

Deniz TEKIN APAYDIN
Assistant Professor
Public International Law Department
Marmara University, Faculty of Law
deniz.apaydin@marmara.edu.tr

THE CANAL ISTANBUL PROJECT: GOVERNANCE BY NATIONAL LAW OR INTERNATIONAL LAW?

I. Introduction

The seas of the world are still the most important medium of trade and transportation. Over 90% of all the world trade is carried out through the seas, which is also considered, by far, “*the most cost-effective way to move en masse goods and raw materials around the world.*”¹ A number of canals were built by men to facilitate international trade through the seas. The principle goal for such grand projects was to reduce the sea routes, thus the journey time and costs.² The Panama Canal reduces the navigation from New York to San Francisco by about 8,000 nm (5,262 nm instead of going through Cape Horn, which would be 13,135 nm), and also makes it possible to complete the journey in half the time.³ Similarly, the Suez Canal reduces the navigation from Rotterdam to Singapore by 3467 nm.⁴

In 2011 the then Prime Minister of Turkey, *Recep Tayyip Erdoğan* introduced a mega project (see figure 1), which he referred as the ‘*Crazy Project*’, that involved the construction of a man-made canal in Istanbul, albeit, as an alternative route to Bosphorus – a natural strait. Since its announcement, the project became the focus of various debates. This study aims to examine the Canal Istanbul project in two main aspects: first its interaction with the Montreux Convention⁵ that regulates the passage regime through the Turkish Straits; and secondly whether its governance would be subject to national law or international law.

¹ The UN-Business Action Hub website: IMO Profile. <https://business.un.org/en/entities/13> (22.11.2018.)

² Such savings on costs may include, inter alia, fuel costs, crew costs, insurance costs and docking costs.

³ A voyage that previously took over sixty days was halved to about thirty. What this meant to all maritime merchants was that they could take on more cargo; virtually making two trips in one. American Studies at the University of Virginia website: Panama Canal. <http://xroads.virginia.edu/~ma03/holmgren/ppie/pc.html> (22.11.2018.)

⁴ The Suez Canal Authority website: Why Suez Canal? <https://www.suezcanal.gov.eg/English/About/Pages/WhySuezCanal.aspx> (22.11.2018.)

⁵ The Convention Regarding the Régime of Straits (adopted 20 July 1936, entered into force provisionally on 15 August 1936 and definitively on 9 November 1936) 173 LNTS 213 [the Montreux Convention].

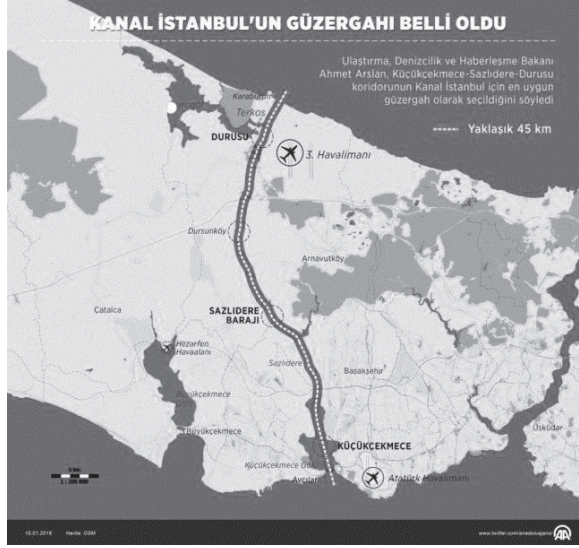


Figure 1 The Route of Canal Istanbul is Officially Announced. Source: Turkish Press Agency: Kanal İstanbul'un Güzergâhı Resmen Açıklandı). January 15, 2018. <https://www.bik.gov.tr/kanal-istanbulun-guzergahi-aciklaniyor/> (30.01.2019.)

II. The Regulation of canals

The law of the sea is a well-codified area of international law. The Law of the Sea Convention of 1982⁶ (the LOSC) is the last and most ambitious attempt to codify international law of the sea. It was intended to be “*comprehensive in scope and universal in participation*”.⁷ Nevertheless, the canals are not among those subjects codified under the LOSC. The closest resemblance appears to be with the international straits regulated in Part III on straits used for international navigation. Despite the resemblance, “*it has always been understood that the legal regimes of the canals were separate and distinct*” from that of the international straits.⁸ On the other hand, there are no implications that suggest that the rather liberal passage regimes applicable to the international straits cannot similarly be applied for the canals. Yet, in practice, “*inter-oceanic canals and rivers are regulated by specific regimes in which, navigational rights are specified and circumscribed*.”⁹

The provisions of the LOSC do not offer a formal definition for either a ‘strait’ or ‘straits used for international navigation’. The Oxford Dictionary defines strait as “*A narrow passage of water connecting two seas or two other large areas of water*”.¹⁰ An often referred

⁶ The United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833, 1834, 1835 UNTS 3 [the LOSC].

⁷ BOYLE, Alan: Further Development of the Law of the Sea Convention: Mechanisms for Change. *International and Comparative Law Quarterly*, 54 (2005) 3. 563.

⁸ ROTHWELL, Donald R. – STEPHENS, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010. 231.

⁹ CAMINOS, Hugo – COGLIATI-BANTZ, Vincent P.: *The Legal Regime of Straits*. Cambridge University Press, Cambridge, 2014. 111.

¹⁰ Oxford Dictionaries: strait. <https://en.oxforddictionaries.com/definition/strait> (28.01.2019.)

attribute of the straits is that they are ‘*naturally-formed*’. Yet this feature was not included into the LOSC, despite some suggestions.¹¹ The rationale of such omission is unlikely to reflect the disagreement on the fact, on the contrary, it probably is due to the fact that the “*natural characteristic of the passage was obvious*”.¹²

The canals, unlike straits, are ‘*man-made*’ waterways that connect two geographically separate marine areas. The national canals, where the whole installation is within the territory of one State, are most of the time regulated and administered by the canal State. Such canals are therefore considered as internal waters, which are subject to the territorial sovereignty of the canal State. However, in some cases the administration was for a while left to international commissions or sometimes to private undertakings¹³ with restricted canal State intervention. The latter may be the case where the construction is undertaken by private enterprises. This is a so called ‘build-operate-transfer’ scheme, where the canal is subsequently acquired by the canal State.

A canal, even where it is under the sole administration of the canal State, due to its practical importance, may attain to a level of internationalisation to ensure free navigation.¹⁴ That is to say, the free passage of all types of ships and of all flags from the canals is usually secured through international treaties, especially where inter-oceanic canals are concerned. The administrative structuring and the passage regime of some of the major inter-oceanic canals may provide a useful insight for future discussions on the Canal Istanbul Project.

The Suez Canal is nationally administered by the *Suez Canal Authority*, which is an independent public authority with a legal personality, reporting directly to the Prime Minister.¹⁵ The passage regime is, however, governed in accordance with the Constantinople Convention of the Suez Canal of 1888, which was nationalised through domestic procedures.¹⁶ This regime establishes a rather keen freedom of passage right for all types of ships, both at times of peace and war, in a non-discriminative manner; however, in exchange of a protective provision that ensures that the Canal shall never be subject to blockade.

The Panama Canal is administered by the *Panama Canal Authority*, which is an autonomous public body with a legal personality, represented by an ‘Administrator’, who is under the supervision of an 11-member Board of Directors.¹⁷ The United States controlled the Panama Canal until it was handed over to Panama in 1999, at the end of the transition period agreed upon by the Panama Canal Treaty of 1977 concluded between the United

¹¹ CAMINOS–COGLIATI-BANTZ, 2014. 109–110.

¹² CAMINOS–COGLIATI-BANTZ, 2014. 111.

¹³ The Universal Suez Canal Company constructed and administered the Suez Canal for nearly eighty seven years – from 1869 – until the Canal was nationalised in 26 July 1956. The Suez Canal Authority website: Canal History. <https://www.suezcanal.gov.eg/English/About/SuezCanal/Pages/CanalHistory.aspx> (22.11.2018.)

