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The Law of Naval Warfare and International Straits

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WHEN IT COMES TO THE QUESTION OF WHICH RULES OF international law apply to international straits in times of naval armed conflict, one has to distinguish between straits bordered by at least one of the parties to an international armed conflict and straits bordered by States that are not directly involved in the hostilities. Although the law of maritime neutrality—let alone the general law of neutrality—is far from settled, the latter situation will, for reasons of convenience, be described as the legal status of neutral straits.¹

Straits are comparatively narrow natural passageways between one part of the high seas or an exclusive economic zone and another part of the high seas, or exclusive economic zone.² Artificial passageways must be distinguished from straits. In particular, they are not governed by the international law applicable to straits, but rather (and if at all) by special treaty provisions. That being so, for the purposes of the present study it is important to note the following provisions.

- With respect to the Panama Canal, the Treaty of 7 September 1977³ provides that “in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire

equality. . . . Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament.”⁴

- Pursuant to the Treaty of Constantinople of 29 October 1888,⁵ “the Suez maritime canal shall always be free and open, in time of war and in time of peace, to every vessel of commerce or war, without distinction of the flag.”⁶

- Pursuant to Article 380 of the Treaty of Versailles, the Kiel Canal is open to all vessels flying the flags of States not at war with Germany.⁷

The Legal Status of Belligerent International Straits

As far as international straits of the parties to an international armed conflict are concerned, neither those not completely overlapped by territorial sea nor straits governed by “long-standing international conventions,” will be dealt with here in depth.⁸ In the case of the former, a route through the high seas or through an exclusive economic zone will usually exist. Hence, littoral States are not bound by the special rules and principles applicable to international straits.⁹ In the case of the latter, there is only one international convention explicitly dealing with the situation of a littoral State being party to an ongoing armed conflict.¹⁰ According to Articles 1, 2, 4, and 5 of the 20 July 1936 Montreux Convention, all neutral vessels enjoy the right of transit passage, as long as they travel through the Bosphorus and the Dardanelles by daytime, refrain from supporting Turkey’s enemies, and respect sea lanes designated by the Turkish authorities. However, there is no provision restricting the transit right of Turkish warships. Rather, Article 20 provides:

En temps de guerre, la Turquie étant belligérante, les dispositions des articles 10 à 18 ne seront pas applicables; le passage des bâtiments de guerre sera entièrement laissé à la discrétion du Gouvernement turc.

Thus if Turkey is a belligerent the same rules apply as in international straits not governed by a special treaty régime.

Suspension of the Right of Transit Passage in Time of Armed Conflict? The territorial seas of the parties to an international armed conflict are part of the general area of hostilities. Therefore, at first glance there seem to exist no restrictions on the conduct of hostilities in and over international straits completely overlapped by the territorial seas of the parties to an international armed conflict. Indeed, subject to the applicable maritime *jus in bello*, enemy vessels and aircraft in such straits may be attacked, and enemy and neutral

merchant vessels may be visited, stopped, and captured.¹¹ Of particular note, the littoral State is entitled to deny all enemy vessels and aircraft the right of transit passage.¹² In view of the economic interests involved,¹³ however, it is a matter of dispute whether such straits may also be closed to the shipping of States not parties to the conflict, i.e., neutral shipping.¹⁴

In the course of the deliberations at the 1907 Second Hague Peace Conference on Convention VIII, a proposal by the Netherlands on a comprehensive prohibition of mining international straits was rejected.¹⁵ Another, seeking a prohibition on the complete closing of an international strait by mines, also failed.¹⁶ Therefore, although a number of delegates expressed sympathy for such proposals, Hague Convention VIII lacks any provision on the mining of international straits.¹⁷ During the Second World War, numerous international straits were mined.¹⁸ Yet during the first two years of the war this closure was not complete. In the respective proclamations of danger zones, either peaceful shipping was referred to or piloting services or safe passages were designated, thus enabling peaceful shipping to transit the straits relatively unmolested.¹⁹ Still, in view of the total character of this war in the years following, these examples are insufficient to prove the existence of a prohibition on entirely closing international straits. State practice after 1945 also reveals that if States bordering an international strait are parties to an international armed conflict, they are inclined to close it even to peaceful shipping; they are not prepared to tolerate the dangers otherwise involved.²⁰

It seems, however, that a total closure of international straits, especially by naval mines, is inconsistent with the 9 April 1949 judgement of the International Court of Justice in the Corfu Channel case.²¹ As is well known, the Court, in view of the state of war alleged by Greece, acknowledged Albania's right to restrict the passage of warships. It emphasized, however, that this may not lead to "prohibiting such passage or subjecting it to requirements of special authorization."²² Recent state practice also indicates the existence of a rule prohibiting the suspension of the right of transit passage, even during an international armed conflict. At the beginning of the first Gulf War, Iran explicitly acknowledged its legal duty to keep open those parts of the Strait of Hormuz²³ overlapped by its territorial sea.²⁴ When Iran proclaimed a war zone in that sea area and closed it to international shipping, the international community, because of the overall importance of this strait for international oil trade, reacted with vehement protests.²⁵ In particular, the United States maintained that the right of transit passage remains unaffected by the fact that the bordering States are involved in an international armed conflict.²⁶

These statements and protests imply that the right of transit passage through and over international straits as laid down in Article 38 of the UN Convention on the Law of the Sea (LOS Convention) is both customary in character and binding upon States parties to an international armed conflict.²⁷ Further evidence in favor of the customary character of a comprehensive and non-suspendable right of transit passage is Article 16, paragraph 4, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.²⁸ According to that provision there "shall be no suspension of the innocent passage of foreign ships through straits which are 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." Moreover, it has to be kept in mind that the right of transit passage applies especially to straits that have lost their high seas character because of an expansion of the territorial sea to twelve nautical miles.²⁹ In all likelihood, without compensation in the form of the right of transit passage, the legal status of international straits would not have been settled.³⁰ Finally, the *Commander's Handbook of the U.S. Navy* (NWP 1-14M) provides that naval mines may be employed "to channelize neutral shipping, but not in a manner to deny transit passage of international straits [. . .] by such shipping."³¹

On the other hand, it must be remembered that some States neither acknowledge the customary character of Article 38 of the LOS Convention,³² nor agree with its applicability in times of armed conflict. At the beginning of the deliberations on the Convention, a number of delegations, while pleading for a transit right for vessels in international straits, were hesitant to accept a right of overflight as well.³³ In contrast to NWP 1-14M, the German Handbook, in section 1042 on mining, provides that "the shipping lanes of neutral and non-belligerent States shall be kept open to an appropriate extent, if military circumstances so permit."³⁴ This view is obviously shared by Denmark.³⁵

It follows from the foregoing that State practice is conclusive only to the extent that, in principle, neutral vessels, i.e., warships and merchant vessels,³⁶ may not be denied the right of transit passage (or of non-suspendable innocent passage) in international straits belonging to the parties to an international armed conflict.³⁷ However, there is also a tendency towards restriction of this right.³⁸ Unfortunately, it is far from clear under which conditions the littoral belligerent State should be allowed to so restrict it. Of course, one possibility is denial to neutral submarines of the right to transit a belligerent strait submerged.³⁹ This restriction could be justified by the legitimate interest of the belligerent littoral States in being fully informed of sea traffic in its coastal waters. The interests of the neutral flag States would be infringed upon only insignificantly, especially in view of the technical difficulties of identifying submerged objects.⁴⁰ Still, because of its inconclusiveness,

no further conclusions relating to restrictions on the neutral States' right of transit passage can be drawn from State practice. In any event, the reasons justifying any limitation of this right must be of considerable weight—for example, overwhelming considerations of national security.⁴¹ This follows from the fact that the law of both naval warfare and maritime neutrality has to be considered to be of an exceptional legal order.⁴²

The Right of Overflight. The foregoing principles cannot, as such, be applied to the right of overflight that Article 38.1 of the LOS Convention includes in transit passage.⁴³ While NWP 1-14M contains a prohibition of entirely mining international straits, no provision addresses closure of the airspace above an international strait.⁴⁴ Of course, enemy military aircraft entering the airspace above an international strait overlapped by the belligerent coastal State's territorial sea may be attacked, and enemy civilian aircraft may be forced to land and be subjected to capture.⁴⁵ In principle, neutral aircraft are entitled to continue with their normal operations, but if they enter that airspace they do so at their own risk.⁴⁶ Still, an unlimited application of the peacetime rules on overflight in time of armed conflict would meet considerable practical difficulties. Aircraft move much faster than ships. The *Vincennes* incident is but one demonstration of the difficulties involved in the identification of aircraft within a limited period of time.⁴⁷ In view of the potential threat posed by aircraft, parties to an international armed conflict will hardly be willing to allow neutral air traffic to continue using the airspace above their international straits. Hence, there seem to be good reasons for a belligerent right to restrict or even suspend the right of overflight by neutral air traffic in the airspace above international straits in time of armed conflict. Indeed, in State practice there are some indications that during an international armed conflict coastal States reserve a right to close entirely the airspace above international straits overlapped by their territorial seas.⁴⁸ This practice, however, is not sufficient to prove either the nonexistence or existence of an unlimited right of overflight by neutral aircraft in time of armed conflict. Therefore, the legality of a restriction of transit passage by neutral aircraft can only be judged, if it can be judged at all, *ex post* in light of the *jus ad bellum*.

The Legal Status of Neutral International Straits

Neutral International Straits to Which the Right of Transit Passage Applies.

