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REINTERPRETING THE NORMAL MODE OF
SUBMARINE IN ARCHIPELAGIC SEA LANE PASSAGE

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Abstract

Today, many experts of maritime powers take it for granted that a foreign submarine has the right of submerged passage in an archipelagic sea lane. By using the 1969 Vienna Convention on the Law of Treaties (VCLT) as a tool of interpretation, this paper tries to decipher whether a submerged passage is permissible or not in archipelagic sea lane passage. This paper found that the submerging in an archipelagic sea lane passage is not a generally accepted interpretation of “normal mode” in Article 53 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The writers discovered on one hand, the result of the travaux préparatoir means of interpretation appears to be in favor of the submerged passage being included within the meaning of “normal mode”. The textual interpretation, on the other hand, emphasizes the exclusion of submerged passage from both transit passage and archipelagic sea lane passage. In the case of an archipelagic sea lane passage, the exclusion of submerged passage weighs more than the transit passage. Therefore, based on VCLT 1969, which says that the textual interpretation takes precedence over the interpretation of travaux préparatoires, the submerged passage is not a widely accepted interpretation.

Keywords: UNCLOS, Submarine, Submerged, Straits, VCLT, normal mode.

I. INTRODUCTION

In Article 53 (3), we can see how the 1982 United Nations Convention on the Law of the Sea (UNCLOS) governs archipelagic sea lane passage for submarines. The only way to describe how a submarine can pass through an archipelagic sea lane is by using the term “normal mode”. Many experts have already interpreted that a submarine can pass through an archipelagic sea lane by submerging, for example in the San Remo Manual (1994).\(^1\) Submergence passage for submarines in a archipelagic sea lane passage is an important and strategic security interest for superpower states and other maritime powers.\(^2\) In

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1. In the non-binding document of the San Remo manual, there are several paragraphs that clearly state that foreign submarine has the right of submerging passage in archipelagic sea lane, for example paragraph 27 and 28.
2. Especially because submarines carry nuclear ballistic missiles for deterrence, and other
this article, we will reinterpret the term “normal mode” by using the two-stage approach of the Vienna Convention on the Law of Treaties (VCLT 1969).³

II. SUBMARINE AS A STEALTH WEAPON

A submerged submarine is a stealth mode in which a submarine conceals its position in order to avoid detection. Without submerging, a submarine is no different than any other warship, albeit in a considerably more vulnerable state.⁴ Factually, the submarine’s stealth is the only advantage it has over other types of warships. A submarine will always submerge during a naval battle, if possible. Once the opponent has determined its location, it will be vulnerable to assault from either a surface ship or an aircraft. It will only come to the surface if it needs to communicate with other units, goes to periscope depth, or goes to snorkel.⁵ Snorkeling is how a submarine recharges its battery. This, however, is only true for conventional submarines. Snorkeling is unnecessary in the case of a nuclear-powered submarine. A nuclear-powered submarine can dive indefinitely without coming to rest.⁶ It is simply an issue of logistics for the crews, such as food needing to be victualled. A nuclear-powered submarine has a significantly greater range and is much faster. Although, in some circumstances, nuclear-powered submarines are noisier than conventional submarines, their overall performance is far superior to that of their equivalents. To put it another way, a nuclear-powered submarine is less susceptible since it does not need to surface to replenish its batteries.⁷


⁵ In order to communicate with another unit, submarine shall surface her antenna. She also needs to use periscope on some occasions, for example to get intelligence data, or as an initial step before attacking surface ship. See:

⁶ The U.S. nuclear-powered submarine for example, only need more than 30 years of replacement of its uranium. Read: Jeon and Khorsand, “Energy Management System,” 802-808.

⁷ While conventional submarine must surface regularly to charge the battery, nuclear-powered submarine does not need to surface at all. Read: Byeongdoo and Khorsand, “Energy Management System,” 802-808.
In contrast to surface warships, which can be easily discovered using contemporary radars or other types of surveillance systems, searching for submarines when they dive into the sea is difficult. For example, it even takes many days to discover the wreckage of an airliner that crashed into shallow water by utilizing cutting-edge equipment, let alone hunt for a stealthy, fast-moving, and silent submarine in deep water. Submarines were a nightmare for surface ships during World War I and World War II, and they still are today. A submarine in the modern era has several purposes and weaponries. A modern nuclear-powered submarine can even carry a nuclear weapon capable of annihilating an entire country.

III. MARITIME POWERS’ INTERESTS ON SUBMERGED SUBMARINES

Maritime powers are always in a position to argue that the normal mode for submarines is submerging. The rationale is that by having a submerged passage, those states can always conceal their submarines, including when they pass through straits used for international navigation and archipelagic sea lanes. Therefore, their submarines will remain undetected and maintain the deterrence level. This is especially true during the Cold War era when the United States and the Soviet Union should have preserved the deterrence level that they had by placing nuclear warheads inside the silos of their nuclear-powered submarines. This way, both parties can uphold the Mutually Assured Destruction (MAD) doctrine. As a result, both states would respect each other and preserve peace. In today’s era, the concealment position of submarines is also crucial for maritime powers. The dynamics of the new global power politics, driven by the emergence of China as the United States’ near-peer powers, are highly dependent on the relative powers of the United States, China, and Russia.