¹⁴ CHURCHILL, Robin Rolf – LOWE, Alan Vaughan: *The Law of the Sea*. Manchester University Press, Manchester, 3rd Ed., 2014. 65.

¹⁵ The Suez Canal Authority website: Suez Canal Authority (SCA) Overview. <https://www.suezcanal.gov.eg/English/About/SuezCanalAuthority/Pages/SCAOverview.aspx> (30.01.2019.)

¹⁶ The Suez Canal Authority website: The Constantinople Convention of the Suez Canal, 1888. <https://www.suezcanal.gov.eg/English/About/CanalTreatiesAndDecrees/Pages/ConstantinopleConvention.aspx> (30.01.2019.) In 1957 Egypt reaffirmed its will to be bound with the terms of the 1888 Convention on Constantinople concerning the Suez Canal.

¹⁷ The Panama Canal Authority website: The Panama Canal Authority (ACP) Overview. <https://www.pancanal.com/eng/acp/acp-overview.html> (30.01.2019.)

States and Panama.¹⁸ A concurrent treaty was also drawn up to confirm the neutrality status of the Panama Canal in 1977 (the Neutrality Treaty), which gives the United States a permanent right to intervene should the neutrality status of the Canal be threatened.¹⁹ In accordance with the provisions of this treaty, the Canal is confirmed to be an “*international transit waterway*”, the security of which shall be maintained in all circumstances, and it shall be available for passage at all times, in a non-discriminatory manner.²⁰

The observation of the legal statuses of the above-mentioned canals, raises the question whether Canal Istanbul, projected as a national canal with no inter-oceanic characteristic, should be regulated through national or international law? Or, if and when we conclude that it should be regulated nationally, how far the international law is expected to influence the national regulation? The attempt to provide an answer to those questions necessitates the observation of some facts surrounding the case.

III. The nautical characteristics of the Bosphorus and the need for safety

At the outset, it would be appropriate to draw attention to the fact that the Canal Istanbul Project is extraordinary, in the sense that it is designed as an alternative waterway to Bosphorus, virtually next to it. This goes against the consuetudinary motive for building a canal, as it is not likely to reduce the costs or the journey of the ships to pass. The major aim is ensuring safety. To elaborate the safety concern, it would be essential to reveal some particularities about the Bosphorus.



Figure 2 The Turkish Straits'. Source: JONES, Dorian: Key Waterways Become Focus of Turkish, Russian Tensions. VOA News. December 11, 2015. <https://www.voanews.com/a/key-waterways-become-focus-of-turkey-russia-tensions/3098692.html> (30.01.2019.)

¹⁸ Panama Canal Treaty (adopted 07 September 1977, entered into force in 01 October 1979) 1280 UNTS 3. 5. Article 2(2).

¹⁹ Treaty concerning the permanent neutrality and operation of the Panama Canal (adopted 07 September 1977, entered into force in 01 October 1979) 1161 UNTS 177. [the Neutrality Treaty].

²⁰ It was made clear that the Panama Canal, shall not be the target of reprisals in any armed conflict, and be open for peaceful transit both at times of peace and war. The Neutrality Treaty, 1161 UNTS 177. 183. Articles 1–2.

The Bosphorus, together with the Marmara Sea and the Dardanelles forms what we refer as ‘the Turkish Straits’ (see Figure 2). These two straits and the Marmara Sea in the middle, connect the Black Sea to the Mediterranean Sea (the Aegean Sea part) as the sole sea route. The Bosphorus (Istanbul Strait) is 17 nm in length, the Marmara Sea is 110 nm in length, and the Dardanelles (Çanakkale Strait) is 37 nm in length, 164 nm in total. Particularly the Bosphorus, is a “*singularly tricky strip of water*”²¹, which is very sinuous, often narrow, and flowed by strong and complex currents.²² For instance, the narrowest point in the Bosphorus is shy of 700 m and there are turns that are as sharp as 80°, accompanied by multiple strong currents to the disadvantage of the ships.

The density of the marine traffic adds to the risk. In 1936, when the Monteux Convention was signed, the ships passing through the Bosphorus was only 17 per day; whereas now it is around 130.²³ Moreover, there is a local sea traffic in Istanbul, which serves around 250,000 people on a daily basis.²⁴ Many fishing boats and private sea vessels also navigate in the Bosphorus.

Not only the numbers of ships have increased in these 82 years, but also the sizes and tonnages have grown. Recent statistics revealed that in the last decade the number of ships passing through the straits have decreased, (from 56,000 in 2007, to nearly 43,000 in 2017) whereas the total tonnage have increased (from 485 million tons in 2007, to nearly 600 million tons in 2017),²⁵ meaning that larger ships are now used in navigation.

A considerable number of those ships carry toxic, dangerous or explosive cargo. Here we need to make note of the oil and gas reserves in and around Russia and the Caspian Sea, and mention that despite all the transnational pipelines, still most of such substances are transported through ships that navigate from the Bosphorus. The Turkish Straits are thus, one of the key shipping chokepoints of the world seaborne oil trade.²⁶ One hundred and forty four million tons of the 485 million was of tankers in 2007 and in 2017 147 million tons of the total 600 million was tankers.²⁷ Nearly ¼th of the total cargo is oil and gas of various types.

Unfortunately, these presented facts and figures come with a toll. The city of Istanbul is under a perpetual threat. Istanbul, which hosts nearly 16 million people, was declared by UNESCO as a World heritage city due to its 3000 years of remarkable history and rich culture.²⁸ Nevertheless, there has been many ship accidents in the Bosphorus and Istanbul is constantly under the threat of a disastrous accident especially by the tankers. Although currents and darkness are defined as the two prevalent factors causing marine accidents

²¹ ECE, Nur Jale – SÖZEN, Adnan – AKTEN, Necmettin – EROL, Serpil: The Strait of Istanbul: A Tricky Conduit for Safe Navigation. *European Journal of Navigation*, 5 (2007) 1. 47.

²² Association Francaise Des Capitaines De Navires website: The Turkish Straits Vessel Traffic Service. http://www.afcan.org/dossiers_techniques/tsvts_gb.html (22.11.2018.)

²³ Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

²⁴ Çancı, Metin et al: İstanbul’da Deniz Ulaşımının Geleceğinin Değerlendirilmesi (The Evaluation of the Future of Marine Transportation in Istanbul), 2015. Project by Okan University, Faculty of Business and Administrative Sciences. <http://www.istka.org.tr/media/20863/%C4%B0stanbul-da-deniz-ula%C5%9F%C4%B1m%C4%B1n%C4%B1n-gelece%C4%9Finin-de%C4%9Feri-gerlendirilmesi.pdf> (06.12.2018.) 11.

²⁵ Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

²⁶ ECE–SÖZEN–AKTEN–EROL, 2007. 50.

²⁷ Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

²⁸ UNESCO Website: <https://whc.unesco.org/en/list/356/video> (26.11.2018.)

in the Bosphorus,²⁹ with the admixture of the factors such as, geographical situation, narrowness, strong currents, sharp bends, uncertain weather conditions, combined with 2500 regional maritime traffic activity, 150 non-stopover vessels and 23 vessels carrying hazardous cargo passed every day, Bosphorus is one of the most unusual natural narrow waterways in the world.

The aggravated circumstances pose serious risk not only to the people living in Istanbul and the historical and cultural heritage of the city³⁰, but also to the marine environment. For instance, in an incident in November 1979, a Romanian Tanker *M/V Independenta* collided with a Greek cargo ship *M/V Evrialy* at the southern entrance of the Bosphorus. Upon collision, the *M/V Independenta* exploded³¹ and 95,000 tons of oil leaked into the sea and some of it burned for almost a month.³² This has been recorded as one of the biggest oil pollution accidents all over the world.³³ This accident killed 43 people and destroyed 96% of sea life in the region.³⁴ The risk posed by the tankers is not exclusive to Istanbul and the Marmara Sea, but it also extends to the Black Sea. The ecological state of the Black Sea is very fragile and gradually suffocating,³⁵ which is worsened by the oil tankers navigating through the Bosphorus. Such accidents may also lead to air pollution along with related health issues.

