Straits, International

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A. Background

1 For geographers and laymen a strait is a narrow, natural passage connecting two larger bodies of water. But the international law of straits applies only to more narrowly defined water spaces. The legal definition of straits regulated by international law is based on two elements: a geographical one—the nature of the bodies of water that they connect; and a functional one—their being used for international navigation, as explained below. International law on straits is a compromise between the interests of the international community, for which freedom of passage through these narrow waterways that link various parts of the high seas is of the utmost importance, and the desire of the coastal States to reserve to themselves a right of supervision and regulation of traffic in waters close to their shores.

2 Generally, no problem arises if the strait is wide enough to include a strip of high seas, or exclusive economic zone, for in that strip the rules on freedom of navigation on the high seas and exclusive economic zone apply (Navigation, Freedom of). But when the strait is so narrow that the territorial seas of the littoral States touch each other or overlap, or when the strip of high seas is not navigable so that ships have to sail through the territorial sea of the littoral States, then a special regime is needed.

3 Several of the most important straits, such as the Dardanelles and Bosporus, the strait of Magellan, and the Danish straits have been the subject of specific international agreements (see paras 18–26 below). In addition, general customary rules on passage through straits in time of peace developed in the last century (Customary International Law). These rules were further defined and applied by the International Court of Justice (ICJ) in the Corfu Channel Case (1949) between Great Britain and Albania: in 1947 several British warships sailed through the strait known as Corfu Channel within the territorial sea of Albania, without prior notification or authorization. Some of the ships struck mines and suffered losses. Great Britain sued Albania in the ICJ for damages, but Albania contested the right of the British warships to sail through its territorial sea within the strait. The ICJ recognized that the British warships had a right of non-suspendable innocent passage in the Corfu Channel, within Albania's territorial sea, because this strait links two parts of the high seas, and is actually used for international navigation, even though it is not indispensable to international navigation.

B. The Convention on the Territorial Sea and the Contiguous Zone of 1958

4 The customary law of straits as crystallized in the Corfu Channel Case, was codified in Art. 16 (4) Convention on the Territorial Sea and the Contiguous Zone, 1958 ('Convention on the Territorial Sea and the Contiguous Zone') (Law of the Sea, History of) which states:

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.

This text deals with two separate questions: first, what kinds of waterways qualify as international straits to which the straits regime applies, and second, what is this regime? As to the water bodies linked by the straits, there are two groups: the first one—linking high seas to high seas—is based on the Corfu Channel Case and is considered as part of customary law by all experts. Some authors, however, claim that the second group—linking high seas to the territorial sea of a foreign State—is an innovation of the Convention on the Territorial Sea and the Contiguous Zone and is not based on custom. The opinion that this alternative geographical element in the definition is also of customary validity is supported by the fact that these straits in fact lead to bays bordered by several States—a category of straits in which the
right of passage has long been recognized by customary law (eg Gidel *Le droit international public de la mer* [Recueil Sirey Paris 1934] vol 3 *Le temps de paix* 603).

5 As to the functional element in the definition—being used for international navigation—it is based on the *Corfu Channel Case*, but it is not easy to apply. It is difficult to establish a criterion for the frequency of use required in order that the passage may be considered as ‘used for international navigation’ (*Corfu Channel Case* at 28). Moreover, it is not easy to get precise and reliable information on the movement of ships through straits.

6 Turning now to the regime that applies to straits, by reading Art. 16 (4) Convention on the Territorial Sea and the Contiguous Zone together with the judgment in the *Corfu Channel Case*, one finds that the regime of straits within the territorial sea of a foreign State differs from the regime of the regular territorial sea in three respects: a) while a coastal State may temporarily suspend innocent passage in the regular territorial sea for security reasons and without discrimination amongst foreign ships, innocent passage in the strait may not be suspended; b) while opinions differ on whether innocent passage in the regular territorial sea applies only to merchant ships or also to warships, it is a well established rule that in straits it applies also to warships; c) while with regard to the regular territorial sea opinions differ on whether the criterion of the ‘innocence’ of the passage is only objective—ie the behaviour of the ship in passage—or perhaps also subjective considerations of the coastal State may lawfully be relevant, with regard to passage in a strait only the objective test is valid (the case of the British warships in the *Corfu Channel*).


7 In the 1960s and 1970s a considerable number of coastal States increased their claims for a territorial sea of up to 12 miles. As a result, many straits, which formerly had a strip of high seas in their centre, were now completely engulfed in the territorial sea of the coastal States. These developments prompted the maritime powers to request that the regime of straits be liberalized. The maritime powers requested that the regime of freedom of navigation, which characterizes the high seas, should also be applicable to straits. The coastal States were opposed to such a drastic change. The compromise ultimately reached was the establishment of a regime of an increased right of passage short of freedom of navigation, which would apply to certain categories of straits only. Other categories would be subject to a regime less favourable to the passage of foreign ships.