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9 The use of submarine as a platform of nuclear ballistic missile has more advantage than land-based missile and aircraft-based missile. This is because for land-based and aircraft-based, it is easy to counter the incoming ballistic missile. See: Frank Barnaby, “The Role of the Submarine,” Ocean Yearbook Online 9, no. 1 (1991): 326-338.

10 Mutually Assured Destruction (MAD) is a doctrine of common annihilation as a result of nuclear attack reciprocity between great powers. Once a party attacks by using nuclear weapons, another party will retaliate by using nuclear weapons. At the end of the day, both states will vanish. By having this doctrine, both states will eventually halt their position for not using nuclear weapons. Read: Alan J. Parrington, “Mutually Assured Destruction Revisited: Strategic Doctrine in Question,” Air and Space Power Journal, (1997).
competitor and the re-emergence of Russia, make the secrecy of submarines more important than ever before.\footnote{Today’s new world order moves from unipolar to multipolar, with China and India as a new emerging power, while Russia re-emerges from its fall in 1990s. Meanwhile we can also see the gradual decline of the U.S. as a sole superpower in the world. See: Muhammad Muzaffar, Zahid Yaseen, and Nazim Rahim, “Changing Dynamics of Global Politics: Transition from Unipolar to Multipolar World,” \textit{Liberal Arts and Social Sciences International Journal (LASSIJ)} 1, no. 1 (2017): 49-61.} Not to mention, the number of states that have nuclear-powered submarines is increasing.\footnote{Currently there are six states which have nuclear-powered submarine: the U.S., the U.K., Russia, France, China, and India. See: Girgis, “Australia’s Need for Nuclear Powered Submarines,” \textit{Headmark}, no. 135 (2010): 4.} After India created its own nuclear-powered submarine that can carry nuclear warheads, Australia is predicted to be the seventh country in the world to join the club of states that own nuclear-powered submarines in the next decade.\footnote{The new deal of AUKUS in 2021 will make Australia the new state that will have nuclear-powered submarine in the near future. See: Julia Masterson, “US, UK Pledge Nuclear Submarines for Australia,” \textit{Arms Control Today} 51, no. 8 (2021): 25-27.} The long endurance and no need for snorkeling advantages of nuclear-powered submarines will be in vain if they still have to surface when they pass through archipelagic sea lanes and straits used for international navigation.

\section*{IV. ARCHIPELAGIC STATES CONCERN ON SUBMERGED SUBMARINES}

Similar to maritime powers, archipelagic states’ interests are mainly due to security reasons. In times of peace, they will become targets of intelligence-gathering by submerging submarines that can pass through their waters without their knowledge. As a result, archipelagic states can become easy prey for intelligence-gathering and other violations by submarines. Archipelagic sea lanes must remain open in times of war, just as they do in times of peace. The passage will go on just as in times of peace, including submerged passages.\footnote{Based on San Remo Manual 1994 paragraph 27 and 28, transit passage and archipelagic sea lane passage will continue to apply in times of armed conflict.} This will automatically undermine the security and survivability of the archipelagic states themselves. The opponent’s submarine will pass through under the surface and easily target some cities in archipelagic states.

It is worth to take note and analyze how a qualified archipelagic state based on Articles 46 and 47 of UNCLOS 1982 wants to be exempted from archipelagic state status to deal with this interest. An example of this is Japan. Even though Japan qualifies as an archipelagic state, it does not consider itself to be one. In order to maximize its national security, it chooses not to accept...
the definition of an international strait according to UNCLOS 1982, instead of claiming archipelagic state status. Based on UNCLOS 1982 Article 37, an international strait is defined as a strait that connects one part of the high seas or EEZ to another high sea or EEZ. However, Japan refuses to include their straits into this definition, resulting in the exclusion of a transit passage from all their straits. This way, Japan can exclude submerged submarines from its straits. In the case of the detection of a Chinese submerged submarine under Japan’s strait in November 2004, Japan could demand an apology from China for its action of entering Japan’s strait by submerging. It means that Japan’s step of not claiming an archipelagic state to get a much better security advantage needs to be considered by other archipelagic states as an alternative solution to exclude submerging submarines from their waters.

V. TRANSIT PASSAGE AND ARCHIPELAGIC SEA LANE PASSAGE

“Transit passage” and “archipelagic sea lane passage” are two new regimes of passage in UNCLOS 1982. The transit passage regime was created as a result of the expanding width of the territorial sea from three nautical miles to twelve nautical miles. Meanwhile, an archipelagic sea lane passage regime was created because of the creation of a new concept of archipelagic state. In many ways, both regimes are similar and almost the same. Based on Article 54 of UNCLOS 1982, almost all the articles for transit passage also apply to archipelagic sea lane passage. However, they are some differences as well.