Another aspect is the possible effects of ship accidents on the trade and economy of Turkey and other States. Upon such incidents, the marine traffic in the straits is suspended for some time³⁶, which is a massive economic loss both for Turkey and other related States. Such suspension or deceleration at the marine traffic in the Bosphorus adversely affects the economies of particularly the Black Sea countries, as there is no alternative route available.³⁷

²⁹ ECE-SOZEN-AKTEN-EROL, 2007. 48.

³⁰ Recently, in April 2018, a Malta flagged ship crashed into a *Yalı* (the historical houses/mansions built by the Bosphorus) and destroyed part of the historical building. That incident flared the discussions on the safety issues in the Bosphorus once again. Daily Sabah: <https://www.dailysabah.com/istanbul/2018/04/07/ship-crashes-into-waterfront-mansion-in-istanbuls-bosporus-after-rudder-gets-stuck> (28.01.2019.)

³¹ In this explosion the windows of houses up to six kilometres inland were smashed and that part of the city was under an intense smoke for days. ITOPIF website: <http://www.itopf.org/in-action/case-studies/case-study/independenta-bosphorus-turkey-1979/> (28.01.2019). Energy Global News website: <http://www.energyglobalnews.com/independenta-explodes-bosphorus/?print=print> (28.01.2019.)

³² Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

³³ Google Earth Files: Black Tides: The Worst Oil Spills in History. <http://earth.tryse.net/oilspill.html> (26.11.2018.)

³⁴ DOĞAN, Ertuğrul – BURAK, Selmin: Ship-Originated Pollution in the Istanbul Strait (Bosphorus) and Marmara Sea. *Journal of Coastal Research*, 23 (2007) 2. 389.

³⁵ “Each year, thousands of tons of pesticides, fertilizers, industrial effluents, gasoline and other wastes flow from East European, Ukrainian, Russian and Georgian rivers into the Black Sea, lapping up finally on Turkish shores or pouring through the Bosphorus.[...] Battered by East European river wastes and international oil spills, exhausted by several thousand years of quiet ecological struggle and assaulted by renegade jellyfish deposited accidentally by foreign ships, the Black Sea is slowly losing the layers of oxygen near its surface that for centuries supported bountiful schools of dolphins, sturgeon and anchovies.” at: COLL, Steve: Turkey’s Dire Strait. *Washington Post*, June 14, 1993, A 14.

³⁶ For instance, in 1994 *M/V Nassia* (an oil tanker) collided with *M/V Shipbroker* (a bulk carrier) at the northern entrance of the Bosphorus, killing 27 people. The tanker burned for several days which caused the Bosphorus traffic to be stopped for six days. Bosphorus Strait News website: <http://www.bosphorusstrait.com/the-bosphorus-strait/incidents/> (28.01.2019.)

³⁷ Turkish Straits are the sole outlet for Ukrainian port of Odessa, Russian Ports of Novorossiysk and Rostov-na-Donu, and Romanian ports. PAVLYUK, Serge V.: Regulation of the Turkish Straits: UNCLOS as an Alternative

IV. The Passage regime of the Bosphorus: the Montreux Convention

Part III of the LOSC lays down two principle regimes³⁸ for passage from the international straits: innocent passage regime and transit passage regime. Both are regimes of passage³⁹, meaning that such passage needs to be in conformity with the definition of Article 18 of the LOSC.⁴⁰ The innocent passage regime in the international straits is as presented in Part II Section 3 of the LOSC, which regulates innocent passage in the territorial sea, with the sole exception that such passage cannot be suspended in the straits.⁴¹ Innocent passage is not available for aircrafts, while submarines are required to navigate on the water surface showing their flag.⁴² Transit passage on the other hand presents a more liberal regime, offering free passage for aircrafts and under water navigation for submarines.⁴³ Transit passage regime is applicable to straits connecting one part of the high seas or the exclusive economic zone to another.⁴⁴ Innocent passage regime, on the other hand, applies to international straits excluded from the transit passage regime under Article 38(1) and to the straits connecting a part of the high seas or the exclusive economic zone to the territorial sea of a State.⁴⁵

Conventionally, the international character of a strait is predominantly determined according to its geographical features; a secondary determinant being its international use for navigation. The LOSC regulates the straits used for international navigation, leaving the national straits out of its scope. When the passage regime of a strait becomes the subject of an international treaty, it automatically attains an international character notwithstanding the geographical factors.⁴⁶ Yet, such straits shall continue to be governed by those long-standing special treaties.

The passage regime of the Turkish Straits is regulated by the Montreux Convention of 1936. This is an example *par excellence* of the situation described above.⁴⁷ The Turkish Straits,⁴⁸

to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region. *Fordham International Law Journal*, 22 (1999) 962.

³⁸ Archipelagic sea lanes passage as submitted in Part IV of the LOSC may be referred as a third passage regime, though a rather exceptional one.

³⁹ NANDAN, S. N. – ANDERSON, D.: Straits. In: Caminos, Hugo (eds.): *Law of the Sea*. Routledge, New York, 2016. 77.

⁴⁰ “*Meaning of passage*

1. *Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.*

2. *Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”* The LOSC 1833, 1834, 1835 UNTS 3. Article 18.

⁴¹ The LOSC 1833, 1834, 1835 UNTS 3. Article 45(2).

⁴² The LOSC 1833, 1834, 1835 UNTS 3. Article 20.

⁴³ The LOSC 1833, 1834, 1835 UNTS 3. Article 38.

⁴⁴ The LOSC 1833, 1834, 1835 UNTS 3. Article 37.

⁴⁵ The LOSC 1833, 1834, 1835 UNTS 3. Article 45(1).

⁴⁶ The LOSC 1833, 1834, 1835 UNTS 3. Article 35(c).

⁴⁷ CHURCHILL–LOWE. 2014. 106.

⁴⁸ The Bosphorus connects the Black Sea (enclosed/semi-enclosed sea) to the Marmara Sea (territorial sea), and the Dardanelles connect the Marmara Sea to the Aegean Sea (high seas). Both straits are used for international navigation, as the only route to and from the Black Sea.

as is stipulated in the preamble to the Montreux Convention, consist of the Bosphorus (strait), Marmara Sea and the Dardanelles (strait).⁴⁹ Parties to the Convention were: Turkey, France, The United Kingdom, The USSR (Soviet Russia), Japan, Romania, Bulgaria, Greece and Yugoslavia. Italy has acceded to the Convention in 1938, and Japan has withdrawn from the Convention in 1951. As construed in Article 1, the general principle of the Convention for the merchant vessels is the “principle of *freedom of passage and navigation* by sea in the Straits”. The meaning and scope of ‘freedom of passage’ is elaborated in the Article 2 of the Convention.⁵⁰

There also are many constraints in this regime, particularly as regards the passage of warships. The Montreux regime involves different categories of passage regulations such as peace time, war time, imminent danger of war time both for merchant ships and warships. It also provides different regulations for Black Sea States and Non-Black Sea States. The peace time regulations include provisions regarding both passage from the Straits, and the status of being in the Black Sea. The protective and restrictive provisions of the Convention aim to protect not only Turkish interests as the State bordering the straits, but also all other coastal States of the Black Sea (the ‘Black Sea Powers’ as referred by the Convention). Therefore, the total naval force of non-Black Sea States is restricted in terms of their presence in the Black Sea.

Turkey is authorised to close the Straits to all foreign warships in wartime⁵¹ or when it was threatened by aggression⁵²; additionally, it was authorised to refuse transit from merchant ships belonging to countries at war with Turkey⁵³.

Due to its particular relevance, only the peace time restrictions as regards the vessels of war will be addressed. Those are twofold: restrictions as per passage from the Straits, and restrictions as regards the Black Sea.

The restrictions as per passage: The transit of all vessels of war should be notified to Turkish authorities at least eight days before their passage.⁵⁴ In time of peace, light surface vessels, minor war vessels and auxiliary vessels, whether belonging to Black Sea or non-Black Sea Powers, and whatever their flag, shall enjoy freedom to transit through

⁴⁹ “Desiring to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus comprised under the general term “Straits” in such manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea, [...]” Preamble to the Convention Regarding the Régime of Straits [The Montreux Convention]. 173 LNTS 213. 215.