The Second Hague Peace Conference. The legal status of neutral international straits was dealt with at the Second Hague Peace Conference, in the context of

the rights and duties of neutral States in naval war. In 1894, the Institut de Droit International had proposed a rule according to which “les détroits qui servent de passage d’une mer libre à une autre mer libre, ne peuvent jamais être fermés.” The Swedish delegate to the Second Hague Peace Conference referred to that proposal in these terms: “Si le droit des neutres d’interdire l’accès de ses eaux territoriales aux navires de guerre et aux prises est consacré comme le porte la proposition britannique article 30, il faudrait ajouter à cette disposition une exception du même contenu que la résolution de l’Institut.”⁴⁹ The Danish delegate proposed an amendment by which the provisions of Hague Convention XIII were not to be understood “de façon à prohiber en temps de guerre le passage simple des eaux neutres, unissant deux mers libres par un navire de guerre ou navire auxiliaire d’un belligérant.”⁵⁰ Both proposals were aimed at denying neutral States the right to close their territorial seas if they formed part of an international strait. The contrary view was taken by the Ottoman and Japanese delegates, who wanted to treat international straits in the same manner as other coastal waters.⁵¹ In the end, the legal status of neutral international straits remained unsettled, even though the Third Committee in its report to the plenary had come to the conclusion that “la formule adoptée . . . ne tranche nullement les questions précédentes, laissées sous l’empire du droit des gens général.”⁵² Still, it is doubtful that by 1907 a rule to that effect was in existence.⁵³ Although only Japan had explicitly rejected a prohibition on closing neutral international straits, the lack of willingness amongst the other delegates to agree upon a special provision on straits cannot be ignored.⁵⁴

State Practice. State practice during international armed conflicts before 1945 was also inconclusive with regard to the existence of a general and comprehensive legal duty of neutral States to keep their international straits open.⁵⁵ Only the Scandinavian States allowed belligerent merchant vessels and warships to transit their international straits and, if they had laid mines there, offered piloting services.⁵⁶ In addition, Denmark, Finland, Iceland, Norway, and Sweden, in the Stockholm Declaration Regarding Similar Rules of Neutrality of 27 May 1938,⁵⁷ promised to keep their international straits open to belligerent warships.⁵⁸ These examples are insufficient to prove the existence of a customary rule.⁵⁹ On the contrary, other States, like Germany, believed that there existed no rule of customary or treaty law obliging neutral States to let belligerent merchant vessels freely transit neutral international straits.⁶⁰

Relevant state practice since 1945 is also predominantly restricted to Scandinavian States,⁶¹ which, by acts of national legislation, have more or less

clearly shown their willingness to keep their international straits open for belligerent warships, merchant vessels, and aircraft.⁶² Some authors claim the existence of a general rule of customary law to that effect.⁶³ Unfortunately, they ignore the fact that such a claim must be based on a general practice accompanied by a corresponding *opinio juris*. Moreover, the question of whether the transit of belligerent warships is in accordance with the neutral status of the littoral State has to be clearly distinguished from that of whether a neutral State is entitled to deny transit through or over its international strait to belligerent warships, merchant vessels, or aircraft. Therefore, despite assertions to the contrary, one must conclude that until the end of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1982, there existed no customary rule prohibiting the total closure of international straits by neutral coastal States.

The Influence of the International Law of the Sea. So far, we have not taken into consideration the progressive development of the international law on international straits initiated by the codifications of the law of the sea, especially by the LOS Convention. As already mentioned, Article 16.4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides that there “shall be no suspension of the innocent passage of foreign ships through straits which are 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.”⁶⁴ Since it was up to the coastal State to determine the innocence of passage, the question arose of whether it was entitled to require foreign warships to leave the strait should they fail to comply with the laws and regulations of the coastal State. Other unresolved issues include the right of submarines to transit straits submerged and the duty of foreign military aircraft to obtain prior admittance from the coastal State for overflight.⁶⁵

These problems were partly solved by UNCLOS III, especially because extension of the territorial sea to twelve nautical miles did not allow the issue of international straits to be left unregulated.⁶⁶ Now the right of transit passage applies in international straits that are overlapped by the territorial seas of the littoral States.⁶⁷ According to Article 38.2 of the LOS Convention, transit passage that “shall not be impeded”⁶⁸ is “the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.” While exercising the right of transit passage, ships and aircraft must proceed without delay; refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of the bordering State, or in any other manner violate the principles of international law embodied in the United Nations Charter; and limit activities to those

incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress.⁶⁹ Moreover, according to Article 39.2, ships in transit shall comply with “generally accepted international regulations, procedures and practices” for safety at sea and for the prevention, reduction, and control of pollution from ships. This means that they are obliged to observe the conventions concluded under the auspices of the International Maritime Organization (IMO).⁷⁰ Aircraft in transit passage shall observe the Rules of the Air established by the International Civil Aviation Organization (ICAO).⁷¹ Finally, the littoral State is entitled to designate sea lanes and to prescribe traffic separation schemes.⁷² However, such laws and regulations shall not discriminate in form or in fact among foreign ships, or in their application have the practical effect of denying or impairing the right of transit passage.⁷³ This implies that the right of transit passage will remain unaffected, even if the vessel or aircraft in transit passage violates the regulations adopted by the littoral State.⁷⁴

In view of the customary character of these provisions, we may draw the conclusion that warships and military aircraft enjoy an unimpeded right of transit passage.⁷⁵ Submarines, because of the reference to “normal modes” in Article 39.1(c), may transit international straits submerged.⁷⁶ The littoral States’ duty not to infringe upon this right is incumbent on them not only in time of peace but also during an international armed conflict at sea if they are not parties.⁷⁷ If the parties to an international armed conflict may restrict or suspend the right of transit passage only in exceptional cases, then, *a fortiori*, States not parties to the conflict must be subject to even stricter limitations.

This conclusion is verified by recent State practice. During the Iran-Iraq conflict, transit through or over the Strait of Hormuz by the Iranian and the Iraqi armed forces was in no way restricted by Oman. The military manuals of the U.S. Navy,⁷⁸ Canada,⁷⁹ and the Federal Republic of Germany⁸⁰ also provide that neutral States are not entitled to restrict or suspend the transit of belligerent warships and military aircraft, or to submit them to stricter regulations than those applicable to vessels and aircraft of other States.⁸¹ Moreover, the continuing validity of the right of transit passage is an appropriate means to meet the object and purpose of the law of neutrality.⁸² Hence, Rauch correctly states:

One of the advantages of the new transit passage concept is that it keeps the littoral States bordering straits with great strategic value out of the vicious circle of escalation in times of tension and crisis. If transit through such straits were subject to the discretion of the coastal States, they would unavoidably become involved, even if the discretionary power were to be exercised evenhandedly, i.e.,

even if they meticulously abided by the rule that all restrictions or prohibitions have to be applied impartially to the belligerents. The ramifications of a refusal or of a permission of transit in whole or in part—e.g., only surface navigation, or surface and submerged navigation, or navigation and overflight—could, albeit legally non-discriminatory, in fact be of quite different military and strategic value to the parties to the conflict.⁸³

As in time of peace, however, belligerent warships in transit must properly respect designated sea lanes and traffic separation schemes and must proceed without delay.⁸⁴ They may not carry out any research or survey activities without the prior authorization of the bordering States.⁸⁵ The prohibition on the threat or use of force against the littoral State is complemented by the relevant prohibitions of the law of maritime neutrality as laid down in the 1907 Hague Convention XIII and as found in customary law.⁸⁶ In particular, belligerent warships and military aircraft may neither take hostile actions nor use these sea areas as a base of operations.⁸⁷ Military aircraft must respect safety regulations and have due regard for the safety of air traffic.⁸⁸ In view of their sovereign immunity, belligerent warships are not bound by the provisions of the LOS Convention on the protection of the marine environment.

While submarines may pass through neutral international straits submerged, it is not quite clear which additional measures belligerent warships and military aircraft in transit may take.⁸⁹ According to the Canadian Draft Manual, they may transit a neutral strait “in an appropriate state of readiness with appropriate sensors activated.”⁹⁰ NWP 1-14M provides that “belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.”⁹¹ Military aircraft may “engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.”⁹² The same rules can be found in the *San Remo Manual*.⁹³ The use of acoustic and electronic sensors must be considered a normal activity of warships and military aircraft, especially during armed conflict, an activity that is not to be equated with “research and survey activities” in the sense of Article 40 of the LOS Convention. Otherwise, their security would be intolerably jeopardized.⁹⁴

There remain some doubts as to whether the other measures mentioned in section 7.3.5 of NWP 1-14M are compatible with the duty of continuous and expeditious transit.⁹⁵ Since there is no relevant State practice that would allow conclusions regarding the current state of the law, one cannot but consider such activities as in accordance with the applicable law if they do not: (1) endanger the safety of navigation within the strait; (2) present a threat or

use of force against the sovereignty, territorial integrity, or political independence of the neutral littoral State in a way incompatible with the laws of neutrality; or (3) unreasonably exceed what is necessary for a continuous and expeditious transit.⁹⁶ As regards the use of military aircraft, this may not result in a use of neutral waters or airspace as a base of operations. Thus, attacks may not be conducted by military aircraft launched from warships within neutral international straits.⁹⁷ Within and over neutral territorial seas, all hostile actions by belligerent forces are prohibited. The fact that parts of a neutral's territorial sea form an international strait does not alter anything. The right of transit passage implies only that the neutral littoral State is prohibited from closing an international strait to belligerent warships and military aircraft; it does not mean that the coastal State's sovereignty is no longer protected.

It needs to be emphasized that the foregoing principles only apply to offensive operations. As seen, according to NWP 1-14M and the San Remo Manual "defensive measures consistent with their security" would not be contrary to the inviolability of the neutral State's sovereignty. During the discussions on the San Remo Manual there "seemed to be general agreement that because of the dangers of unlawful attack on a transiting unit by an opposing belligerent which might ignore its duty to respect the neutrality of the State bordering the strait, . . . the transiting unit should be allowed to go through in a high state of readiness and should be able to adopt the defensive measures necessary for the self-defence of the unit or force."⁹⁸

Unfortunately, the participants were unable to be more concrete about this issue. There is, however, another rule in the San Remo Manual that is of help in evaluating the legality of defensive measures taken in neutral waters, including neutral international straits. Paragraph 22 provides:

Should a belligerent State be in violation of the regime of neutral waters . . . the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give the neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

Accordingly, belligerent warships and military aircraft transiting a neutral international strait are allowed to take all measures necessary for self-defense

as acknowledged by customary international law if the neutral littoral State is either unwilling or unable to terminate the violation of its neutrality. Thus, the sovereignty of the neutral State and the belligerents' interests are equally met.