Regarding how submarines can pass through both regimes, there is no clear and blunt language in the UNCLOS 1982 that can explain that question. For both regimes of passages, the only clues are that the passage is conducted in “normal mode”, which is mentioned in Article 39 (1)(c) for transit passage, and Article 53 (3) for archipelagic sea lane passage. In the next section below, we will examine whether submerged passages are allowed or not, particularly regarding archipelagic sea lane passage.

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15 Both passage regimes are new regimes which were the result of the convention.
16 As compromise, straits, which previously had high seas beyond three NM became gone. Then there was a compromise to make new regime of passage, which is transit passage.
17 There are only several difference, which are there is a “freedom of navigation” for transit passage, but right of navigation for archipelagic sea lane passage, there is a word “solely” for transit passage, which doesn’t exist for archipelagic sea lane passage.
VI. TEXTUAL INTERPRETATION

Nowadays, it is common to assume that submarines are allowed to navigate under straits used for international navigation and archipelagic sea lanes,\(^{18}\) since transit passage and archipelagic sea lane passage are more lenient regimes than innocent passage.\(^{19}\) However, there is nothing in UNCLOS 1982 that says a submarine can pass through an archipelagic sea lane by submerging. All it says is “normal mode”. By using Articles 31 and 32 of the VCLT 1969 regarding general rule of treaty interpretation,\(^{20}\) we will decipher what is the normal mode for submarines.

Firstly, we must look at the text as an authentic expression of the parties, based on Article 31 of the VCLT 1969. A word, once it is written in the text of a treaty, will have its own life. The lexical meaning of a specific word in a treaty is important. It implies that we must consider both the ordinary meaning and the “context”. The context here is related to the text of the treaty itself, the preamble, annexes, and other related agreements.\(^{21}\) However, in many cases, it doesn’t help much. This is especially true in the case of UNCLOS 1982. UNCLOS 1982 uses many general terms, including the word “normal”. The use of the word “normal” is typical of UNCLOS 1982. There are several times the word “normal” is used in the convention. Phrases such as “normal operations of vessels”, “normally used”, “normal modes”, “normal passage routes for international navigation”, “normal navigation channels”, “normally used for international navigation”, “normal catch”, and “normal circumstances” are some examples.

By having general terms, the parties to UNCLOS 1982 want to have developing meanings. The use of general terms means that the presumption is that the parties agreed to have an evolving meaning. This is consistent with the International Court of Justice’s decision in the Costa Rica and Nicaragua

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18 One of the most well-known examples is in San Remo Manual, which is written by many experts.
19 In innocent passage, submarine shall surface and show her flag. See: article 20 UNCLOS 1982.
20 There are several methods of interpretations other than based on VCLT, for example The American approach of interpretation. However, since VCLT has been recognized as customary international law, there is no other way than using it as a tool to interpret the treaty. However, we will also use ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties 2018. For theories and methods of treaty interpretation, read: Shai Dothan, “The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights.” Fordham International Law Journal 42, no. 3 (2018): 765. J. G. Merrills, “Two Approaches to Treaty Interpretation,” The Australian Year Book of International Law Online 4, no. 1 (1968): 55.
21 Merrills, “Two approaches to,” 55.
cases concerning Navigational and Related Rights in 2009.\textsuperscript{22} Considering UNCLOS 1982 is the most comprehensive treaty ever made, it needs lengthy and exhausting negotiations.\textsuperscript{23} At the end of the day, there must be a middle ground; otherwise, the entire convention will fail. The word “normal” is used as a compromise. It has the function of deadlock avoidance. Clear and blunt language will be counter-productive to the negotiation itself. It would be better to use vague language that could be accepted by the majority. It would also be easier for the conferees to sign and to report to each state’s legislative organ to get it ratified. The real problem is that it is left to interpretation based on the future’s conditions, including subsequent practices and subsequent rules that would be created going forward.

It is also difficult to interpret the ordinary meaning of submarine by comparing how long submarines spend time at sea. Whether it is surfacing or submerging, which takes most of the time, the mode of submarine in which you spend most of the time will be considered the “normal mode”. This interpretation cannot be used as it changes over time. In the past, during the era of World War II and sometimes afterward, most of the submarines’ stationing time was spent surfacing. It would only submerge when it wanted to attack a specific target in order to conceal its position. Then suddenly, it shows up to attack the target with a machine gun.\textsuperscript{24} There was also another tactic, which was kept at periscope depth in order to launch torpedoes.\textsuperscript{25} A submarine in that era just did not have the ability to submerge for a long period of time. A modern submarine, on the other hand, can submerge for a long period of time, only surfacing when they need to recharge the battery.\textsuperscript{26} Even for a nuclear-powered submarine, it does not need to surface at all.\textsuperscript{27}