⁵⁰ “In time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities, except as provided in Article 3 below. No taxes or charges other than those authorized by Annex I to the present Convention shall be levied by the Turkish authorities on these vessels when passing in transit without calling at a port in the Straits. In order to facilitate the collection of these taxes or charges merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 their name, nationality, tonnage, destination and last port of call (provenance). Pilotage and towage remain optional.” The Montreux Convention. 173 LNTS 213. 219. Article 2.

⁵¹ The Montreux Convention. 173 LNTS 213. 225. Article 20.

⁵² The Montreux Convention. 173 LNTS 213. 227. Article 21.

⁵³ The Montreux Convention. 173 LNTS 213. 219. Article 5.

⁵⁴ It is also submitted that this period is to be extended to fifteen days for non-Black Sea Powers. The notification is required to specify the destination, name, type and number of the vessels, as also the date of entry for the outward passage and, if necessary, for the return journey. The Montreux Convention. 173 LNTS 213. Article 13.

the Straits without any taxes or charges.⁵⁵ The maximum aggregate tonnage of all foreign naval forces which may be in course of transit through the Straits shall not exceed 15,000 tons, or nine vessels.⁵⁶

The restrictions as regards the Black Sea: The aggregate tonnage which non-Black Sea Powers may have in that sea in time of peace shall normally not exceed 30,000 tons,⁵⁷ and the tonnage which any one non-Black Sea Power may have in the Black Sea shall be limited to two-thirds of the aggregate tonnage.⁵⁸ Vessels of war belonging to non-Black Sea Powers cannot remain in the Black Sea more than twenty-one days, whatever the object of their presence there may be.⁵⁹

In consequence, no aircraft carriers, capital warships or submarines of non-Black Sea Powers are allowed through the Turkish Straits. This is an important security instrument for Black Sea States perhaps more than it is for Turkey.

VI. National Administration of the Turkish Straits

In Turkey, the administration of the straits is carried out by the Directorate General of the Coastal Safety (set up in 1997), which is placed under the Ministry of Transport and Infrastructure. The mission of the Directorate General of the Coastal Safety (DGCS) is to assist and improve the safety of navigation in Turkish waters, and its core competences are: search and rescue, salvage and towage, Turkish Straits Vessel Traffic Services (TSVTS), aids to navigation (lighthouses, buoys, etc.), marine communication, and marine oil spill response during salvage operations or in case of emergency.⁶⁰

In 1993 Turkey invited the International Maritime Organisation (IMO) to consider the navigational risks and hazards in the Turkish Straits. In 1994 Turkey adopted Maritime Traffic Regulations for the Turkish Straits and Marmara Region, upon recommendations by the IMO.⁶¹ This legislation however, exceeded the IMO's recommendations and brought stricter rules for safety.⁶² It is worth mentioning that IMO's Rules and Recommendations were rather "*minimal*" compared to the Panama⁶³ and

⁵⁵ The Montreux Convention. 173 LNTS 213. 221. Article 10.

⁵⁶ The Montreux Convention. 173 LNTS 213. 223. Article 14.

⁵⁷ Exceptionally that can be increased up to 45,000 tons under the conditions laid down in Montreux Convention Article 18. The Montreux Convention. 173 LNTS 213. 223–225.

⁵⁸ The Montreux Convention. 173 LNTS 213. 221–225. Article 18(1).

⁵⁹ The Montreux Convention. 173 LNTS 213. 225. Article 18/2.

⁶⁰ Directorate General of the Coastal Safety website: <https://www.kiyiemniyeti.gov.tr/aboutus> (03.12.2018.)

⁶¹ The traffic separation schemes (TSS) were introduced in 1994 in the Straits in accordance with the provisions of the 'International Regulations for Prevention of Collision at Sea' (COLREG). The TSS were approved by the International Maritime Organization (IMO) General Assembly in November 1995. Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

⁶² *Schweikart* examined IMO's role as a forum for international problem solving and observed its shortcomings to address the navigational safety concern in the Turkish Straits. SCHWEIKART, Debora: Dire Straits. The International Maritime Organisation in the Bosphorus and Dardanelles. *University of Miami Yearbook of International Law*, 5 (1996–1997) 3. 29–50.

⁶³ In the Panama Canal, as a general rule, pilotage is compulsory, where it was only '*strongly recommended*' by the IMO in the Turkish Straits. The Panama Canal Authority website: Maritime Regulations: Regulation for

Suez⁶⁴ Canals, “two other narrow, key oil tanker routes”.⁶⁵ Still, the 1994 Regulations led to serious reaction especially from States that rely on the straits for their shipping activities, on the grounds that it did not comply with the IMO rules and recommendations, international law, and the Montreux Convention.⁶⁶ Turkey, on the other hand, strictly contested such allegations.⁶⁷ In 1998 Turkey replaced that Regulation with a new one, which appeared more acceptable by the concerned States. The Maritime Traffic Regulations of 1998⁶⁸ was designed to apply to all vessels entering or navigating in the Turkish Straits, and aims to ensure safety of navigation, safety of life, property and marine environment by improving the safety of vessel traffic in the Straits. The Regulations introduced some safety and control measures such as the setting up of Traffic Separation Schemes, Traffic Control Centre and Stations, technical conditions and reporting requirements for ships.

As a further measure, equipped with 13 observation towers, the VTS (The Vessel Traffic System) has been operational since 2003, in the Turkish Straits. Each Observation Tower has X band radar, Monocolor – Color-Infrared Camera and Network Equipment. A few Towers has extra, meteorological Stations and communications equipment.⁶⁹ The establishment of the VTS is a major investment with considerable running costs. Yet it enables the monitoring electronic display chart all of vessels movement on area of interest; provides navigational assistance to captains to routing the vessels; renders Information Services to give the knowledge regarding meteorological and hydrographical situations and etc. of the Turkish Straits; supplies promulgation of navigational information and general warnings; and helps to provide effective vessel passage planning: saving time, while ensuring safety. It may be considered as money well spent.

Although these national measures drastically reduced the number of casualties in the Bosphorus,⁷⁰ it is still far from safe.

Navigation in Canal Waters. Agreement No. 13. June 3, 1999. <https://www.pancanal.com/eng/legal/reglamentos/acuerdo13-eng.pdf> (30.01.2019.) Article 90.

⁶⁴ In the Suez Canal, pilotage is compulsory for all vessels, and it regularly operates as a one-way waterway, where IMO recommended that two-way traffic in Turkish Straits ‘*may temporarily be suspended*’ to ensure safe transit of vessels which cannot comply with the traffic separation schemes. The Suez Canal Authority website: Rules of Navigation. <https://www.suezcanal.gov.eg/English/Navigation/Pages/RulesOfNavigation.aspx> (30.01.2019)

⁶⁵ SCHWEIKART, 1996–1997. 45.

⁶⁶ IMO Maritime Safety Committee: Report of the Maritime Safety Committee. 64th Session, U.N. Doc. MSC 64/22.1994. 11–14.

⁶⁷ It was submitted by Turkey that: “*The Turkish Straits Regulations and the TSS aim at enhancing safety of navigation in the Turkish Straits and are in conformity with the relevant rules of international law and practice.*” Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

⁶⁸ The English text of the Maritime Traffic Regulations of 1998 is available at: <http://denizmevzuat.udhb.gov.tr/dosyam/T%C3%9CRK%20BO%C4%9EAZLARI%20VE%20DEN%C4%B0Z%20TRAF%C4%B0K%20D%C3%9CZENLEME%20Y%C3%96NERMEL%C4%B0%C4%9E%C4%B0.doc> (03.12.2018.)

⁶⁹ Directorate General of the Coastal Safety website: About Us. <https://www.kiyemniyeti.gov.tr/aboutus> (03.12.2018.)

