunciated in the opening paragraph, it becomes necessary to understand what led the US to target India in FONOPS.

Article 17 of UNCLOS specifies, “Subject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. It does not in any way differentiate between warships and commercial traffic, nor does UNCLOS limit the right of innocent passage for warships in any other article. On the other hand, Article 4(1) of India’s ‘The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (MZI Act) specifically excludes warships from the right of innocent passage. It states, “Without prejudice to the provisions of any other law for the time being in force, all foreign ships (other than warships including submarines and other underwater vehicles) shall enjoy the right of innocent passage through the territorial waters”. Article 4(2) goes on to say, “Foreign warships including submarines and other underwater vehicles may enter or pass through the territorial waters after giving prior notice to the Central Government”. It is noteworthy that the MZI Act requires only notification, not approval (prior or otherwise). Nevertheless, the American contention is that India, by requiring foreign warships to notify GOI before entering India’s Territorial Waters, restricts the right of innocent passage guaranteed by UNCLOS.

India’s territorial sea includes not just the area around the mainland, but also waters abutting the Lakshadweep and Minicoy Islands, through which heavily used international shipping lanes (ISL) pass. Shipping using these lanes must pass through India’s territorial waters. The implication of India’s MZI Act is that all warships, including those of the US, using the ISL from the Red Sea and going towards South East Asia, thus passing through the Nine Degree Channel (in the Lakshadweep, between Kalpeni, Suheli Par and Minicoy), must notify GOI in advance. Similarly, the ISL from the Persian Gulf to Malacca runs through the Eleven Degree Channel, between the Indian islands of Amini and Kavaratti.



ISL from Persian Gulf to Malacca. The expanded section in top right corner shows the ISL in relation to Indian islands

Movements of warships are intentionally not broadcast in advance and are kept classified. To enact a law requiring warships of other nations to circumscribe their established freedoms, without simultaneously creating the framework to give teeth to and enforce this law, and then expect that other nations would comply out of goodwill, was somewhat optimistic. As brought out in the September 23, 1989 Joint Statement by the US and USSR, “Such laws and regulations of the coastal state may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982”¹⁶.

This is not the only area where Indian and US perceptions on FON differ. On November 28, 2000, USNS Bowditch, a Pathfinder Class survey ship operated by the United States Military Sealift Command, was spotted about 55 Km East of Car Nicobar Island, well within India’s EEZ. On being asked what she was doing, Bowditch replied that she was engaged in oceanographic research, a euphemism for collecting data vital for underwater operations. A few days later, HMS Scott, a Royal Navy survey vessel, was spotted inside India’s EEZ off Diu, and later off Porbandar. On being challenged, she replied that she was carrying out military surveys for the British Defence Ministry. India lodged official protests through diplomatic channels in both cases, with the US and UK respectively. Both the US and UK maintained that military surveys in the EEZ are operations beyond the jurisdiction of coastal states and there is no prohibition on them in UNCLOS. India did not follow up.

The specific legal regime for the EEZ is identified in Part V (Articles 55-75) of UNCLOS. Article 56 identifies the rights, jurisdiction and duties of coastal states in the EEZ. These include “sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources and with regard to economic exploration and exploitation in the EEZ”. The rights are economic in nature: they do not include any military or security rights. Specifically, they do not include the right to curtail connectivity or research for military purposes. In fact, during negotiations, when some nation states tried to insert an enforceable security interest in the legal regime applicable to the EEZ, the proposal was deliberately considered and rejected by the majority of nations present. Article 58 of UNCLOS confers on all states the freedom of navigation in the EEZ, without any restriction on military vessels, or any of the restrictions accompanying innocent passage in territorial waters.

When ratifying UNCLOS on June 29, 1995, more than a decade after negotiations were completed and the Convention signed by it, India had exercised its right to make a declaration under Section 310 and declared that, “The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the Exclusive Economic Zone and on the Continental Shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State”. But Article 310 specifically states, “Such declarations cannot exclude or modify the legal effect of UNCLOS in their application to the state concerned”. India’s declaration was, therefore, meaningless, as has in fact been pointed out in the declarations made by Russia on March 12, 1997, UK on July 25, 1997, and The Netherlands on June 28, 1996. Whether GOI will eventually get around to rescinding its declaration and harmonising domestic law with UNCLOS, as it has committed to do, is uncertain. Since India’s Supreme Court has ruled that domestic law enacted by parliament takes precedence over treaty law, the provisions of the MZI Act of 1976 take precedence over UNCLOS. This creates mixed perceptions about India’s position.