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\textsuperscript{22} In this case, ICJ rules that the use of general terms means that the parties agreed to have an evolving meaning. See: Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2009, p. 213.
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\textsuperscript{23} UNCLOS 1982 is the most comprehensive treaty ever made. It has 320 articles, with around eight-nine years negotiations.
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\textsuperscript{24} This is the tactical doctrine of submarine during World-War II. Since torpedos were limited, when submarine could attack by using machine gun, she would attack by using machine gun. It was also a tactic mainly for target other than warship, since less harmful. It was also the rule to conduct visit and search first before attack the target. Attacking the merchant ship could only be done if the merchant ship resisted visit and search.
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\textsuperscript{25} This tactic mainly for warship target.
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\textsuperscript{26} For modern conventional submarine, it is possible to stay submerge for several days before she must recharge the battery. See: Byeongdoo and Khorsand, “Energy Management System,” 802-808.
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\textsuperscript{27} For nuclear-powered submarine, there is no need to recharge the battery, since she does not use battery, but nuclear generator. See: Byeongdoo and Khorsand, “Energy Management System,” 802-808.
\end{flushleft}
Based on Article 31 of the VCLT, it is important to interpret based on the context in the light of object and purpose. Afterwards, we go to the object and purpose itself. According to the preamble, the object and purpose of the entire UNCLOS 1982 are for peaceful uses of the sea and the strengthening of peace, security, cooperation, and friendly relations among all nations. Meanwhile, the use of the ocean by submarines as warships is clearly beyond the object and purpose of the convention. One might argue and refer to Article 38(2) of UNCLOS 1982 regarding the specific object and purpose of the sub-charter “transit passage”. It mentions there that the meaning of transit passage is “the exercise in accordance with the freedom of navigation and overflight.” By using this argument, we can apply the freedom of navigation in the context of the high seas. In the high seas, absolutely any submarine can navigate by submerging. Therefore, transit passages under straits used for international navigation should be interpreted the same. A submarine may navigate by submerging. However, another object and purpose may emerge, based on Article 39(1)(b), which states that it shall refrain from threatening or using force. Meanwhile, a submerged submarine is a stealth mode that can become a threat to a coastal state. Another thing to note is that if we take “freedom of navigation” as an object and purpose, then it will only apply to transit passage, not to archipelagic sea lane passage. This is because Article 38 of the convention is excluded from mutatis mutandis in Article 54 regarding archipelagic sea lane passage. We can also have the object and purpose exclusively for archipelagic sea lane passage based on Article 49, which says that sovereignty extends to archipelagic waters. It means that, based on this, archipelagic sea lane passage is different from transit passage in some ways. The right of a submarine to pass through an archipelagic sea lane might be different from the right of a submarine to navigate an international strait. The difference between Article 38, which mentions “freedom of navigation” and Article 53 (3), which mentions “right of navigation”, is not a trivial issue from the perspective of ordinary meaning interpretation. A written treaty has its own life and might be interpreted differently than the delegates’ original intent.

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28 Preamble of UNCLOS 1982.
29 Burke in his article stated that the difference was insignificant. Even though based on supplementary means of interpretation that might be right, but treaty once it is written, it has its own life based on text means of interpretation, which is the authentic expression of parties’ intention. The result of interpretation in the future might be different from what the conferees intended. This is especially true considering that treaty is perpetual. Those who interpret treaty might be another generation. Therefore, if it is not written in the text, it might be illegitimate.
VII. SUPPLEMENTARY MEANS OF INTERPRETATION

After concluding the interpretation of the text, we now turn to the supplementary means of interpretation, based on Article 32 VCLT. This is a subjective element of the intention of the conferees. The process of identifying *travaux préparatoir* shall be conducted after we finish our first step of inquiring about the ordinary meaning of the text. This is important, especially in the interpretation, as not all of the *travaux préparatoirs* are available. In some cases, it might be misleading as well.\textsuperscript{30} The function of this stage is to confirm the step that has already been mentioned in Article 31 of the VCLT. The step is by identifying the *travaux préparatoires* of the convention and the circumstances of its conclusion. During the negotiation process, there was a huge divergence between the maritime user states and the strait states. Maritime user states, particularly the United States and the Soviet Union, always tried to preserve the concealment of their submarines, especially their nuclear-powered submarines or Submerged Submarine Ballistic Nuclear (SSBN), which carried ballistic missiles with nuclear warheads, which are normally called Submarine Launcher Ballistic Missile (SLBM).\textsuperscript{31} This is important to keep the SSBN undetected. Therefore, they could maintain the deterrent effect of their nuclear weapons.

Initially, there was a draft of the convention that was proposed by the United States regarding the new regime of transit passage in 1971, which stated that:

“In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit \textbf{shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas}. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.”\textsuperscript{32}

\textsuperscript{30} Merrills, “Two approaches to,” 55.


From here, we can see the difference between the accepted text and the United States’ proposal. The words “as they have on the high seas” were rejected. It means that, at the very least, the conferees could not accept this sentence to be included in the text.