⁷⁰ “*The Maritime Safety Committee of the IMO concluded at its 71st session, which was held in London on 19–28 May 1999, that the safety measures and the associated IMO Rules and Recommendations ‘have proven to be effective and successful’. The drastic decline in the number of accidents and collisions substantiate this conclusion.*” Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

VI. The ‘Crazy Project’ as a crazy solution?

The Canal Istanbul Project, which was announced as the ‘Crazy Project’ is proposed as a safer route for the ships to navigate and presumed to be able to reduce the ship accidents in the Bosphorus. Moreover, it is rationalised equally on an economy-related aspect. It is claimed to provide extra revenue to Turkey. It is projected to create a new tourist attraction and also boost the real-estate market. Being a massive project, it is also expected to positively affect the political power of the government.

Safety argument, presented as the main motive for the Canal, appears to suffer from some discrepancies. To begin with, the availability of an alternative route is unable to address the safety concerns, for two basic reasons. First, it will not divert all the traffic off the Strait, as Montreux Convention Articles 1 and 2 constitute a legal barrier to such an imposition to use the Canal instead of the Bosphorus.⁷¹ So it will be up to the vessel to choose which route to navigate from. The ship can prefer to navigate through the Canal, for avoiding the financial burden of congestion in the Bosphorus.⁷² Yet the pricing of the Canal passage will be of critical significance in influencing this decision. *Akgün and Tiryaki* argue that going back to the original version of the Montreux Convention and apply *Gold Franc* would increase the actual fees paid today by the ships, and then there would be a chance for Turkey to direct ships that carry hazardous materials to use the planned Canal at an equivalent rate.⁷³ I do not agree with the second part of this argument: even if the Canal would somehow end up to be the cheaper option, it still does not legally provide Turkey with a right to derogate from the ‘*eternal*’ principle of freedom of navigation in the Straits.⁷⁴ Such an imposition to the contrary of a crystal-clear legal regulation cannot be justified by merely offering equivalent conditions. The only possible way to make it happen would be through reregulation or deregulation; that is to say, either by amendment⁷⁵ or termination⁷⁶ of the Montreux Convention or enactment of a new treaty to replace it. On the other hand, I agree that such an initiative to go back to Gold Franc will consequently increase the applicable charges⁷⁷, which could create a competitive advantage for the Canal. Yet again this cannot be forced upon the ships but can only increase the incentive to use the Canal. Under the current legal conditions, it is nearly impossible for Turkey to profit from the Canal passages, since should the price is set too high, it is likely that the Canal

⁷¹ Freedom of navigation principle as construed in the Convention preclude the possibility to obstruct the passage from the Bosphorus.

⁷² It is estimated that the average daily waiting cost of a medium-sized ship is 30,000USD when the trade is in its lowest. TÜTÜNÇÜ, Ayşe Nur: Montrö Sözleşmesi ve Kanal İstanbul (The Montreux Convention and Canal Istanbul). *Public and Private International Law Bulletin*, 37 (2017) 1, 118.

⁷³ AKGÜN, Mensur – TIRYAKI, Sylvia: The Political Feasibility of the Istanbul Canal Project. Global Political Trends Center (GPoT), *Policy Brief*, 2011/27. <https://core.ac.uk/reader/20539280> (06.12.2018.) 5.

⁷⁴ The Montreux Convention Article 28(2) states that unlike the Convention itself, the principle of transit and navigation affirmed in Article 1 shall ‘*continue without limit of time*’. The Montreux Convention. 173 LNTS 213. 225. Article 28(2).

⁷⁵ The Montreux Convention. 173 LNTS 213. 225. Article 29.

⁷⁶ The Montreux Convention. 173 LNTS 213. 225. Article 28.

⁷⁷ *Akgün and Tiryaki* reveal that a commercial ship with a net tonnage of 10,000 is for its passage from the Straits is obliged to pay 4,881 USD to Turkey, whereas if we were to apply Gold Franc (according to the gold rate of 4th of August, 2011) it would increase to 59,976 USD. AKGÜN–TIRYAKI, 2011. 4, 5.

will become the unfavourable option; whereas should the price is set too low, it will impair the economic feasibility of the Project.

Secondly, the Canal Project is accompanied by huge urbanisation plans around the Canal. It is planned that a considerable amount of people will be accommodated by the new shores of the Canal, with a vision to relief the densely populated areas, especially in the old town part of Istanbul.⁷⁸ However, this plan could cause increased strain over the city such as air pollution and health issues, and practically may end up with relocating some of the existing risks in the Bosphorus at the Canal shore.⁷⁹

Leaving aside the feasibility and possible environmental impact of opening a man-made canal in Istanbul, the question on the legal sphere rests: How it should be regulated?

As a national waterway, Canal Istanbul is expected to be subject to national law and administered through national authorities.⁸⁰ Then, would it be governed by the Directorate General of the Coastal Security or another administrative body? As the plan involves the employment of a ‘build-operate-transfer scheme’ to finance the project, how much ‘say’ would the contractor have over the passage regulation? These are more of the internal matters, but the subject also has a transnational aspect. Despite categorising it as ‘national’, is it possible to extend the Montreux restrictions to the Canal?

Before proceeding with substantive examination of such questions, it could be useful to shed a light on the Turkish constitutional system with reference to its relationship with international law. The relationship between international law and national law according to the Turkish legal system has always been a complicated subject. Since the Constitution of the Republic of Turkey 1982⁸¹ has no clear references as to the relationship between international law and national law, indicating supremacy of either one over another, such normative vagueness leads to the presentation of dissimilar opinions in the legal literature that vary immensely as to the categorisation of such relationship as per the classical theoretical views of monism and dualism.⁸²

⁷⁸ The creation of new residential areas bears the risk of triggering internal migration and increase the already dense population. The project is estimated to cause a rise in the population of Istanbul up to 25 millions, and that of the Thrace Region (including Istanbul) – which is approximately 8% of the whole Turkish land territory – up to 40–45 millions. GÖKÇE, Cemal: İstanbul Kanal Projesi Neden Yapılmamalıdır? (Why the İstanbul Canal Project should not be done?). Chamber of Civil Engineers, *Press Release*, TMH-490-2016/2. http://www.imo.org.tr/resimler/ekutuphane/pdf/17210_26_36.pdf (06.12.2018.) 61.

⁷⁹ AKKAYA, M. Ali: “Kanal İstanbul” Projesi Karadeniz Kıyısındaki Devletlerle Olan İlişkilerimize Etkisi ve Montrö Sözleşmesi (“Canal İstanbul” Project and the Effect Thereof Upon Our Relations with the Coastal States of the Black Sea, and the Montreux Convention), *Ordu Üniversitesi Sosyal Bilimler Araştırmaları Dergisi*, 5 (2015) 12, 254–255.

⁸⁰ Upon a question, the Minister of Transport and Infrastructure, *Cahit Turhan*, has recently affirmed the legal status of the Canal as a national waterway. He also mentioned that the Canal will be open for international navigation, yet it is intended for the passage of commercial ships. Moreover, he confirmed that the pricing studies according to the permitted ship types and tonnages, along with the technical and administrative preparation work in relation to navigational safety is in progress. GÜRÇANLI, Zeynep: Kanal İstanbul’un hukuki statüsü açıklandı. İç su yolu (The legal status of Canal İstanbul is revealed: National waterway). *Sözcü*, 05 December, 2018. <https://www.sozcu.com.tr/2018/gundem/kanal-istanbulun-hukuki-statusu-aciklandi-ic-su-yolu-2777579/> (06.12.2018.)