Neutral International Straits to Which the Right of Transit Passage Does Not Apply. The rules and principles dealt with so far undoubtedly apply to international straits overlapped by the territorial seas of neutral coastal States. However, according to the LOS Convention the right of transit passage is not valid in all straits which—either in general or in specific maritime parlance—are used for international navigation. The exceptions have repercussions for the law of maritime neutrality, because they concern sea areas covered by the territorial sovereignty of the neutral coastal State.

Exceptions to the Right of Transit Passage According to the LOS Convention. Straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea or historical bay of a foreign State are governed only by the right of innocent passage.¹⁰⁰ Although according to Article 45.2 of the LOS Convention there “shall be no suspension of innocent passage through such straits,” the coastal State will be in a position to impose stricter limitations on international navigation than if the transit passage régime applied. The decisive differences are that foreign submarines may not transit such straits submerged and that foreign aircraft are prohibited from entering the airspace above them, unless the coastal State explicitly consents.

Another explicit exception to the transit passage régime is laid down in Article 36 of the LOS Convention; it applies “if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.” If an international strait is not—at least in part—completely overlapped by the territorial sea of the coastal States, ships and aircraft of all nations enjoy freedom of navigation and overflight in the remaining corridor even if an exclusive economic zone has been proclaimed. Such a situation is encountered in all straits whose breadth exceeds twenty-four nautical miles measured from properly drawn baselines. In straits whose breadth is less than twenty-four nautical miles there may also exist a high seas (or EEZ) corridor if the coastal States claim a territorial sea of less than twelve nautical miles.¹⁰¹ Within those portions of the strait that are part of the coastal State's territorial sea, ships and aircraft only enjoy a *suspendable* right of innocent passage.¹⁰²

At first glance, the provisions of Article 36 seem rather clear. However, their practical application sometimes poses difficult problems. It needs to be

emphasized that the existence of a high seas or EEZ corridor as such does not exclude the applicability of the transit passage régime. The route must be “of similar convenience with respect to navigational and hydrographical characteristics.” If the remaining corridor does not meet these qualifications, the transit passage régime will also apply in straits not overlapped by the territorial sea of the bordering State.¹⁰³ But when is the corridor “of similar convenience”? In view of the wording of Article 36, this will not be the case if the navigational channel is not identical with the remaining corridor or when transiting through the corridor would result in navigational difficulties or a loss of time.¹⁰⁴

The latter aspect is also of importance with regard to overflight. If the corridor, due to the geographic configuration of the bordering coastlines, often changes its direction, military aircraft in particular will hardly be able to follow it exactly. This problem is not resolved by demanding that pilots decelerate, because, should they do so, their aircraft would be more vulnerable to surface to air missiles. Hence, the coastal State will have to tolerate flights over those parts of the strait overlapped by its territorial sea.¹⁰⁵

Of course, some will counter these arguments by denying a neutral State’s duty to have regard for belligerent military considerations. The neutral coastal State is, they would argue, obliged to tolerate transit through and over its territorial sea only if necessary for the safety of international air and sea traffic. If a belligerent is not prepared to assume the risks resulting, e.g., from slow flight, it must simply refrain from using the neutral airspace. The counterarguments have some validity in time of peace. Although the relationship between belligerents and neutrals is to a considerable extent governed by the law of peace, the modification thereof by the laws of neutrality may not be ignored. The object and purpose of the law of neutrality is to protect the neutral against the effects of hostilities and to prevent it from becoming (directly) involved in the armed conflict. The parties to the conflict will scarcely be willing to limit their operations to corridors that are not of “similar convenience.” The neutral State would be obliged to react, possibly by military means, to the use of its airspace. Of course, there remains no specific rule of maritime neutrality which would permit belligerent aircraft to overfly neutral territorial seas in those international straits through which there are high seas or exclusive economic zone routes of similar convenience as defined by Article 36. However, functional considerations seem to justify the conclusion that belligerent warships and military aircraft are entitled to transit such straits in and over the neutral coastal State’s territorial sea.¹⁰⁶

The third kind of strait excluded from the application of the régime of transit passage is dealt with in Article 38.1 of the LOS Convention. This exception, generally called the Messina Exception because it has its origin in a corresponding endeavour by Italy, applies to a strait that “is formed by an island of a State bordering the strait and its mainland.”¹⁰⁷ In such a case, transit passage shall not apply “if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.”¹⁰⁸ However, according to Article 45 all ships enjoy the right of innocent passage in such straits. Although States bordering a strait like that of Messina will regularly try to exclude the right of transit passage, they will be entitled to do so only if the conditions laid down in Article 38.1 are met.¹⁰⁹ For example, even in the Strait of Messina there is no unlimited right to prevent ships and aircraft from transiting.¹¹⁰ Otherwise, ships and aircraft travelling from France to the southern and southeastern Mediterranean would be compelled to take the route around Sicily, which is about sixty nautical miles longer than the passage through the Strait of Messina. It can hardly be said that that route is of “similar convenience.”

Straits Governed by Long-Standing International Conventions. Finally—and this is a continuing cause for dispute—according to Article 35(c) of the LOS Convention the régime of transit passage does not apply to straits “in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.”¹¹¹ There is no indication in the Convention as to which straits qualify for this exception. Still, according to the view taken here, only six international straits, if any at all, are regulated by such conventions:¹¹² the Turkish Straits (Bosporus and Dardanelles), the Strait of Magellan, the Strait of Gibraltar, the Sound and the Belts, and the Åland Islands Strait.¹¹³

It is beyond any doubt that in the Turkish Straits the right of transit passage does not apply,¹¹⁴ for there are specific rules with regard to transit passage in the Montreux Convention of 20 July 1936.¹¹⁵ In time of peace and in time of war, merchant vessels of all nations enjoy an unrestricted right of passage through the Dardanelles, the Marmara Sea, and the Bosporus.¹¹⁶ Article 23 limits the right of overflight to civil aircraft. Accordingly, military aircraft may not enter airspace above the Straits, either in time of peace or war.

Special provisions apply to warships; further, the Convention distinguishes between warships belonging to States bordering the Turkish Straits and those belonging to other States.¹¹⁷ In principle, all warships are obliged to inform the Turkish authorities in advance, by notification of the names, types, and

numbers of the ships and of the date of passage.¹¹⁸ Prior to passage the commander must also provide information about the nature of weapons aboard his ship. No more than nine ships may transit the Straits simultaneously. The aggregate tonnage of the ships may not exceed fifteen thousand tons unless they belong to a State bordering the Straits. If they exceed fifteen thousand tons, the ships may only transit alone or in the company of two cruisers (or destroyers). The total tonnage of warships in the Black Sea belonging to States not bordering that sea may amount to thirty thousand tons (or, in the event of significant disparity between fleets, a maximum of forty-five thousand tons). All warships transiting the Straits are prohibited from launching their aircraft. Submarines may not transit, unless they belong to bordering States and originate from areas beyond the Black Sea. Such submarines may only transit alone, during the day, and on the surface. Laid down in Articles 10 through 18, these provisions on warships apply both in time of peace and, if Turkey is not a belligerent, in time of war.¹¹⁹ Warships belonging to the parties to an international armed conflict are strictly prohibited from transiting the Turkish Straits.¹²⁰

While the Turkish Straits do indeed match the conditions laid down in Article 35(c) of the LOS Convention, the other straits mentioned do not; however, they clearly qualify as being governed by “long-standing international conventions” in the sense of that provision. Freedom of navigation in the Strait of Magellan is dealt with in the Boundary Treaty between Argentina and Chile of 23 July 1881.¹²¹ That treaty was concluded due to an arbitral award by Edward VII. According to Article V, the Strait of Magellan is permanently neutralized, and ships of all nations enjoy an unrestricted right of freedom of navigation. In Article 10 of the Treaty of Peace and Amity of 18 October 1984, Argentina and Chile, explicitly referring to the treaty of 1881, agreed in as follows:¹²²

The delimitation herein agreed in no way alters what is laid down in the Boundary Treaty of 1881, whereby the Strait of Magellan is neutralized in perpetuity and unrestricted navigation in it is assured for the flags of all nations. . . .

Since there is no provision in these treaties specifically regulating “passage,” some argue that Article 35(c) is not applicable and that therefore the Magellan Strait is governed by the right of transit passage.¹²³ However, the missing reference to “passage” should not be overestimated. Rather, “navigation” is to be understood as comprising passage.¹²⁴ This is one of the reasons why, for example, the United States acknowledges that the Strait of Magellan falls

under the 35(c) exception.¹²⁵ Thus, according to the Treaty of 1881 (not Article 38 of the LOS Convention), warships and merchant vessels of all nations enjoy an unlimited right of passage through the Strait of Magellan at all times.

Since there is no reference to aircraft in either the 1881 or 1984 treaties, it is a matter of contention whether aircraft of all nations also enjoy the right of non-suspendable overflight. Although Argentina and Chile are seemingly unwilling to accept such a right, in light of long-standing practice a rule of customary law to that effect has evolved.¹²⁶ Therefore, it may be concluded that although the régime of transit passage as such does not apply to the Strait of Magellan, ships (according to the Treaty of 1881) and aircraft (according to customary law) of all nations enjoy the right of non-suspendable passage and overflight.