There are several analyses regarding the travaux préparatoir when the negotiation was conducted. One of the most important is that Professor Burke in 1977 analyzed the result of negotiation meetings among states.33 Regarding whether “normal mode” encompassed a submerged passage or not, Burke concluded that normal mode did include submerged passage.34 However, in his article’s conclusion, it was clear that straits states did not agree with submerging submarines in transit passages, and they also felt that the revised text that was negotiated for the draft text of UNCLOS 1982 did not accommodate their interests.35 He also concluded that most observers, but not all, agreed that the text had already accommodated submerged passages.36 This means that, from Burke’s conclusion, even though it was accepted by the majority, we do not know whether it was general acceptance or not at that time. Reisman, in 1980, argued otherwise. He stated that it is difficult to accept that “normal mode” included a submerged passage in the absence of any expression of submerged passage.37 Reisman also commented that, based on the VCLT, it would be difficult to accept the understanding by the parties without any written agreement.38

A critical point is that the United States factor may be excluded from travaux préparatoir interpretation. This is because the United States, even though it has already signed, is not a party to UNCLOS 1982.39 However, President Reagan’ Statement on United States Oceans Policy in 1983 suggests that the United States is prepared to accept and implement the provisions on UNCLOS 1982, with the exception of Chapter XI of UNCLOS 1982.40 It means that the number of delegates that wanted “normal mode” to be

33 Professor Burke’s analysis is one of the most important sources for travaux préparatoirs and the circumstances at that time.
35 Ibid.
36 Ibid.
38 Ibid.
39 The U.S. signed UNCLOS 1982 in 1994 when Bill Clinton was the POTUS, but then was rejected by the senate. See: Robert Beckman, “Bush’s Decision to Accede to UNCLOS Why It Is Important for Asia,” RSIS Commentaries 22 (2007): 2.
interpreted as “including submerged passage”, should be less than what was seen. Moreover, the United States was one of the most outspoken states during negotiations when it comes to submerged passage in straits used for international navigation and archipelagic sea lanes.

Based on the *travaux préparatoir* and the circumstances of the conclusions, it seems that the interpretation that supports the submerging passage is higher. Also, it seems that there is not much difference in the interpretation of transit passage and archipelagic sea lane passage when it comes to the *travaux préparatoire* means of interpretation. In both passages, normal mode can be interpreted as including submerging passages.

**VIII. SUBSEQUENT PRACTICE OF SOME PARTIES AND THE SILENCE OF OTHER PARTIES**

According to VCLT Article 31(3)(b), any subsequent practice must be considered in conjunction with the context.\(^41\) Also, it is important to note that the subsequent practice that will be counted as interpretation under Article 31 is subsequent practice that “establish the agreement of the parties regarding the interpretation of the treaty”, based on the ILC draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of the 2018 treaties.\(^42\) Otherwise, subsequent practice which does not “establish the agreement of the parties” will fall under subsequent practice as a supplementary means of interpretation under Article 32. Therefore, because there is no agreement among the parties regarding the issue of submerged passage in archipelagic sea lanes, which has been concluded after UNCLOS 1982, we shall categorize the subsequent practice of submerged passage in archipelagic sea lanes as part of the supplementary means of interpretation under Article 32.

Now we need to look at how the state’s actions or subsequent practice of some parties confirm the interpretation of the submarine’s normal mode, and whether or not those subsequent practices are rejected by other parties. The silences by other parties may be interpreted as acquiescence in some cases. However, there are two conditions that must be met in order to be classified as an acquiescence. The first one is that the action of parties shall have been

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\(^41\) Article 31 (3)(b) says: “There shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

known to other parties.\textsuperscript{43} The second one is that such action shall be the one that invite reaction from other parties.\textsuperscript{44}

The practice of submerged passage is covert in nature. Usually, maritime powers keep information regarding their submarine operations tight, including when those submarines conduct transit passage or archipelagic sea lane passage. The United States regularly conducts Freedom of Navigation Operations (FONOPS) through its Department of Defense (DoD). By having this operation, the United States makes it clear which things they consider “excessive”. Unfortunately, there are still no FONOPS using submarines. If the FONOPS by using submarine exist, it will help to clarify the state practice of submerged passage by declaring its submarines that will pass through straits used for international navigation or archipelagic states.\textsuperscript{45} However, because of the secrecy of submarine operations, declaring a submarine position is impossible. Arguably, submarines from maritime user states routinely pass through archipelagic sea lanes by submerging. However, archipelagic states remained silent regarding the submerged passage. This silence cannot be regarded as acquiescence, as they were simply not aware. This does not satisfy the first condition of acquiescence, which requires that the actions of the parties be known to the other parties.