⁸¹ The English text of the 1982 Constitution of the Republic of Turkey is available at the official website of the Grand National Assembly of Turkey: https://global.tbmm.gov.tr/docs/constitution_en.pdf (29.01.2019)

⁸² TEKİN APAYDIN, Deniz: Monizm-Düalizm İkileminde Türk Hukuk Sistemi: Uluslararası Hukuka Bakış Üzerine Doktrinel Uzlaşmazlığın Nedenleri ve AB Hukuku Işığında bir Değerlendirme (Turkish Legal System in the

According to Article 104 of the 1982 Constitution, the ratification and promulgation of international treaties is a duty of the President of the State.⁸³ Yet, such ratification shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification in accordance with Article 90.⁸⁴ The first sentence of the Article 90(5) provides that “*International agreements duly put into effect have the force of law*”, which stipulates that the treaties are positioned as equivalent to laws in the hierarchy of norms. This indicates that the Turkish legal system perceives international treaties and national law as a single unit and determines their respective position within that single body of law. Moreover, the third sentence of the same paragraph refers to the case of a conflict between international treaties concerning fundamental rights and freedoms and national laws, and gives priority to the application of the former. Such a case relating to a conflict between international law and national law is only possible within monist systems, because dualist systems observe international law and national law as two different sets of laws that cannot co-exist. Hence in dualist systems those two laws cannot conflict with each other, unless international law is incorporated into national law with a legislative act, which then converts the conflict into a domestic one. Therefore, the present author strongly believes that the Turkish legal system represents the peculiarities of a monist structure.⁸⁵

The Montreux Convention was implemented immediately and has been applied as an integral part of Turkish law since 1936.⁸⁶ If the Canal Project is carried out and regulated nationally there is a possibility that it may conflict with the provisions of the Montreux Convention. In such a scenario the legal instrument used for regulating the Canal would be

Monism – Dualism Conundrum: The Reasons of the Doctrinal Disagreement on the Viewpoint of International Law and a Review in the Light of EU Law). *Inönü Üniversitesi Hukuk Fakültesi Dergisi*, 9. (2018) 1. 529–560.

⁸³ The English text of the 1982 Constitution: https://global.tbmm.gov.tr/docs/constitution_en.pdf (29.01.2019.) 44.

⁸⁴ “D. Ratification of international treaties Article 90 – *The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification. Agreements regulating economic, commercial or technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the State, and provided they do not interfere with the status of individuals or with the property rights of Turks abroad. In such cases, these agreements shall be brought to the knowledge of the Grand National Assembly of Turkey within two months of their promulgation. Implementation agreements based on an international treaty, and economic, commercial, technical, or administrative agreements, which are concluded depending on the authorization as stated in the law, shall not require approval of the Grand National Assembly of Turkey. However, economic, commercial agreements or agreements relating to the rights of individuals concluded under the provision of this paragraph shall not be put into effect unless promulgated. Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph. International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” The English text of the 1982 Constitution. 39.*

⁸⁵ TEKİN APAYDIN, 2018. 529–560.

⁸⁶ Turkey became a party to the Montreux Convention in accordance with the Constitution of the Republic of Turkey 1924, which, in its Article 26, sought the approval of the Grand National Assembly to ratify an international treaty, with no further references for a transposition procedure. This design may also be perceived as reflecting a monist approach as regards international law. The English text of the Constitution of the Republic of Turkey 1924 is available through: EARLE, Edward Mead: *The New Constitution of Turkey. Political Science Quarterly*, 40 (1925) 1. 91.

of crucial significance, as it will be the main determinant in resolving the conflict. Should the Canal be regulated through a regulation or by-law, as the Convention is equivalent to statutory law, the Convention will be ranked higher in the hierarchy of norms, thus prevail according to *lex superior derogat legi inferiori* principle provided that the terms of the Convention are self-executing. However, if the Canal is to be regulated through a statutory law, they would be equal, so the general principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori* would apply.

Getting back to the substantive questions; following the common predisposition in the regulation of canals, if Turkey applies a freedom of passage for all types of ships and for instance permits the passage of a non-Black Sea capital warship through the Canal, would it violate the Montreux Convention? There is no single and straightforward yes or no answer to this question.

From a generic perspective it would be a ‘no’, because the Montreux Convention regulates passage from the ‘Turkish Straits’ and Canal Istanbul is not part of the Turkish Straits. The Canal is beyond the geographical scope of the Convention. However, it would also be a ‘yes’, because the Convention not only regulates the passage of warships from the Straits, but also their presence in the Black Sea. So as regards the *passage*, the Montreux restrictions would not be applicable to the Canal; on the other hand, upon passage, the restrictions as regards *presence* in the Black Sea would start to apply. The literal meaning in the interpretation of Article 18 of the Convention, purports to verify the provision applicable, notwithstanding the route of passage. Therefore, assuming that the Canal was regulated based on freedom of passage for all types of ships, the ships, which passed from the Canal freely, would become subject to Montreux restrictions, once they reach to the Black Sea. This means that passage from the Canal would indirectly and ultimately be subject to the Montreux Convention.

In the same scenario, accepting the contrary interpretation that suggests that the Montreux Convention is entirely inapplicable to the Canal, would mean the circumvention of the Convention. Russia in particular, feels threatened by this possibility, as it endangers the protected status of the Black Sea against the United States. For that reason, Russia takes it very seriously and the Russian officials say that countermeasures could be applied where necessary.⁸⁷ In this case, unless the restrictions of the Convention is somehow translated into the national regulation, it could be like reopening the Pandora’s Box, and probably start a diplomatic fuss in the best case scenario. It could even lead to the termination of the Convention, the aftermath of which is a big question mark.

VII. Conclusion

The Turkish Straits “*territorially speaking*” are “*narrow geographical areas*”, but through “*their position, they are geostrategic keys, which is the reason why the powers in the area have had an interest in changing their status.*”⁸⁸ The privilege of Turkey to keep the two gates

⁸⁷ Russian News website: Canal Istanbul: The Turks Encircle the Neighbouring Russia. <https://svpressa.ru/society/article/44524/> (03.12.2018.)

⁸⁸ POPESCU, Daniela: The Straits – between geopolitical best card and bone of contention in the Turkish–Russian relations. *Kanal Istanbul Projesi. Romanian Journal of History and International Studies*, 2 (2015) 2, 235.

of the Black Sea opening to the Mediterranean Sea comes up with the burden of a highly delicate balance to maintain. In the post-cold-war era, Turkey, being a NATO member, is expected to take sides with the United States and Europe against Russia in such international disputes. However, it is not that straightforward. Turkey is in a position to watch for the peaceful relations in the Black Sea region, while teaming up with its allies, which proves to be challenging at times of crisis.⁸⁹ Such incidents put Turkey in a “*difficult diplomatic position not only between two neighbouring countries with which it has been cultivating close relations and cooperation, especially on energy, but also between the United States and Russia*”.⁹⁰ From this viewpoint, the Canal Istanbul Project can be perceived as “*a will for an independent foreign policy*”,⁹¹ albeit, not free from complications.

Despite the developments in international law of the sea that upheld the efforts to ensure certain navigational rights in the strategic international straits, those developments never sought to also address international canals.⁹² Thus, their internationalisation has been maintained not by developing general rules in international law, but through specific international treaties. The lack of common rules applicable to canals provides no clear guidance for the Canal Istanbul. The situation is further deteriorated by the fact that the Canal Istanbul Project suffers the absence of an inter-oceanic category.

The Canal Istanbul Project is still at a planning phase and there is a chance that it may at least be postponed for now due to the current unfavourable economic conditions. Yet there is no such official announcement as of now.⁹³

The feasibility of this project to counterchallenge the navigational risks posed by the ship traffic in the Bosphorus is questionable, yet again beyond the scope of this study; so is the possible environmental impact of constructing the Canal. The more immediate and relevant question is addressing the tension between the Montreux Convention, which represents international law obligations and *pacta sunt servanda*; and the national regulation of the Canal Istanbul, which stands for national sovereignty and national interests.

The obvious solution to avoid conflict would be to regulate the Canal by national law, save that such regulation is in conformity with the provisions of the Montreux Convention. From one point of view, this could mean the triumph of international law over State sovereignty. Another option could be to allocate the Canal to the passage of merchant ships

⁸⁹ In the South Ossetia crisis between Georgia and Russia (in August 2008), Turkey felt the strain between the US and Russia. Initially permitting the passage of three US warships (of nearly 30,000 tons in total) ostensibly, to provide ‘*humanitarian aid*’ to Georgia, Turkey later refused permission to the entrance of two massive warships of 140,000 tons into the Black Sea, saying that such passage would be against the provisions of Montreux Convention. Turning down the wish of its ally “to make a show of support for Georgia” unsurprisingly displeased the US. MORRISON, David: Turkey Restricts US Access to the Black Sea. October 18, 2008. <http://www.david-morrison.org.uk/us/turkey-restricts-us-access.htm> (30.01.2019.)