As regards the Strait of Gibraltar, the passage of ships is subject to agreements between France, Spain, and the United Kingdom of 1904, 1907, and 1912.¹²⁷ There is, however, no indication in those treaties that the parties also intended either to guarantee or exclude passage by ships of third States.¹²⁸ When they were concluded, the high seas, including the high seas corridor between Gibraltar and North Africa, could not be made subject to bilateral or multilateral international treaties. Nevertheless, Spain has repeatedly maintained that the Strait of Gibraltar is regulated by the Declaration of 1904 and is therefore exempted from at least the right of overflight.¹²⁹ It is interesting to note that during the Yom Kippur War (1973), U.S. military aircraft on flights from the Azores to Israel scrupulously kept to the airspace above the high seas corridor between the former three-nautical-mile territorial seas of Spain and Morocco.¹³⁰ In 1973, however, the régime of transit passage was still unknown. Four years after the adoption of the LOS Convention, U.S. military aircraft launched from Britain to attack targets in Libya flew over the Strait of Gibraltar. The United States justified the overflight based on the Convention's right of transit passage.¹³¹ Hence, neither the treaties referred to nor State practice allows the conclusion that the Strait of Gibraltar is a strait within the meaning of Article 35(c).¹³² So far, only Spain has taken a view to the contrary. Since it did not protest the 1986 overflight by U.S. military aircraft, the Spanish position has no influence on the legal characterization of the Strait of Gibraltar.

With respect to passage through the Baltic Straits (Sound, Great and Little Belt), it may be doubted here too whether it is regulated by "long-standing international conventions." Denmark has repeatedly referred to the Treaty on the Redemption of Sound Dues of 14 March 1857¹³³ and to the U.S.-Danish Treaty of 1 April 1857¹³⁴ to maintain that those straits are not governed by

Article 34 ff. of the LOS Convention.¹³⁵ Accordingly, by the Ordinance of 27 February 1976 Denmark has subjected transit by warships and overflight by military aircraft to prior notice and prior admittance respectively. While in principle all States observe these regulations,¹³⁶ they have emphasized that the 1857 treaties were never applied to warships.¹³⁷ Rauch takes the position that passage in the Baltic Straits is not regulated, either in whole or in part, by the treaty of 14 March 1857. He therefore maintains that the straits are governed by the right of transit passage in accordance with Part III of the LOS Convention.¹³⁸ Indeed, the Treaty on the Redemption of Sound Dues contains only an indirect reference to the customary freedom of navigation. On the other hand, in the U.S.-Danish Treaty of 1 April 1857 "the free and unencumbered navigation of American vessels, through the Sound and the Belts forever" is guaranteed. Ultimately, there is little need for a final solution to this problem, since such a solution would not clarify a situation in which Denmark was neutral. Even if one were prepared to characterize the Danish Straits as regulated by "long-standing conventions," doing so would not necessarily imply that a neutral Denmark would be entitled to close them to belligerent warships and military aircraft. Instead, the practice of Scandinavian States already referred to above justifies the assumption that Denmark will keep its straits open in the event of neutrality.¹³⁹ As regards Sweden and transit through the Øresund, that assumption is strengthened by the Swedish Ordinance of 17 June 1982, which expressly excludes warships and military aircraft from the right of transit passage restrictions.¹⁴⁰ This means that Sweden, although considering the Øresund a historical strait,¹⁴¹ acknowledges the continuing validity of the right of passage and overflight by belligerent warships and military aircraft in naval armed conflict. Hence, the Danish restrictions on passage and overflight do not apply when the bordering States are neutrals.

Finally, Sweden¹⁴² and Finland¹⁴³ maintain that the Åland Islands Strait, in light of the 3 March 1918 Treaty of Brest-Litovsk and the 20 October 1921 Treaty Concerning the Non-Fortification and Neutralization of the Åland Islands, is excluded from the régime of transit passage laid down in Part III of the LOS Convention. Indeed, according to Article 5 of the 1921 treaty the right of passage is not restricted but is, instead, subject to the rules of international law and to international practice. The question, therefore, is whether a specific regulation of passage exists. In that regard, Rauch takes the following position:

Unless one is to throw overboard all rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties, however, it is impossible to

construe Art. 5 of the Åland Convention as a treaty provision “regulating” passage through that strait.¹⁴⁴

Obviously, Rauch is in favor of a very narrow understanding of the notion “regulated” in Article 35(c) of the LOS Convention, since he is prepared to accept only explicit restrictions or prohibitions. This notion, however, need not necessarily be understood so restrictively. It may well suffice that the provisions in question deal with passage at all. Hence, there are good reasons to maintain that passage through the Åland Straits is free only to the extent commonly understood in 1921. Thus, ships of all nations enjoy the right of passage, whereas aircraft are not entitled to overflight. Still, the Åland Straits may not be completely excluded from the régime of transit passage. In the treaty of 1921 the breadth of the territorial sea is fixed at three nautical miles. Since that treaty is still in force and has not been modified, a right of transit passage at least exists in the sea areas beyond the three-nautical-mile territorial seas.

Conclusion

Practice with regard to international straits has shown that States bordering an international strait have continuously endeavored to assimilate the sea areas concerned into their territorial sea or even internal waters. The majority of these endeavors are inconsistent with the legal regime of international straits as it has been developed by State practice and especially by the United Nations Convention on the Law of the Sea. In and over international straits a right of transit passage exists that shall not be impeded, whether in time of peace or armed conflict. Of course, a belligerent is not obliged to leave unmolested enemy vessels and aircraft transiting a strait overlapped by its territorial sea. Neutral shipping and neutral aircraft, however, continue to enjoy the right of transit passage. Neutral States bordering an international strait may prescribe and enforce only regulations that are in conformity with the respective provisions of Part III of the LOS Convention. Moreover, they are obliged to counter any abuse of the neutral status of the respective waters by any of the belligerents. They may, however, neither suspend nor in any other manner impede the right of transit passage, even though observing the principle of impartiality.

Of course, the law of maritime neutrality is far from settled. However, as regards the legal status of neutral international straits, it is here maintained that there exists a consensus adequately balancing the interests involved: neutral States are protected from the adverse effects of the hostilities, and

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belligerents continue to enjoy the degree of mobility that is essential for the success of their naval operations. In order to preserve that compromise it is necessary to counter any effort aimed at a further restriction of the freedom of navigation and overflight in and over international straits. Since international straits are highly important traffic ways, every interested State should, starting in time of peace, take all feasible measures in accordance with international law to prevent any infringement of the legal regime of those sea areas. It may be emphasized that to secure effectively the international legal status of international straits it is in no way sufficient merely to rely upon one "lead nation." Rather, all States concerned must, individually and collectively, take the steps necessary.

Notes

1. Presently, the law of maritime neutrality is under scrutiny by a committee of the International Law Association. However, the discussions have revealed that there only is a fairly narrow basis for consensus.

2. See the definition in United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 37, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 [hereinafter LOS Convention]. See also Convention on the Territorial Sea and the Contiguous Zone, Apr. 19, 1958, art. 16(4), 15 U.S.T. 1606, 516 U.N.T.S. 205. In the Corfu Channel Case, the International Court of Justice characterized the respective sea area as an international strait because of "its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." 1949 I.C.J. Rep. 4, 23.

3. 33 U.S.T. 1, T.I.A.S. No. 10,029, reprinted in 16 I.L.M. 1082 (1977).

4. For an older effort to suspend the right of passage through the Panama Canal by way of an extensive interpretation of "defence," see Padelford, *Neutrality, Belligerency, and the Panama Canal*, 35 AM. J. INT'L L. 55 (1941).

5. Reprinted in 3 AM. J. INT'L L. (Supp.) 123 (1909).

6. For a general overview, see Roussos, *Le principe de la liberté de passage du Canal de Suez et l'application des règles du droit de la guerre maritime*, 1 REVUE DE DROIT INTERNATIONAL POUR LE MOYEN-ORIENT 151 (1951/52). On the illegality of Egyptian interference with Israeli and neutral shipping, see UN Security Council Resolution 95 of 1 September 1951, U.N. Doc. S/2298/Rev. 1, and Gross, *Passage through the Suez Canal of Israel-Bound Cargo and Israeli Ships*, 51 AM. J. INT'L L. 530 (1957).

7. Note that on 14 November 1936 the German government had denounced arts. 380 ff. Hence, according to a widely held view the Kiel Canal is no longer governed by the relevant provisions of the Treaty of Versailles.

8. LOS Convention, *supra* note 2, art. 35(c).

9. Accordingly, the U.S. Navy's *Commander's Handbook on the Law of Naval Operations* provides:

Ships and aircraft transiting through or above straits used for international navigation which are not completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor.

Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all nations have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well.

U.S. NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M), § 2.3.3.2 (1995) [hereinafter NWP 1-14M].

10. The legal régime of straits in which passage is regulated in whole or in part by long-standing international conventions specifically relating to such straits will be dealt with in the context of neutral straits.

11. RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 44 (1984); Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in THE LAW OF NAVAL WARFARE 20 (Ronzitti ed., 1988); DONNER, DIE NEUTRALE HANDELSCHIFFFAHRT IN BEGRENZTEN MILITÄRISCHEN KONFLIKT 143 (1993); Baxter, *Passage of Ships through International Waterways in Time of War*, 31 BRIT. Y.B. INT'L L. 189, 202 (1954); Bothe, *Neutrality in Naval Warfare*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD—ESSAYS IN HONOUR OF FRITZ KALSHOVEN 403 (Delissen & Tanja eds., 1991); MÜNCH, DIE RÉGIME INTERNATIONALER MEERENGEN VOR DEM HINTERGRUND DER DRITTEN UN-SEEBRECHTSKONFERENZ 44 (1982). For a contrary view *de lege ferenda*, see Harlow, *UNCLOS III and Conflict Management in Straits*, 15 OCEAN DEV. & INT'L L.J. 197, 206 (1985).