There was one state practice in 1966. At that time, the U.S. Navy made an agreement with the Indonesian government regarding submerged passage through Indonesian waters.\textsuperscript{46} The U.S. Navy would then send notifications for its submarine to navigate by submerging.\textsuperscript{47} At that time, Indonesia had proclaimed the area that today is considered archipelagic waters as internal waters.\textsuperscript{48} In order to conceal the submarine position, there was an agreement between the United States and Indonesia not to provide the exact location of the submarine.\textsuperscript{49} Unfortunately, this time period was before UNCLOS 1982.

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\item \textsuperscript{43} Natalie Holvik, “Silence is consent: Acquiescence and Estoppel in International Law,” Master of Law Thesis, Orebro University, 2018, 23.
\item \textsuperscript{44} Conclusion 10(2) of ILC Draft Conclusions on Subsequent.
\item \textsuperscript{45} However, even though it does exist, it will be counted as state practice in terms of the process of forming customary international law, not as a subsequent practice of some parties, in the context of treaty interpretation.
\item \textsuperscript{47} Ibid.
\item \textsuperscript{48} Indonesia. \textit{Undang-Undang tentang Persetujuan Perjanjian Persahabatan antara Republik Indonesia dan Persekutuan Tanah Melayu. UU No. 4 Tahun 1960. (Law on the Agreement of the Treaty of Friendship between the Republic of Indonesia and the Federation of Malaya, Law No. 4 Year 1960).}
\item \textsuperscript{49} Leifer, \textit{International Straits of}, 162.
\end{itemize}
From 1994, after UNCLOS 1982 came into force, up until now, there has been no state practice of prior authorization or prior notification regarding submerged passage or objection from the coastal state whatsoever regarding submerging passage of submarines under archipelagic sea lanes. The absence of an objection to a submerged submarine transiting an archipelagic sea lane without prior authorization or notification is not evidence of tacit agreement or agreed interpretation. It cannot be seen as proof that the coastal state accepts the interpretation that the normal mode for submarines regarding navigation through archipelagic sea lanes is by submerging. It is highly likely that the coastal state just doesn’t have any capability to conduct surveillance under water, considering its vast area of archipelago. It is better to not bite off more than you can chew. The coastal state just ignores it and pretends nothing happened, since it clearly has no capability to check down under. After all, submarine operations are also classified from the standpoint of submarine operators. It is impossible to uncover the plans of a submarine before it enters straits used for international navigation or archipelagic sea lanes. From here, we can conclude that the silence of archipelagic states regarding the subsequent practice of submerged passage by submarine under an archipelagic sea lane cannot be categorized as tacit agreement to other parties’ practice, since the practice itself is not promulgated. Therefore, it fails to satisfy the first condition, which is that the action should have been known by other parties.

Regarding the subsequent practice of some of the parties, it is important to remember that the United States is not a party to the UNCLOS 1982. It means that the United States depends on the application of UNCLOS 1982 as customary international law. Because of the young age of the convention and the fact that archipelagic sea lanes were a new concept during the UNCLOS 1982 negotiations, it is difficult to accept an argument that the regime of archipelagic sea lane passage is customary international law. By following this logic, what the United States conducts cannot be regarded as subsequent practice. This is important for several reasons. First, there is no other country in the world that has the ability to conduct Freedom of Navigation Operations (FONOPS) as the United States does. It means the subsequent practice regarding the application of UNCLOS 1982, including transit passage and archipelagic sea lane passage, is much less than what was seen. Secondly, other states seldom or barely challenge other states’ “excessive claims” on purpose. By having the United States excluded from the number of subsequent practices, the number of practices of the parties that silently pass through archipelagic sea lanes by submerging is also significantly decreasing. Even though the United States practice is excluded from the assessment of the interpretation of the treaty, it
is still relevant in assessing the subsequent practice of the parties.\textsuperscript{50}

Naturally, there will be a sharp difference between subsequent practice regarding transit passage and archipelagic sea lane passage. This is because the number of archipelagic states is much less than the number of strait states.\textsuperscript{51} Even lesser is the number of archipelagic states that have strategic positions in terms of international navigation and have deep and wide archipelagic sea lanes that can be used for submarines to submerge. Arguably, the Indonesian archipelago is the only one that is located in strategic waters for international navigation. Up to now, Indonesia is the only archipelagic state that has already submitted archipelagic sea lanes to the International Maritime Organization (IMO) as a competent international organization based on Article 53 (9) of the convention.\textsuperscript{52} All of those factors make the subsequent practice of archipelagic sea lane passage more limited in numbers than transit passage.\textsuperscript{53}

Another important consideration is the silence of straits states and archipelagic states from arguing the San Remo Manual or the Naval Manual. For example, we can look at the U.S. Manual: The Commander’s Handbook on the Law of Naval Operations. It clearly states in those two manuals that the interpretation of “normal mode” includes a submerged passage.\textsuperscript{54} These manuals are also available to the public. Straits states and archipelagic states should express their objections. From this perspective, those states seem to have already accepted the submerged passage as the interpretation of “normal mode”. However, the states’ silence cannot always be interpreted as acquiescence. Silence can be regarded as speech when the conduct of another state requires a response.\textsuperscript{55} The last thing is that those manuals, by their nature,