International custom clearly predicates that FON, as set out in UNCLOS, applies equally to commercial and military vessels. Nothing in international law supports the concept of a separate regime denying FON to military vessels. But India-US differences on this score are trivial. There have no strategic impact, unlike in the case of China. China rightly states that it has not ever tried to restrict FON for commercial traffic, nor is it, as a nation whose economy depends on trade, likely to do so. FON for military vessels and aircraft, however, is entirely another matter, and China’s actions in the South China Sea are predicated by strategic compulsions to push American maritime power back beyond the first island chain.

The nature of these strategic compulsions to redefine FON along with the steadfast intent of the US to maintain the status quo will form the subject of a follow up brief. It must be stated, however, that all precedent cited in support of FON is based on the pre-UNCLOS 1982 period, dominated by maritime powers of 15th-20th centuries. Perceptions of developing nations, including India, are on the other hand dominated by the thought that the maritime powers who now so strongly support FON are the ones who destroyed their FON when colonising them. They thus associate absolute FON with colonialism and loss of freedom. Moreover, today’s developed nations possess the technology and wealth to put in place systems to secure their maritime security interests in a FON regime, while less developed Asian and African countries have neither the financial nor the technological nor military resources required.

UNCLOS, therefore, does not ensure equal security to all: it is weighted heavily towards developed nations.

The reality is that maritime powers continue to reshape their navies for security of their own connectivity, disrupting enemy connectivity, littoral operations and power projection that are made easier by FON, while regional navies, particularly in Asia, remain focused on Sea Denial, which is facilitated by restricting FON. Will India, as an emerging maritime power, shift completely to the FON side? Time will tell.

Endnote:

- ¹ Ensuring Secure Seas: Indian Maritime Security Strategy, published by IHQ MoD (Navy), 2015, P 6
- ² Inaugural address by Prime Minister at Second Raisina Dialogue, New Delhi (17 January 2017), see http://mea.gov.in/Speeches-Statements.htm?dtl/27948/Inaugural_Address_by_Prime_Minister_at_Second_Raisina_Dialogue_New_Delhi_January_17_2017
- ³ http://www.mea.gov.in/bilateral-documents.htm?dtl/26176/Joint_Statement_on_India_and_Japan_Vision_2025_Special_Strategic_and_Global_Partnership_Working_Together_for_Peace_and_Prosperty_of_the_IndoPacific_R
- ⁴ http://mea.gov.in/bilateral-documents.htm?dtl/26879/IndiaUS_Joint_Statement_during_the_visit_of_Prime_Minister_to_USA_The_United_States_and_India_Enduring_Global_Partners_in_the_21st_Century
- ⁵ http://mea.gov.in/Speeches-Statements.htm?dtl/29593/English_Translation_of_Press_Statement_by_Prime_Minister_during_the_State_visit_of_President_of_France_to_India_March_10_2018
- ⁶ As identified in DoD Annual Freedom of Navigation Reports, sourced from <http://policy.defense.gov/OUSDP-Offices/FON/>
- ⁷ Data sourced from Dod Annual FON Reports, *ibid*.
- ⁸ Sourced from ICJ Website, see <http://www.icj-cij.org/documents/?p1=4&p2=2>
- ⁹ Article 87 (1) (a) of UNCLOS 1982 lists Freedom of Navigation as one of the freedoms that may be exercised by all states on the high seas, but does not define it.
- ¹⁰ “The Santa Catarina Incident”, sourced from <http://eresources.nlb.gov.sg/history/events/48d0a785-2b61-467a-8c85-f2728e33702c>
- ¹¹ Condensed from Hugo Grotius, “Commentary on the Law of Prize and Booty (1603)”, sourced from Online Library of Liberty, <http://oll.libertyfund.org/titles/grotius-commentary-on-the-law-of-prize-and-booty>
- ¹² From Statement by Rüdiger Wolfrum, “Freedom of Navigation: New Challenges”, published by ITLOS, sourced from https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/freedom_navigation_080108_eng.pdf
- ¹³ *Ibid*

¹⁴ Condensed from “The Freedom of the Seas”, dissertation by Hugo Grotius, translated by Ralph Van Deman Maguffin, published Oxford University Press, 1916.

¹⁵ Statement of President Reagan on United States Ocean Policy, 10 March 1983, sourced from Weekly Compilation of Presidential Documents no. 383 (10 March 1983).

¹⁶ USA – USSR Joint Statement on Unified Interpretation of Norms of International Law Governing Innocent Passage, published in United Nations Law of the Sea Bulletin No 14, December 1989, P 13. See http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf

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