12. In 1951, during the Israeli-Arab conflict, Egypt prohibited passage through the Strait of Tiran by all enemy warships. Enemy merchant vessels were subject to capture. On 23 May 1967 President Gamal Abdel Nasser declared the Strait of Tiran closed to all Israeli shipping: "The Aqaba Gulf constitutes our Egyptian territorial waters. Under no circumstances will we allow the Israeli flag to pass through the Aqaba Gulf." 6 I.L.M. 516 (1967). See also Gross, *Passage through the Strait of Tiran and in the Gulf of Aqaba*, 3 LAW & CONTEMP. PROBS. 125 (1968); Hammand, *The Right of Passage in the Gulf of Aqaba*, 15 REVUE EGYPT. DE DROIT INTERNATIONAL (1959). During the Iran-Iraq conflict, those parts of the Strait of Hormuz overlapped by the Iranian territorial sea were closed to Iraqi shipping. See Amin, *The Iran-Iraq War: Legal Implications*, 6 MARINE POL'Y 193, 209 (1982).

13. For the importance attached to the freedom of navigation in international straits, see U.N. DEPT OF DISARMAMENT AFFAIRS, THE NAVAL ARMS RACE 49, 68 ff. (1986); Alexander, *International Straits*, in THE LAW OF NAVAL OPERATIONS, 91, 101 ff. (Robertson ed., 1991).

14. For an older, detailed analysis, see Baxter, 31 BRIT. Y.B. INT'L L. 202 ff. (1954). As already mentioned, this question does not arise with respect to international straits not governed by the right of transit passage, i.e., straits "in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits" [LOS Convention, *supra* note 2, art. 35(c)], "if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics" (*Id.*, art. 36), or "if the strait is formed by an island of a State bordering the strait and its mainland . . . and if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics" [(*Id.*, art. 38.1)]. According to Article 45 of the LOS Convention, in international straits in the sense of Article 38.1, a non-suspendable right of innocent passage exists; in straits in the sense of Article 36, a suspendable right of innocent

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passage exists. (*Id.*, art. 45). See also ROBERTSON, THE "NEW" LAW OF THE SEA, 38 ff. (Newport Paper #3, Naval War College, 1992); RAUCH, *supra* note 11, at 38 ff.

15. Article 4 of the Netherlands proposal reads, "En tout cas les détroits, qui unissent deux mers libres ne peuvent pas être barrés." Reprinted in NIEMEYER, URKUNDENBUCH ZUM SEEKRIEGSRECHT 47 (1913). For the English translation, see III THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, at 663 (Scott ed., 1921). See also the references in LEVIE, MINE WARFARE AT SEA 42 ff. (1992).

16. See Article 6 (Réservé) of the *Texte d'un Projet de Règlement arrêté sur la base des Délibérations du Comité d'Examen*: "La communication entre deux mers libres ne peut être barrée entièrement par des mines automatiques de contact. Mais le passage pourra y être soumis à conditions qui seront décrétées par les autorités compétentes." Reprinted in NIEMEYER, *supra* note 15, at 744; see also Scott, *supra* note 15, at 674.

17. In its report to the plenary, the Third Committee declared:

Enfin la Commission, sur la proposition de la Délégation néerlandaise eut encore à s'occuper de la forme qui serait donnée à la décision du Comité, approuvée par la Commission en principe, et d'après laquelle, par les stipulations de la Convention à conclure rien n'était changé, en quoique ce fût, à la situation actuelle des détroits. La Délégation néerlandaise désirait qu'une disposition comportant ce texte fût insérée dans le Règlement concernant la pose des mines. Après discussion, il fut jugé préférable de ne rien ajouter au texte du Règlement, mais de modifier le passage du Rapport qui parle de la résolution prise sur cette question par le Comité d'Examen; on établirait dans le Rapport que les détroits sont restés en dehors des délibérations de la présente Conférence et, tout en réservant expressément les déclarations faites au sein du Comité par les Délégations des Etats-Unis d'Amérique, du Japon, de la Russie et de la Turquie, on indiquerait la conviction de voir appliquer sur les mines dont on pourrait se servir dans les détroits les conditions techniques adoptées par le présent Règlement.

Reprinted in NIEMEYER, *supra* note 15, at 757, and SCOTT, *supra* note 15, at 654. See also Levie, *Commentary on the 1907 Hague Convention VIII*, in THE LAW OF NAVAL WARFARE, *supra* note 11, at 140, 145 ff., who rightly states that "there is no indication as to what the then existing law was actually considered to be with respect to such mining."

18. For the practice during the First World War, see Levie, MINE WARFARE, *supra* note 15, at 65, 77 ff.

19. See, *inter alia*, the announcements of the German government on 9 April 1940 concerning the Skagerrak between Lindesnes, Lodbjerg, and Flekkerøy, Sandnäs Hage (reprinted in OBERKOMMANDO DER KRIEGSMARINE, URKUNDEN ZUM SEEKRIEGSRECHT [Sept. 1, 1939 bis Aug. 31, 1940], no. 340 [Berlin 1941]) [hereinafter OKM, URKUNDEN ZUM SEEKRIEGSRECHT]; on 3 September 1939 concerning the southern entry of the Sound and the Great Belt (*id.*, no. 345); of 5 and 17 September 1939 concerning the Great Belt (*id.*, nos. 346 & 348); of 29 April concerning the Kattegat (*id.*, no. 354). The United Kingdom provided free passages in the Strait of Dover and in the Firth of Forth. See the statement by the Danish Ministry of Commerce of 3 September 1939. (*Id.*, no. 361).

20. For example, Swedish Ordinance no. 366 of 3 June 1966 (UN ST/LEG/SER.B/15, 259), as amended on 17 June 1982 (Ordinance concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality, Swedish Code of Statutes 1982:756), regulating the rights of foreign warships and military aircraft, is explicitly restricted to situations in which Sweden is not a party to the conflict. There remains therefore the possibility that Sweden will close its straits to enemy as well as neutral shipping.

21. 1949 I.C.J. 4.

22. *Id.* at 29.

23. For the characteristics of the Strait of Hormuz and its importance for international oil trade, see Milan, *Innocent Passage through the Strait of Hormuz*, 1982 REVUE HÉLLENIQUE DE DROIT INTERNATIONAL 247, 247 f.

24. In its statement of 1 October 1980, Iran declared that "in view of its international obligations, . . . Iran shall not hesitate in any effort to keep this waterway in full operation." See Rousseau, *Chronique*, 85 R.G.D.I.P. 174 (1981); Amin, 6 MARINE POL'Y 209 ff. (1982). In his letter to the Security Council, the Iranian foreign minister stated: "As certain rumours have been spread concerning the Straits of Hormuz, which might disturb international navigation in that areas, the Ministry of Foreign Affairs of the Islamic Republic of Iran reaffirms that Iran is committed to keeping the Straits open to navigation and will not spare any effort for the purpose of achieving this end." U.N. Doc. S/14226 (Oct. 22, 1980).

25. See the notes of protest by the United States, France, and the Netherlands printed in 85 DEPT. OF STATE BULL., May 1985, 9 & 46; 86 *id.* 71 (Aug. 1986); 87 *id.* 52 (April 1987); 87 *id.* 70 (June 1987), 87 *id.* 59, 66 (July 1987); 27 A.F.D.I. 895 (1981); 33 *id.* 849 (1987); 13 NETH. Y.B. INT'L L. 259 (1982).

26. Apart from the references in note 25, see the reply by the Secretary of State to Iranian protests against measures taken by the U.S. Navy in the Persian Gulf. In its essential part it reads as follows:

The procedures adopted by the United States are well established and fully recognized in international practice on and over international waters and straits such as the Persian Gulf, Strait of Hormuz, and the Gulf of Oman. The United States has made clear they will be implemented in a manner that does not impede valid exercises of the freedom of navigation and overflight and of the right of transit passage.

Reprinted in 78 AM. J. INT'L L. 885 (1984).

27. In Article 38(2) of the LOS Convention, transit passage is defined as "the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." LOS Convention, *supra* note 2, art. 38.2. For an analysis of the provisions on straits, see Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980).

28. In his speech of 5 February 1987, the British Foreign secretary stated, *inter alia*, that it has been recognized in State practice, international negotiations and the case law of the International Court that a special régime for navigation is appropriate in straits. . . . International law and practice have now developed to the point where, if the United Kingdom extends to 12 miles, we should afford to others the essential rights in some internationally important straits for which there is no alternative route, namely, the Straits of Dover, the North Channel lying between Scotland and Northern Ireland and the passage between Shetland and Orkney. These rights, which are widely recognised as necessary, include: a right of unimpeded passage through such straits for merchant vessels and warships; a right of overflight; the right of submarines to pass through the straits submerged; and appropriate safeguards for the security and other interests of the coastal State.

Hansard, H.L., Feb. 5, 1987, col. 382, reprinted in LAW OF THE SEA BULLETIN, No. 10, Nov. 1987, at 11.

In their common statement of 2 November 1988, the French and U.K. Governments acknowledged as generally accepted "the existence of a specific régime of navigation in straits,"

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especially "rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Strait of Dover." Reprinted in *LAW OF THE SEA BULLETIN*, No. 14, Dec. 1989, at 14. See also ALEXANDER, *supra* note 13, at 98 ff; Robertson, *Passage of Ships through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VA. J. INT'L L. (1980).

29. Due to that expansion, in 116 cases sea areas formerly belonging to the high seas now have to be considered international straits in the sense of Article 37 of the LOS Convention. Note, however, that figures to be found in the literature differ considerably; they range from 130 to "over 116." See 1 O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 31 ff. (Shearer ed., 1982); KOH, *STRAITS IN INTERNATIONAL NAVIGATION* (1982); Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, 74 AM. J. INT'L L. 48, 59 (1980).

30. For example, the German delegate stated, "A prerequisite for the recognition of the coastal State's right to extend the territorial sea is the régime of transit passage through straits used for international navigation." U.N. Conf. on the Law of the Sea, XIV Off. Rec. 157, 158.

31. NWP 1-14M, *supra* note 9, § 9.2.3, para. 6.

32. For example, Iran has taken the position that the transit regime is not customary in character. U.N. Doc. S/20525, March 15, 1989. When signing the LOS Convention, Iran declared that it is binding upon States parties only. This declaration is printed in U.N. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, *STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* 18 (1985).