\textsuperscript{51} There are 22 states claimed as Archipelagic states in the world. See: Erik Franckx and Aster Boeye, “Archipelagic States” in Oxford Bibliographies in International Law, (2020), 1-42.
\textsuperscript{53} There are a lot of straits states in the world. However, archipelagic state that located in a strategic location, and with deep and wide archipelagic sea lanes, arguably, Indonesia is the only one that fulfil all those conditions.
\textsuperscript{55} Based on the ICJ decision in the case concerning the sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge between Malaysia and Singapore, it is stated that “silence may also speak, but only if the conduct of the other state calls for a response”. ICJ
do not cause a reaction from other parties. The San Remo Manual is clearly not a legally binding instrument, and it was never intended to be. In terms of the Naval Manual, even though it is available to the public, it is intended for internal purposes. Therefore, it does not need a reaction from other parties. But in the case of the U.S. Navy manual, it is not part of subsequent practice by a state party because the United States is not a party to UNCLOS 1982.56

The silence of archipelagic states could be attributed to the fact that they want to conceal their true intention, since they don’t have any ability to challenge maritime powers. They wait and buy time until they have the power to say no. Until then, it is better for them to remain silent as long as there is no loss or harm to the coastal state from the submerged passage by submarine. In fact, when there is no damage, especially in times of peace, it is just the same whether the submerged submarine violates the rules as described in the convention or not.57 After all, archipelagic states lack the capability to detect submarines in all their archipelagic sea lanes and archipelagic waters. Therefore, it can be concluded that the subsequent practice does not confirm the submerged passage of submarine as a part of “normal mode” in archipelagic sea lane passage. However, the subsequent practice also does not show otherwise. Now, we turn to San Remo Manual which can be categorized as a non-state actor, to identify the subsequent practice of some state parties.

**IX. SAN REMO MANUAL INTERPRETATION**

We can also assess the subsequent practice of state parties by identifying non-state actors.58 In this way, it can help to identify the subsequent practice of treaty based on Article 31 VCLT. The prominent San Remo Manual (SRM) 1994 can become an alternative. Since it has received worldwide acceptance (including the ICRC),59 we can use it as an alternative means. This is because the San Remo Manual was written by many experts. The San Remo Manual is decision paragraph 121. State silence can be a way to conceal the state’s real intention. ILC in 2018 also states that the interpreter needs to take into account subsequent practice of some parties with silence of other parties as a part of interpretation, in which that subsequent conduct requires reaction from other parties.

56 Even though it cannot be regarded as subsequent practice of state, but it is included in state practice that form customary international law.

57 In times of peace, in case there is a violation of submerged submarine while conducting archipelagic sea lane passage, as long as there is no damage from for example, pollution, then it is basically just the same for the coastal state. In this situation, a submerged passage or a surfaced passage doesn’t matter. But in times of war, the coastal states will suffer the most.

58 ILC Draft Conclusions on Subsequent, 5(2).

59 However, in this case, ICRC only has a competence in a field of Humanitarian law. At the 26th Conference in 1995, ICRC endorsed all countries to adopt the San Remo Manual 1994.
a manual that codified many rules of the Law of Naval Warfare by experts (not by states) in 1994.60 This is a non-binding document. Based on the San Remo Manual paragraph 28, during armed conflict, belligerent submarines can pass through archipelagic sea lanes of neutral states by submerging.61 In the explanation, it is mentioned that the general interpretation of Articles 39 and 54 of UNCLOS 1982 regarding “normal mode” includes submerged passage by submarine.62 From here, we can see the difference between the discussion among state representatives during UNCLOS 1982 and the discussion among experts in their personal capacity in the SRM. During the UNCLOS 1982 discussion, there was a debate regarding this issue between maritime user states and strait states. However, during the SRM discussion, it seemed that the debate was fading away. At the very least, we can see some development here. During the negotiation of UNCLOS 1982, there was no general agreement to jot down a specific mode of passage. Even though it might be finally agreed by the majority that submarines can pass through by submerging (at least from the perspective of supplementary means of interpretation by examining travaux préparatoir and the circumstances of the conclusion), it was impossible at that time to write it in the text. Rather, states used vague language such as “normal” to get all delegates onboard. However, this situation was changed during the SRM meeting. The manual resulted in clear and direct language stating that a submarine can submerge and pass through straits used for international navigation and archipelagic sea lanes.

There are several possibilities for conclusion regarding this. It might be because of the development of international law, particularly regarding the subsequent practices by some parties and their acceptance by other parties. There might be some changes in state practice and the acceptance of states, particularly strait states and archipelagic states, one to two decades after the UNCLOS 1982 discussion. This could also be because the discussion was conducted in the post-cold war era, when the United States became the sole superpower. There was an impression at that time that the world would become much more peaceful than before. The transformation from a bipolar to a unipolar world would automatically change the way nuclear deterrence effects work, which eventually increases world peace.