⁹⁰ ALIRIZA, Bulent: Turkey and the Crises in the Caucasus. September 9, 2008. *Commentary*. Center for Strategic and International Studies. <https://www.csis.org/analysis/turkey-and-crisis-caucasus> (30.01.2019.)

⁹¹ POPESCU, 2015. 239.

⁹² ROTHWELL, Donald R. – STEPHENS, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010. 231.

⁹³ According to the latest official statements the project will ‘*hopefully*’ start in 2019 and will be finished by 2023, on the 100th anniversary of the Turkish Republic. Şahin, Tuba: Turkey plans to start building Canal Istanbul in 2019. *Anadolu Agency*, 15 November, 2018. <https://www.aa.com.tr/en/energy/international-relations/turkey-plans-to-start-building-canal-istanbul-in-2019/22308> (06.12.2018.)

only, which would leave the contestable part out of the equation.⁹⁴ Yet, none of those options is capable of providing a cure for the Bosphorus, suffering from a chronic safety condition.

In a retrospective perspective, perhaps the project could be used as a leverage to renegotiate the terms of the Convention and modify the ‘freedom of passage’ principle to a more restricted passage regime to protect Istanbul in particular and Turkey and the region in general, rather than actually constructing the Canal that can seriously harm the city and the environment. The Montreux Convention was concluded as a result of initiations by Turkey, relying on the change of circumstances since the conclusion of the Lausanne Peace Treaty in 1923,⁹⁵ which was then governing the Turkish Straits. Despite all the political risks, perhaps, once again, it is time to invoke the *clausula rebus sic stantibus* to modify the terms to adapt the current circumstances to protect Istanbul. The Montreux Convention was “*adopted in another era*”, and unless it is capable of being modified to reflect contemporary navigational concerns, its ongoing application may be questioned by user States.⁹⁶

The US Energy Information Administration (the EIA) refers to the Turkish Straits as “*Only half a mile wide at the narrowest point, the Turkish Straits are among the world’s most difficult waterways to navigate because of their sinuous geography.*”, yet one of the busiest maritime chokepoints.⁹⁷ Under the circumstances, the Bosphorus has increasingly been like an impending disaster waiting to occur. The Montreux Convention prescribes freedom of navigation for merchant ships, including the oil tankers and ships carrying hazardous cargo. However, this principle should be interpreted with due regard to the safety of millions of people and the protection of environment. As proclaimed by the Turkish Ministry of Foreign Affairs, “*otherwise, this would be nothing but an abuse of the right of freedom of passage without taking into account the legitimate and justified concerns of Turkey for its people, its environment and its historical and cultural assets.*”⁹⁸

Undoubtedly, there exists a pressing need for a change in the Bosphorus. The Montreux Convention proves to be insufficient to ensure the safety of the Bosphorus and is a fortiori focused on protecting the Black Sea Powers from the marine access of non-Black Sea forces. This approach needs to be adjusted to address the safety and marine environmental protection concerns. It is necessary and inevitable that certain actions are to be taken to ensure that such concerns are dealt with. But, I personally hope that one of them is not the construction of a canal in Istanbul. In either case if the Canal is built, a Turkish national regulation will possibly determine the future of an international treaty, legally; together with the future of a region, politically.⁹⁹

⁹⁴ This option appears to be the preferred one by Turkish authorities as of today.

⁹⁵ Lausanne Peace Treaty, II. Convention Relating to the Régime of the Straits, Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/ii-convention-relating-to-the-regime-of-the-straits.en.mfa> (29.01.2019)

⁹⁶ ÜNLÜ, Nihan: *The Legal Regime of the Turkish Straits*. Martinus Nijhoff, The Hague, 2002. 10914, considering options for reform, quoted via ROTHWELL–STEPHENS, 2010. 245

⁹⁷ The EIA website: World Oil Transit Chokepoints, July 25, 2017. <https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=WOTC> (29.01.2019.)

⁹⁸ Ministry of Foreign Affairs website: <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (26.11.2018.)

⁹⁹ Karlıklı examines the geostrategic importance of the Black Sea region and the balance secured by the Montreux Convention. He suggests that sustainable peace and the future of the region mostly depends on the political choices of Turkey in relation to the Montreux Convention and the Black Sea. KARLIKLIL, Yücel: Rethinking the Montreux Convention Regarding the Regime of the Straits in its 80th Anniversary. *Public and Private International Law Bulletin*, 37 (2017) 1, 48.

References

- AKGÜN, Mensur – TIRYAKI, Sylvia: The Political Feasibility of the Istanbul Canal Project. Global Political Trends Center (GPoT), *Policy Brief*. 2011/27. <https://core.ac.uk/reader/20539280> (06.12.2018).
- AKKAYA, M. Ali: “Kanal İstanbul” Projesi Karadeniz Kıyısındaki Devletlerle Olan İlişkilerimize Etkisi ve Montrö Sözleşmesi (“Canal Istanbul” Project and the Effect Thereof Upon Our Relations with the Coastal States of the Black Sea, and the Montreux Convention), *Ordu Üniversitesi Sosyal Bilimler Araştırmaları Dergisi*, 5 (2015) 12, 242–262.
- ALIRIZA, Bulent: Turkey and the Crises in the Caucasus. September 9, 2008. *Commentary*. Center for Strategic and International Studies. <https://www.csis.org/analysis/turkey-and-crisis-caucasus> (30.01.2019.)
- American Studies at the University of Virginia website: Panama Canal. <http://xroads.virginia.edu/~ma03/holmgren/ppie/pc.html> (22.11.2018.)
- Association Francaise Des Capitaines De Navires website: The Turkish Straits Vessel Traffic Service. http://www.afcan.org/dossiers_techniques/tsvts_gb.html (22.11.2018.)
- Bosphorus Strait News: <http://www.bosphorusstrait.com/the-bosphorus-strait/incidents/> (28.01.2019.)
- BOYLE, Alan: Further Development of the Law of the Sea Convention. Mechanisms for Change. *International and Comparative Law Quarterly*, 54 (2005) 3, 563–584.
- CAMINOS, Hugo – COGLIATI-BANTZ, Vincent P.: *The Legal Regime of Straits*. Cambridge University Press, Cambridge, 2014.
- CHURCHILL, Robin Rolf – LOWE, Alan Vaughan: *The Law of the Sea*. Manchester University Press, Manchester, 3rd Ed., 2014.
- COLL, Steve: Turkey’s Dire Strait. *Washington Post*. June 14, 1993, A 14.
- Convention Regarding the Régime of Straits (adopted 20 July 1936, entered into force provisionally on 15 August 1936 and definitively on 9 November 1936) 173 LNTS 213 [the Montreux Convention].
- ÇANCI, Metin *et al.*: İstanbul’da Deniz Ulaşımının Geleceğinin Değerlendirilmesi (The Evaluation of the Future of Marine Transportation in Istanbul), 2015. Project by Okan University, Faculty of Business and Administrative Sciences. <http://www.istka.org.tr/media/20863/%C4%B0stanbul-da-deniz-ula%C5%9F%C4%B1m%C4%B1n%C4%B1n-gelece%C4%9Finin-de%C4%9Ferlendirilmesi.pdf> (06.12.2018.)
- Daily Sabah: <https://www.dailysabah.com/istanbul/2018/04/07/ship-crashes-into-waterfront-mansion-in-istanbuls-bosphorus-after-rudder-gets-stuck> (28.01.2019.)
- Directorate General of the Coastal Safety website: About Us. <https://www.kiyiemniyeti.gov.tr/aboutus> (03.12.2018.)
- DOĞAN, Ertuğrul – BURAK, Selmin: Ship-Originated Pollution in the Istanbul Strait (Bosphorus) and Marmara Sea. *Journal of Coastal Research*, 23 (2007) 2, 388–394.