33. Especially by Spain (LOS Convention, II Off. Rec. 136 ff; XIV *id.* at 149 ff.; XVI *id.* at 243 ff.); Denmark (II, *id.* at 124); Algeria (*id.* at 137 ff.); Albania (*id.* at 139); Kuwait (*id.*); and the former People's Republic of Yemen (*id.* at 142).

34. FEDERAL MINISTRY OF DEFENSE, FEDERAL REPUBLIC OF GERMANY, *HUMANITARIAN LAW IN ARMED CONFLICT—MANUAL* (1992) [hereinafter ZDv 15/2].

35. In a background paper on naval mining of January 1978 (*Forudsætninger for dansk sominekrigsforelse*, S. III 5), the authors come to the following conclusion: "Relative to third parties, such minefields may be justified under the principles of international law relating to self-defence."

36. The distinction sometimes found in the literature between neutral warships and merchant vessels is made without any justification and can, therefore, be ignored. See Ronzitti, *Crisis*, *supra* note 11, at 20 ff.

37. See NWP 1-14M, *supra* note 9, § 9.2.3; Hoog, *Mines*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 283, 284 (Bernhardt ed., 1982) [Encyclopedia hereinafter E.P.I.L.].

38. For a view to that effect, see Bothe, *Neutrality in Naval Warfare*, *supra* note 11, at 403; Ronzitti, *Passage through International Straits in Time of International Armed Conflict*, in 2 *INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO* 363, 377 (1987).

39. Note that Articles 37ff. of the LOS Convention contain no provision on submarines. However, according to Article 39.1(c), ships and aircraft while exercising the right of transit passage are obliged only "to refrain from any activities other than those incident to their normal modes of continuous and expeditious transit." Hence, submarines are free to transit international straits submerged, since that is their normal mode of operation. See Lowe, *The Commander's Handbook on the Law of Naval Operations*, in *THE LAW OF NAVAL OPERATIONS*, *supra* note 13, at 109, 122; Reisman, *supra* note 29, at 62 ff. (1980); Moore, *Regime*, *supra* note 27, at 117 ff. (1980). For the origin of Article 39 and its strategic implications, see Clove, *Submarine Navigation in International Straits: A Legal Perspective*, 39 *NAVAL L. REV.* 103 (1990); Burke,

Submerged Passage through Straits, 52 WASH. L. REV. 193 (1977); Grunawalt, *United States Policy on International Straits*, 18 OCEAN DEV. & INT'L L.J. 445 (1987).

40. For the technical aspects of anti-submarine warfare, see JOPP, *MARINE* 200, at 127 ff., 153 ff. (1989).

41. As early as 1954 Baxter came to the following conclusion: "There is some basis for concluding that a belligerent is under an obligation to provide passage, subject to reasonable measures of security and control such as compulsory pilotage and navigation by day, to neutral vessels and that it may completely block passage of a strait only as a last resort in the most urgent and compelling of circumstances." Baxter, *supra* note 11, at 204. Of course, this conclusion was related to innocent passage, since transit passage was still unknown in 1954. For a contrary view, see RAUCH, *supra* note 11, at 45. Rauch merely acknowledges a belligerent right to subject neutral shipping to "reasonable measures of security and control." This conclusion is, however, not drawn from State practice but only founded upon the judgement in the Corfu Channel case.

42. For a characterization to that effect, see Heintschel von Heinegg, *The Current State of International Prize Law*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 5, 25 ff. (Post ed., 1994).

43. Note that there exists no right of overflight in straits governed by Articles 36 and 38.1, first alternative.

44. NWP 1-14M, *supra* note 9, § 9.2.3.3.

45. In this context, it suffices to mention Articles 34 and 39 of the 1923 Hague Rules on Aerial Warfare, which can be considered customary law. See SPETZLER, *LUFTKRIEG UND MENSCHLICHKEIT* 156 (1956). For a more cautious view, see Bierzanek, *Commentary on the 1923 Hague Rules*, in *THE LAW OF NAVAL WARFARE*, *supra* note 11, at 396, 404 ff.

46. See CANADIAN ARMED FORCES, *LAW OF ARMED CONFLICT MANUAL* (Second Draft), § 1521 (n.d.), [hereinafter CANADIAN DRAFT MANUAL]; Ronzitti, *Crisis*, *supra* note 11, at 25. This does not prejudice the legal status of civilian passenger aircraft.

47. See the ICAO Report, Nov. 7, 1988, 28 I.L.M. 900 (1989); Friedman, *The Vincennes Incident*, U.S. NAVAL INST. PROC., May 1989, at 74; Evans, *Vincennes—A Case Study*, U.S. NAVAL INST. PROC., Aug. 1993, at 49.

48. For example, the Swedish Ordinance of 1966, *supra* note 20.

49. Statement by the Swedish delegate during the third session of the second subcommittee, July 27, 1907, printed in NIEMEYER, *supra* note 15, at 1009.

50. Reprinted in *id.* at 922.

51. While the Ottoman delegate referred to the Bosphorus and the Dardanelles, the Japanese delegate stated, "Le Gouvernement japonais ne prenait aucun engagement concernant les détroits qui séparent les nombreuses îles ou îlots qui composent l'empire japonais et qui ne sont que des parties intégrantes de l'empire." *Id.* at 893.

52. Report of Oct. 9, 1907, reprinted in *id.* at 893.

53. In 1927 Jessup maintained that the applicability of the right of innocent passage to international straits "requires no supporting argument or citation." He conceded, however, that there was no general agreement with regard to warships. See JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 120 (1927).

54. The same view was taken by Wehberg, *Das Seekriegsrecht*, in *V HANDBUCH DES VÖLKERRECHTS* 418 (Stier-Somlo ed., 1915). Rauch draws a different conclusion from the conference history: "From the opinions expressed, it seemed that a neutral State may forbid even innocent passage through limited parts of its territorial waters so far as that was considered necessary to maintain its neutrality, but that this prohibition could not extend to straits uniting two open seas." RAUCH, *supra* note 11, at 41. Rauch also refers to the statement of the

Norwegian delegate concerning the right of innocent passage in time of war. However, that statement contains nothing in relation to international straits; it is proof only for the customary character of Article 10 of Hague Convention XIII. Ronzitti, *Crisis*, *supra* note 11, at 19.

55. See the references in WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 276 ff. (1968) (on State practice during armed conflicts before 1945).

56. The respective announcements and proclamations are printed in REICHS-MARINE-AMT, SEEKRIEGSRECHT IM WELTKRIEG (SAMMLUNG DIPLOMATISCHER NOTEN UND ANDERER URKUNDEN. ZUSAMMENGESTELLT IM AUFTRAGE DES STAATSEKRETÄRS DES REICHS-MARINE-AMTS), 3 vols. (1916); and in OKM, URKUNDEN ZUM SEEKRIEGSRECHT, *supra* note 19. See also, RAUCH, *supra* note 11, at 32 ff.

57. 188 L.N.T.S. 294-331.

58. See Articles 2.3 and 8.1 respectively for Denmark and Sweden. See also Bring, *Commentary on the 1938 Stockholm Declaration*, in THE LAW OF NAVAL WARFARE, *supra* note 11, at 839, 891, who concludes that "the Danish and Swedish Regulations implicitly confirmed the traditional right of unimpeded passage of foreign warships in time of war through the Baltic Straits."

59. Note that the Harvard Draft of 1939 contains no explicit prohibition on closing neutral international straits. There is only one reference to straits in the commentary on Article 25. That commentary is, however, restricted to the Turkish Straits, the Suez, and the Panama Canal. Otherwise, it is stated that the Permanent Court of International Justice (PCIJ), in the case of the *Wimbledon*, ruled that the use of international waterways is in accordance with neutrality.

60. See Memorandum by the German Foreign Office of 6 June 1941, reprinted in OKM, URKUNDEN ZUM SEEKRIEGSRECHT, *supra* note 19, no. 432.

61. For the few examples of belligerent warships transiting neutral international straits, see O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 99 ff. (1975).

62. See the Swedish Ordinance of 1966, *supra* note 20, and the Danish Ordinance of 27 February 1976 concerning admittance of foreign warships and military aircraft (U.N. ST/LEGSER.B/19, 142). The Swedish Ordinance was revised by the Ordinance of 17 June 1982 concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality (Swedish Code of Statutes 1982:756). The restrictions of the transit right of foreign warships and military aircraft does not apply in the Öresund, where no prior notice is necessary. See also RAUCH, *supra* note 11, at 43 ff.

63. RAUCH, *supra* note 11, at 44. Rauch believes that "taken together, doctrine and State practice would seem to justify the conclusion that if the littoral States are neutral, innocent passage of belligerent warships through international straits in time of war may be interfered with only in exceptional cases." See also 2 OPPENHEIM, INTERNATIONAL LAW 696 (7th ed., Lauterpacht ed., 1963), who, by reference to an *obiter dictum* of the PCIJ in the *Wimbledon* case, claims an unrestrictable right of transit passage. The PCIJ had mentioned "the general opinion according to which, when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie." P.C.I.J. Ser. A., No. 1, 28. A more cautious approach is taken by Castrén, who states, "Transit by belligerent warships may probably not, however, be prevented in those straits connecting different parts of the high seas where the territorial waters of one or several neutral coastal States meet." CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 518 (1954).

64. In Article 17 of its draft (U.N. Doc. A/3159), the International Law Commission (ILC) had proposed the following wording: "There must be no suspension of the innocent passage of

foreign vessels through straits normally used for international navigation between two parts of the high seas." Hence, in the final wording there is no longer a reference to the "normal use" for international navigation.

65. See, *inter alia*, Alexander, *International Straits*, *supra* note 13, at 97 ff.; O'CONNELL, *INFLUENCE*, *supra* note 61, at 103 ff.

66. 1 O'CONNELL, *LAW OF THE SEA*, *supra* note 29, at 317; KOH, *supra* note 29, at 27; Reisman, *supra* note 29, at 59.