60 All experts are at their personal capacities without representing views of their respective states. See: “Treaties, States Parties.”
61 Paragraph 28 SRM.
However, one might also conclude that there is no representative of the states in the SRM. It was just a non-binding meeting which did not get much attention from states, particularly strait states and archipelagic states. All the experts came in their personal capacity. And many of them came from developed countries and maritime powers. In fact, many of the SRM provisions were adopted from the naval manuals of western states, such as the United States, the United Kingdom, and Germany. Even the U.S. manual, the one in which many of its contents have been adopted into the SRM, is not a manual that is owned by a state party to UNCLOS 1982. There was also no experts on the archipelagic state present during the SRM discussion. It is worth noting that even though generally, experts in SRM meetings accept the interpretation of normal mode for submarines as submerging, it is only the states alone that can interpret the treaty. This is with the exception of international courts, if the case is brought before the court by the parties, with the parties’ consent (military activities are exempted from UNCLOS 1982 compulsory dispute settlement). Even so, it can be concluded that the SRM does support the subsequent practice to confirm the submerged passage of submarine as a part of “normal mode” in archipelagic sea lane passage.

X. SUBMARINE PASSAGE AS A MILITARY ACTIVITY WHICH IS EXCLUDED FROM COMPULSORY DISPUTE SETTLEMENT

Whichever the accepted interpretation is, in this case, power does matter. This is because, based on Article 298 (1) (b) of optional exceptions to the applicability of section 2, the dispute regarding military activity is exempted from compulsory dispute settlement under section 2 of UNCLOS 1982. A submerged submarine is definitely a military activity. It is impossible for

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66 Article 298 (1)(b): “When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
   a…. b. disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service.”
states, particularly superpower states, to voluntarily accept the jurisdiction of an international court regarding this issue. The interpretation of “normal mode” will never go to court. The court will have no opportunity to examine this issue. It means that each party, or even non-party states like the United States, will use the interpretation that supports their respective national interests. Even though archipelagic states become persistent objectors regarding the making of customary international law processes or the interpretation of “normal mode”, the maritime powers or submarine operators will just use their own interpretation. It is simply because archipelagic states have no power to enforce their interpretation. Without any compulsory jurisdiction, maritime powers can easily undermine archipelagic states. This might be the reason why all these times archipelagic states just keep silent regarding this issue.

However, the exception itself is an optional exclusion. Not all states have already proclaimed the exemption of military activities from compulsory dispute settlement. One might argue that once an incident happens, then that specific state will proclaim an exemption. That might be true, but in this case, it all depends on who makes the case itself. It is possible when two archipelagic states that do not agree on a submerged passage arrange a scenario. One state will become the coastal state, and another one will become the submarine operator. Then the archipelagic state, which has a role as a submarine operator, will send its submarine to conduct a submerged passage in the archipelagic sea lane of the archipelagic state, which has a role as a coastal state. The submerged passage will be conducted as easily as possible to be detected by the coastal state. The coastal state then makes a complaint and sends a diplomatic note regarding the submarine’s violation of the archipelagic sea lane passage by submerging. Both states finally volunteered to bring the case before the court and accept the jurisdiction of the court. In this way, the court will have the opportunity to examine whether the exact interpretation of “normal mode” in Article 53 (3) of UNCLOS 1982 includes submerging passage or not. The court’s verdict then becomes the jurisprudence in this case.

Another option is that in a scenario when the submerging submarine is a non-military submarine or other underwater vehicle, it is possible for the coastal state to invoke compulsory dispute settlement. This is in accordance with UNCLOS 1982 Article 297 (1)(a)(b), which states that disputes concerning the interpretation of freedom and right of navigation shall be subject to the mandatory procedure involving binding decision in section 2 of the convention. Of course, the archipelagic states shall have an excellent underwater surveillance capability to identify submerging underwater vehicle.

68 To do this, of course both states should calculate the political impacts within both internal countries.
XI. CONCLUSION

All in all, the writers conclude that the submerging passage for submarines for archipelagic sea lane passage is not an accepted interpretation of “normal mode” in UNCLOS 1982. This is because, on one hand, *travaux préparatoir* means of interpretation seem to favor submerged passages that are included within the meaning of “normal mode”. This is supported by the assessment of subsequent practice, particularly from non-state actors, in this case the San Remo Manual. On the other hand, the textual interpretation gives more weight to the exclusion of submerged passage for both transit passage and archipelagic sea lane passage. In the case of archipelagic sea lane passage, the weight of the exclusion is heavier than that of the transit passage. This is because of the absence of the phrase “freedom of navigation” from the text of Article 53 of UNCLOS 1982. As a result, based on VCLT 1969, which states that textual interpretation takes precedence over *travaux préparatoires*, the submerged passage is not a widely accepted interpretation in archipelagic sea lane passage.
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