- EARLE, Edward Mead: The New Constitution of Turkey. *Political Science Quarterly*, 40 (1925) 1, 73–100.
- ECE, Nur Jale – SÖZEN, Adnan – AKTEN, Necmettin – EROL, Serpil: The Strait of Istanbul: A Tricky Conduit for Safe Navigation. *European Journal of Navigation*, 5 (2007) 1, 46–55.
- Energy Global News website: <http://www.energyglobalnews.com/independenta-explodes-bosphorus/?print=print> (28.01.2019.)
- Google Earth Files: Black Tides: The Worst Oil Spills in History. <http://earth.tryse.net/oilspill.html> (26.11.2018.)
- GÖKÇE, Cemal: İstanbul Kanal Projesi Neden Yapılmamalıdır? (Why the Istanbul Canal Project should not be done?). Chamber of Civil Engineers, *Press Release*, TMH-490-2016/2. http://www.imo.org.tr/resimler/ekutuphane/pdf/17210_26_36.pdf (06.12.2018.)
- GÜRCANLI, Zeynep: Kanal İstanbul'un hukuki statüsü açıklandı: İç su yolu (The legal status of Canal Istanbul is revealed: National waterway). *Sözcü*, December 05, 2018. <https://www.sozcu.com.tr/2018/gundem/kanal-istanbulun-hukuki-statusu-aciklandi-ic-su-yolu-2777579/> (06.12.2018.)
- IMO Maritime Safety Committee: *Report of the Maritime Safety Committee*. 64th Session, U.N. Doc. MSC 64/22. (1994.)
- IITOPF website: <http://www.itopf.org/in-action/case-studies/case-study/independenta-bosphorus-turkey-1979/> (28.01.2019.)
- JONES, Dorian: Key Waterways Become Focus of Turkish, Russian Tensions. *VOA News*. December 11, 2015. <https://www.voanews.com/a/key-waterways-become-focus-of-turkey-russia-tensions/3098692.html> (30.01.2019.)
- KARLIKLI, Yücel: Rethinking the Montreux Convention Regarding the Regime of the Straits in its 80th Anniversary. *Public and Private International Law Bulletin*, Vol. 37. No. 1. 2017. 29–49.
- Lausanne Peace Treaty, II. Convention Relating to the Régime of the Straits, Ministry of Foreign Affairs website: http://www.mfa.gov.tr/ii_-convention-relating-to-the-regime-of-the-straits.en.mfa (29.01.2019)
- Ministry of Foreign Affairs website: Turkish Straits. <http://www.mfa.gov.tr/the-turkish-straits.en.mfa> (06.12.2018.)
- MORRISON, David: Turkey Restricts US Access to the Black Sea. October 18, 2008. <http://www.david-morrison.org.uk/us/turkey-restricts-us-access.htm> (30.01.2019.)
- NANDAN, S. N. – ANDERSON, D.: Straits. In: Caminos, Hugo (eds.): *Law of the Sea*. Routledge, New York, 2016. 66–114.
- Oxford Dictionaries: strait. <https://en.oxforddictionaries.com/definition/strait> (28.01.2019.)
- Panama Canal Treaty (adopted 07 September 1977, entered into force in 01 October 1979) 1280 UNTS 3.

- PAVLYUK, Serge V.: Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region. *Fordham International Law Journal*, 22 (1999) 961–1001.
- POPESCU, Daniela: The Straits – between geopolitical best card and bone of contention in the Turkish–Russian relations. Kanal Istanbul Projesi. *Romanian Journal of History and International Studies*, 2 (2015) 2, 233–243.
- ROTHWELL, Donald R. – STEPHENS, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010.
- Russian News website: Canal Istanbul: The Turks Encircle the Neighbouring Russia. <https://svpressa.ru/society/article/44524/> (03.12.2018.)
- SCHWEIKART, Debora: Dire Straits. The International Maritime Organisation in the Bosphorus and Dardanelles. *University of Miami Yearbook of International Law*, 5 (1996–1997) 3, 2950.
- ŞAHİN, Tuba: Turkey plans to start building Canal Istanbul in 2019. *Anadolu Agency*. November 15, 2018. <https://www.aa.com.tr/en/energy/international-relations/turkey-plans-to-start-building-canal-istanbul-in-2019/22308> (06.12.2018.)
- TEKİN APAYDIN, Deniz: Monizm-Düalizm İkileminde Türk Hukuk Sistemi: Uluslararası Hukuka Bakış Üzerine Doktrinel Uzlaşmazlığın Nedenleri ve AB Hukuku Işığında bir Değerlendirme (Turkish Legal System in the Monism – Dualism Conundrum: The Reasons of the Doctrinal Disagreement on the Viewpoint of International Law and a Review in the Light of EU Law). *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 9 (2018) 1. 529–560.
- The Convention Regarding the Régime of Straits (adopted 20 July 1936, entered into force provisionally on 15 August 1936 and definitively on 9 November 1936) 173 LNTS 213 [the Montreux Convention].
- The EIA website: World Oil Transit Chokepoints, July 25, 2017. <https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=WOTC> (29.01.2019.)
- The English text of the Maritime Traffic Regulations of 1998: <http://denizmevzuat.udhb.gov.tr/dosyam/T%C3%9CRK%20BO%C4%9EAZLARI%20VE%20DEN%C4%B0Z%20TRAF%C4%B0K%20D%C3%9CZENLEME%20Y%C3%96NERMEL%C4%B0%C4%9E%C4%B0.doc> (03.12.2018.)
- The Grand National Assembly of Turkey website (The Constitution of the Turkish Republic of 1982): https://global.tbmm.gov.tr/docs/constitution_en.pdf (29.01.2019.)
- The Panama Canal Authority website: Maritime Regulations: Regulation for Navigation in Canal Waters. Agreement No. 13. June 3, 1999. <https://www.pancanal.com/eng/legal/reglamentos/acuerdo13-eng.pdf> (30.01.2019.)
- The Panama Canal Authority website: The Panama Canal Authority (ACP) Overview. <https://www.pancanal.com/eng/acp/acp-overview.html> (30.01.2019.)
- The Suez Canal Authority website: Canal History. <https://www.suezcanal.gov.eg/English/About/SuezCanal/Pages/CanalHistory.aspx> (22.11.2018.)

- The Suez Canal Authority website: Rules of Navigation. <https://www.suezcanal.gov.eg/English/Navigation/Pages/RulesOfNavigation.aspx> (30.01.2019.)
- The Suez Canal Authority website: Suez Canal Authority (SCA) Overview. <https://www.suezcanal.gov.eg/English/About/SuezCanalAuthority/Pages/SCAOverview.aspx> (30.01.2019.)
- The Suez Canal Authority website: The Constantinople Convention of the Suez Canal, 1888. <https://www.suezcanal.gov.eg/English/About/CanalTreatiesAndDecrees/Pages/ConstantinopleConvention.aspx> (30.01.2019.)
- The Suez Canal Authority website: Why Suez Canal? <https://www.suezcanal.gov.eg/English/About/Pages/WhySuezCanal.aspx> (22.11.2018.)
- The UN-Business Action Hub website: IMO Profile. <https://business.un.org/en/entities/13> (22.11.2018.)
- The United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833, 1834, 1835 UNTS 3 [the LOSC].
- Treaty concerning the permanent neutrality and operation of the Panama Canal (adopted 07 September 1977, entered into force in 01 October 1979) 1161 UNTS 177.
- Turkish Press Agency: Kanal İstanbul'un Güzergâhı Resmen Açıldı (The Route of Canal Istanbul is Officially Announced). January 15, 2018. <https://www.bik.gov.tr/kanal-istanbulun-guzergahi-aciklaniyor/> (30.01.2019.)
- TÜTÜNCÜ, Ayşe Nur: Montrö Sözleşmesi ve Kanal İstanbul (The Montreux Convention and Canal Istanbul). *Public and Private International Law Bulletin*, 37 (2017) 1, 113–123.
- UNESCO website: <https://whc.unesco.org/en/list/356/video> (26.11.2018.)
- ÜNLÜ, Nihan: *The Legal Regime of the Turkish Straits*. Martinus Nijhoff, The Hague, 2002.