67. Note that the right of transit passage does not apply to internal waters within a strait "except where the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which had not previously been considered as such." LOS Convention, *supra* note 2, art. 35(a). Although the legal status of internal waters within an international strait is of special relevance for the Northeast and Northwest passages, the status of these sea areas is still unclear; see the exchange of notes between the United States and the former USSR in DEPT. OF STATE, *LIMITS IN THE SEAS*, No. 112, at 68 ff. (1992). See also Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L.J. 331 (1993).

Another open question is the legal status of the entries to an international strait if they are completely overlapped by the littoral States' territorial seas. This is the case in the Strait of Magellan and in the Beagle Channel. It follows, however, from the object and purpose of the right of transit passage that there also exists a right of passage and overflight that may not be hampered or suspended. This is the position taken by the U.S. Department of State vis-à-vis Chile and Argentina. See *LIMITS IN THE SEAS*, No. 112, *supra*, at 63.

68. LOS Convention, *supra* note 2, art. 38.1. For an analysis, see Young, *The Evolution of a Proposed New Navigation Rule: The "Duty Not to Impede,"* 17 J. MAR. L. & COM. 119 (1986).

69. LOS Convention, *supra* note 2, art. 39.1(a-c).

70. Convention on the International Regulations for Preventing Collisions at Sea of 20 October 1972; International Convention for the Prevention of Pollution from Ships (MARPOL) of 2 November 1973; International Convention for the Safety of Life at Sea (SOLAS) of 1 November 1974.

71. LOS Convention, *supra* note 2, art. 39.2(a). Note that State aircraft "will normally comply with such safety measures." *Id.*, art. 39.3(a).

72. *Id.*, art. 41.1.

73. *Id.*, art. 42.2.

74. Bryde, *Militärische und sicherheitspolitische Implikationen der neuen Seerechtskonvention*, in *DAS NEUE SEERECHT* 151, 176 (Delbrück ed., 1984).

75. See, *inter alia*, ROACH & SMITH, *EXCESSIVE MARITIME CLAIMS* 177 ff. (66 *International Law Studies*, 1994); MÜNCH, *DIE RÉGIME INTERNATIONALER MEERENGEN VOR DEM HINTERGRUND DER DRITTEN UN-SEERECHTSKONFERENZ* 127 ff. (1982) (on the customary character of the provisions).

76. Alexander, *supra* note 13, at 91; RAUCH, *supra* note 11, at 48; Robertson, *supra* note 28, at 843 ff.; Moore, *supra* note 27, at 95; Clove, *supra* note 39, at 108 ff.; Burke, *supra* note 39, at 193; Bryde, *supra* note 74, at 176 f., 182 ff.; MÜNCH, *supra* note 75, at 111 ff.

77. Alexander, *International Straits*, *supra* note 13, at 93; RAUCH, *PROTOCOL ADDITIONAL*, *supra* note 11, at 45 ff.; ROBERTSON, *supra* note 14, at 21 f.; Dinstein, *supra* note 37, at 19 f.; MÜNCH, *supra* note 75, at 44; Harlow, *The Law of Neutrality at Sea for the 80's and Beyond*, 3 *UCLA PACIFIC BASIN L.J.* 42, 50 (1984); Grunawalt, *Belligerent and Neutral Rights in Straits and Archipelagos*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 137 (Clingan ed., 1988); Ronzitti, *Passage*, *supra* note 38, at 366 ff. See also para. 29 of the San Remo Manual: "Neutral States may not suspend, hamper, or otherwise impede the right of transit passage . . ."

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SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA , para. 29 (Doswald-Beck ed., 1995). Only Lowe seems to have doubts as regards the validity of the right of transit passage during armed conflict. Lowe, *supra* note 39, at 123.

78. "Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits." NWP 1-14M, *supra* note 9 § 7.3.5. "The airspace above neutral international straits . . . remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit . . . passage." *Id.*, § 7.3.7.

79. "Warships and military aircraft of a belligerent state may exercise the right of transit passage, that is, of essentially unimpeded passage or overflight . . . through certain straits where the transit passage applies." CANADIAN DRAFT MANUAL, *supra* note 46, § 1511.2.

80. "While transit passage through international straits . . . include[s] the right of overflight and the right of passage in submerged mode." ZDv 15/2, *supra* note 34, § 1126.

81. In the Danish background paper, *supra* note 35, the authors consider the legal status unclear. It must be kept in mind, however, that that paper was written in 1978. Moreover, it is made clear that "in the case of international straits the legality of a minefield will presumably depend on whether passage of the straits by the belligerents is 'innocent' in relation to the peace, order and security of the coastal State."

82. Harlow, *supra* note 77, at 50.

83. RAUCH, *supra* note 11, at 46.

84. NWP 1-14M, *supra* note 9, § 7.3.5. "The rights of transit passage . . . applicable to international straits . . . in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits . . . relating to transit passage . . . adopted in accordance with general international law remain applicable." SAN REMO MANUAL, *supra* note 77, para. 27.

85. LOS Convention, *supra* note 2, art. 40. *See also*, Alexander, *supra* note 13, at 93.

86. "A belligerent in transit passage through, under and over a neutral international strait . . . is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral . . . State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise refrain from any hostile actions or other activities not incident to their transit." SAN REMO MANUAL, *supra* note 77, para. 30. *See also*, Ronzitti, *supra* note 38, at 369 f.

87. SAN REMO MANUAL, *supra* note 77, paras. 15-17; NWP 1-14M, *supra* note 9, § 7.3.5; ZDv 15/2, *supra* note 34, § 1118 ff. For the Egyptian action taken in the strait of Bab al Mandab, see O'CONNELL, *supra* note 61, at 101 ff.

88. Alexander, *supra* note 13, at 93.

89. Hence, there is no difference with the applicable peacetime rule. In view of the vulnerability of surfaced submarines, it would be unrealistic to prohibit submerged transit. Moreover, the neutral State is thus not obliged to monitor the strait, which would necessitate the use of expensive equipment. *See* Harlow, *supra* note 77, at 51 (1984); Ronzitti, *supra* note 38, at 370 ff.

90. CANADIAN DRAFT MANUAL, *supra* note 46, § 1511.2.

91. NWP 1-14M, *supra* note 9, § 7.3.5.

92. *Id.*, § 7.3.7.1.

93. "Belligerents passing through, under and over neutral straits . . . are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft,

screen formation steaming, and acoustic and electronic surveillance.” SAN REMO MANUAL, *supra* note 77, para. 30.

94. This may also be based upon the judgement of the ICJ in the *Corfu Channel Case*, because the Court did not consider the transit of British warships, which had been in a state of readiness, contrary to international law. 1949 ICJ Rep. 1 ff. *See also*, Harlow, *supra* note 77, at 51:

Because straits are natural “choke points,” no naval commander can pass through without being prepared to respond to hostile action. In the regime of transit passage, the concept of peacetime transit in the “normal mode” includes the use of routine defensive measures such as air and surface search radar, and sonar. In wartime, the use of such defensive measures, which do not threaten the coastal state or its resource interests, is made even more necessary by the heightened potential for imminent attack. Attempts by neutrality laws to restrict such measures would be highly unrealistic and possibly counterproductive since they could breed disrespect for the laws in general.

95. For example, common Article 8.2 of the 1938 Stockholm Declaration, *supra* note 57, provides that “[a]ircraft carried on board belligerent warships shall not leave such vessels while in . . . territorial waters.” There is no indication that this rule is not to apply in international straits.

96. *See* O’CONNELL, *supra* note 61, at 103 ff.

97. *See also* SAN REMO MANUAL, *supra* note 77, para. 30. “Belligerents in transit . . . passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary or as a base of operations.”

98. SAN REMO MANUAL, *supra* note 77, explanation of para. 30.1.

99. RAUCH, *supra* note 11, at 49. The differences between international straits where the right of transit passage applies and those where it does not apply are ignored by Ronzitti. *See, e.g., Passage*, *supra* note 38, at 363 ff.

100. LOS Convention, *supra* note 2, art. 45. *See* Alexander, *International Straits*, *supra* note 13, at 99, 103.

101. For example, Finland still claims a territorial sea of four nautical miles in breadth. *See* Law No. 463 of 18 August 1956; LAW OF THE SEA BULLETIN 29, No. 2, March 1985. Therefore, in the Gulf of Finland there remains an open corridor. The example given by Alexander (*International Straits*, *supra* note 13, at 100) concerning the Bass Strait between Australia and Tasmania is not valid any longer; on 20 November 1990 Australia extended its territorial sea from three to twelve nautical miles. *See* the Statement by the Permanent Representative of Australia to the UN of 29 November 1990, *reprinted in* LAW OF THE SEA BULLETIN 8, No. 18, June 1991.

102. Alexander, *supra* note 13, at 100.

103. RAUCH, *supra* note 11, at 47 f.; Alexander, *supra* note 13, at 99 f.

104. This is the case if the breadth of the remaining corridor is not sufficient for the safety of navigation. An example given by Alexander (*id.* at 100) is the Bahamas. If the Bahamas extended the territorial sea to twelve nautical miles, the breadth of the remaining corridor in the Providence Channel would measure 0.25 nautical miles. However, IMO requires a breadth of three nautical miles in order to guarantee as safe a passage as possible.

105. RAUCH, *supra* note 11, at 48. Rauch also refers to strategic submarines, which might be unable to keep to the corridor simply because it is not deep enough.

106. *Id.* at 48.

107. The Strait of Messina between the Italian mainland and Sicily has a breadth of two nautical miles. For the Italian position during the Conference, *see* the statement by the Italian delegate *reprinted in* UNCLOS III, Off. Rec. 130. *See also* MÜNCH, MEERENGEN, *supra* note 81.

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108. Italy was supported by the British delegation. See UNCLOS, II Off. Rec., Vol. 125. According to the British view, the following straits fulfil the conditions of Article 38.1., LOS Convention: the Pentland Firth south of the Orkney Islands, and the passage between Cornwall and the Scilly Islands. Hansard, 484 H.L., Feb. 5, col. 382.

109. For further examples (like Messina), see Alexander, *supra* note 13, at 101.

110. As of 3 April 1985, Italy has subjected international navigation to a number of restrictions. Oil tankers of more than ten thousand tons may no longer transit the strait. Oil tankers of more than five thousand tons and all other ships of more than ten thousand tons are assigned to compulsory piloting. The United States, by a diplomatic note of April 5, 1985, has emphasized that it considers these measures only preliminary in character and not applicable to warships; LIMITS IN THE SEAS, No. 112, *supra* note 67, at 68.

111. This provision has its origin in corresponding endeavours by Denmark, Finland, and Turkey. See UNCLOS, III, Off. Rec. 124 f., 132 f.

112. In Article V, para. 2, of the Egyptian-Israeli Peace Treaty of March 26, 1979, reprinted in THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 218 ff. (Lapidoth & Hirsch eds., 1992), the two States have agreed as follows: "The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba." While in view of the date of signature, that treaty will hardly qualify as a "long-standing international convention," it is declaratory of the right of transit passage as laid down in the LOS Convention. See also MÜNCH, MEERENGEN, *supra* note 75, at 53; Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace between Egypt and Israel*, 77 AM J. INT'L L. 99 (1983). A more cautious view is taken by Alexander, *supra* note 13, at 102. See also Fink, *The Gulf of Aqaba and the Strait of Tiran: The Practice of "Freedom of Navigation" after the Egyptian-Israeli Peace Treaty*, 42 NAVAL L. REV. 121 (1995).

113. See Moore, *supra* note 27, at 111 (1980); Alexander, *supra* note 13, at 101 ff.; Barabolja in 1 MODERNE SEEVÖLKERRECHT 230 (1978); ROACH & SMITH, *supra* note 75, at 177 ff.

114. Apart from the sources cited in note 113, see RAUCH, *supra* note 11, at 50; LIMITS IN THE SEAS, No. 112, *supra* note 67, at 65. There is good reason to believe that the delegates to UNCLOS III had these straits in mind.

115. Reprinted in THE LAW OF NAVAL WARFARE, *supra* note 11, at 437. For an analysis, see Vignes, *Commentary on the 1936 Montreux Convention*, *id.* at 468, 472 ff.; MÜNCH, *supra* note 75, at 45 ff.

116. Arts. 2-5. However, if Turkey is a belligerent, the Turkish Straits remain open for neutral merchant vessels only—which have to travel by daytime, must respect the sealanes designated by the Turkish authorities (art. 5.2), and are subjected to compulsory pilotage (art. 6).

117. With regard to the passage of the *Kiev* in 1976, see Knight, *The Kiev and the Turkish Straits*, 71 AM. J. INT'L L. 125 (1977); MÜNCH, *supra* note 75, at 47 ff. For State practice during World War II, see WHITEMAN, *supra* note 55, at 277 ff.

118. For States bordering the Straits, the time limit is nine days; for all other States it is fifteen days (art. 13).

119. If Turkey is a belligerent, art. 20 applies. For the wording, see *supra*, text following note 10.

120. Art. 19.2. Note, however, that this does not apply if, under the Covenant of the League of Nations or another pact of mutual assistance concluded within the League's framework, there

exist special obligations for Turkey. This presupposes that the State whose warships are to transit the Straits is the victim of an act of aggression.

121. Martens, XVI NOUVEAU RECEUIL GÉNÉRAL 491 (1887).

122. Reprinted in LAW OF THE SEA BULLETIN, No. 4, Feb. 1985, at 50.

123. That view is taken by RAUCH, *supra* note 11, at 52.

124. Hence, Münch in his analysis of the Treaty of 1881 comes to the conclusion that that treaty is a typical “long-standing convention in the sense of Article 35(c) UNCLOS.” MÜNCH, *supra* note 75, at 53.

125. See the references in LIMITS IN THE SEAS, No. 112, *supra* note 67, at 67; ROACH & SMITH, *supra* note 75, at 194. See also note 36 to § 2.3.3.1 of the annotated version of NWP 9, the predecessor of NWP 1-14M.

126. The same position was taken by the U.S. Secretary of State in a statement of 21 December 1984 (reprinted in LIMITS IN THE SEAS, No. 112, *supra* note 67, at 67):

This long-standing guarantee of free navigation for all vessels has been amply reinforced by practice, including practice recognizing the right of aircraft to overfly. . . . Essentially, the USG position would be that the 1881 Treaty and over a century of practice have imbued the Strait of Magellan with a unique regime of free navigation, including the right of overflight. That regime has been specifically recognized and reaffirmed by both Argentina and Chile in the Beagle Channel Treaty. Hence, the United States and other States may continue to exercise navigational and overflight rights and freedoms in accordance with this long-standing practice.

127. London Declaration by France and the United Kingdom concerning Egypt and Morocco, art. VII, Apr. 8, 1904, reprinted in MARTENS, XXXII NOUVEAU RECEUIL GÉNÉRAL 18 (1905). Spain acceded on Oct. 3, 1904. Franco-Spanish Declaration of Mutual Assistance in Mediterranean Affairs, May 16, 1907, 204 PARRY’S T.S. 353. Anglo-Spanish Declaration of Mutual Assistance in Mediterranean Affairs, May 16, 1907, *id.* at 179. Franco-Spanish Accord concerning Morocco, art. 6, Nov. 27, 1912, 217 PARRY’S T.S. 288. Sometimes the Treaty of Utrecht of 13 July 1713, by which Philip V ceded Gibraltar to England, is referred to. However, art. 10 does not regulate the high seas corridor between Gibraltar and North Africa. Still, Spain maintains that the provisions of the LOS Convention on straits do not apply to that sea area. Upon signature, Spain declared that “[t]he Spanish Government, upon signing this Convention, declares that this act cannot be interpreted as recognition of any rights or situations relating to the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 between the Spanish and British Crowns,” reprinted in STATUS, *supra* note 32, at 25.

128. See TRUVER, THE STRAIT OF GIBRALTAR AND THE MEDITERRANEAN 179 (1980); ROACH & SMITH, *supra* note 75, at 185 ff.

129. See the references in Alexander, *supra* note 13, at 102. See also Saenz de Santa & Paz, *Spain and the Law of the Sea—Selected Problems*, 32 ARCHIV DES VÖLKERRECHTS 202 (1994). When signing the LOS Convention, Spain declared: “It is the Spanish Government’s interpretation that the régime established in part III of the Convention is compatible with the right of the coastal State to issue and apply its own air regulations in the air space of the straits used for international navigation so long as this does not impede the transit passage of aircraft” (*supra* note 127). According to the Spanish position, this recognition of the right of overflight is without prejudice to the legal status of the Strait of Gibraltar because Spain has made clear that its signature does not affect “the maritime spaces of Gibraltar.”

130. Alexander, *International Straits*, *supra* note 13, at 102; O’CONNELL, *supra* note 61, at 98.

131. *Ibid.*

132. See RAUCH, *supra* note 11, at 52. See also MÜNCH, *supra* note 75, at 52, who considers the treaties obsolete.

133. MARTENS, NOUVEAU RECEUIL GÉNÉRAL, série I, tome XVI, partie II, 345 ff. The following States and entities were parties to that treaty: Austria, Belgium, Denmark, France, Hannover, the Cities of the Hanse, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and the United Kingdom.

134. U.S.-Danish Convention on Discontinuance of Sound Dues, 11 Stat. 719, T.S. 67.

135. During the deliberations on the LOS Convention, the Danish delegate declared that "after negotiations with all interested parties his delegation was satisfied that Art. 35(c) applied to the specific regime in the Danish straits." U.N. Doc. A/CONF.62/SR. 138, at 35 (1980). See also U.N. Doc. A/CONF.62/SR. 163, at 10 (1982). During the eleventh meeting of the Second Committee the Danish delegate stated "that some straits, such as the Danish straits leading to the Baltic Sea, had never been subject to the right of free passage but had been under a special régime serving the interests of both the coastal State and the international community; such a type of arrangement should remain in effect." UNCLOS III, Off. Rec. 124. For the Order of the ICJ of 29 July 1991 on Provisional Measures, see Gray, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of July 29, 1991, 42 INT'L & COMP. L.Q. 705 (1993); Koskenniemi, *L'affaire du passage par le Grand Belt*, 38 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 905 (1992).

136. The former USSR accepted the Danish regulations because it considered the Baltic Straits excluded from the régime of transit passage by the Treaty of 1857. See also the references in ROACH & SMITH, *supra* note 75, at 215 ff.

137. See note 36 to § 2.3.3.1, NWP 1-14M, *supra* note 9; MÜNCH, *supra* note 75, at 50.

138. Rauch, DIE SOWJETUNION UND DIE ENTWICKLUNG DES SEEVÖLKERRECHTS 81 ff., 289 ff., 305 (1982). A more cautious view is taken by Bryde, *supra* note 74, at 187. For the contrary view, see MÜNCH, MEERENGEN, *supra* note 75, at 51.

139. *Supra* text to notes 55 ff. (for the practice of Scandinavian States).

140. Ordinance Concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality, *supra* notes 20 and 62. See also Bring, *supra* note 58, at 841.

141. When signing the LOS Convention, the Swedish delegate declared:

It is the understanding of the Government of Sweden that the exception from the transit passage régime in straits provided for in article 35(c) of the Convention is applicable to the strait between Sweden and Denmark (Oresund) as well as to the strait between Sweden and Finland (the Åland Islands). Since in both those straits the passage is regulated in whole or in part by long-standing international conventions in force, the present legal régime in the two straits will remain unchanged after the entry into force of the Convention.

Reprinted in STATUS, *supra* note 32, at 26.

142. *Id.*

143. See the declaration of the Finnish delegate during UNCLOS III, U.N. Doc. A/CONF.62/SR.135 (1980), at 8.

144. RAUCH, *supra* note 11, at 52. For further references, see ROACH & SMITH, *supra* note 75, at 182 ff.