8 The rise in the importance of straits is also reflected in the scope of space consecrated to the subject in the 1982 United Nations Convention on the *Law of the Sea* (‘UN Convention on the Law of the Sea’). While in the Convention on the Territorial Sea and the Contiguous Zone only one paragraph dealt with straits, in the UN Convention on the Law of the Sea a whole part—Part III—is devoted to the subject. First, the two main regimes included in the text of the UN Convention on the Law of the Sea will be examined, then a determination will be made regarding to which categories of straits they respectively apply.

9 The UN Convention on the Law of the Sea has established a regime of transit passage which may not be impeded (Arts 38–44):

Transit passage means 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. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State. (Art. 38 (2) UN Convention on the Law of the Sea.)

10 Ships and aircraft in transit must refrain from any threat or use of force (see also → *Use of Force, Prohibition of; → Use of Force, Prohibition of Threat*). Ships have to comply with generally accepted international standards for safety at sea (→ *Maritime Safety Regulations*), including the regulations for preventing → collisions at sea and against pollution (→ *Marine Pollution from Ships, Prevention of and Responses to*)—irrespective of whether the flag State (→ *Flag of Ships*) is a party to the relevant texts. They must comply with → sea lanes and traffic separation schemes. They may not be involved in → marine scientific research without permission from the coastal State. The coastal State may legislate on matters of safety of navigation, control of pollution, prevention of illegal fishing, matters concerning loading and unloading. The ship in transit has to comply with those laws, but it is not clear whether and how the coastal State may enforce them, since ‘States bordering straits shall not hamper transit passage … There shall be no suspension of transit passage’ (Art. 44 UN Convention on the Law of the Sea).
Aircraft in transit passage have to observe the rules of the air established by the → International Civil Aviation Organization (ICAO) as they apply to civil aircraft; → State aircraft will normally comply with safety measures. All aircraft have to monitor the relevant radio frequency.

12 The second regime endorsed by the UN Convention on the Law of the Sea is non-suspendable innocent passage as laid down in Art. 45 UN Convention on the Law of the Sea—the regime codified by the Convention on the Territorial Sea and the Contiguous Zone described above.

13 What are the main differences between these two regimes? First, transit passage applies also to → overflight, while non-suspendable innocent passage does not. Second, under non-suspendable innocent passage, submarines have to pass above water and show their flag, while in transit passage a submarine may navigate under water (→ Nuclear Powered Submarines). Third, the authority of the coastal State to regulate the passage is much more limited in the case of transit passage.

14 Turning now to the question of to which categories of straits each of these two regimes respectively applies: according to Art. 38 (2) UN Convention on the Law of the Sea, ‘transit passage’ applies to straits linking two parts of the high seas or exclusive economic zones—eg the strait of Hormuz, and → Gibraltar (see also → Gibraltar, Strait of)—and according to Art. 54 UN Convention on the Law of the Sea to ‘archipelagic sea lanes passage’ among certain → islands of archipelagic States (see also → Archipelagic Waters). Non-suspendable innocent passage, on the other hand, applies to straits between a State and its own island if there exists a convenient passage on the other side of the island (Art. 45 (1) (a) UN Convention on the Law of the Sea)—eg the Strait of Messina—and to straits linking the high seas or exclusive economic zone to the territorial sea of a foreign State (Art. 45 (1) (b) UN Convention on the Law of the Sea)—eg the Strait of Tiran.

15 It was mentioned above that there are some doubts as to whether and how the coastal State can enforce implementation of its regulations in the case of transit passage. However, with regard to cases of severe pollution threat, the coastal State has expressly been authorized to act: ‘[I]f a foreign ship … has committed a violation … causing or threatening major damage to the environment … the States bordering the strait may take appropriate enforcement measures …’ (Art. 233 UN Convention on the Law of the Sea). This provision was probably included because States bordering straits—such as the strait of Malacca and Singapore (→ Malacca, Straits of), fear the dreadful consequences of pollution accidents which have become more severe with the modern development of shipping. This consideration may also explain the ratio behind Art. 234 UN Convention on the Law of the Sea authorizing the coastal State to prevent pollution in ice-covered areas within the exclusive economic zone—including straits.

16 A considerable number of States, including the United States of America and Great Britain, as well as experts, are of the opinion that the regime of transit passage is already part of customary law (eg Mahmoudi 157; Wolfrum 53; Treves (1990) 223 Rdc 9–302, 133). Some authors have, however, expressed some doubts, mainly because the UN Convention on the Law of the Sea was a package-deal and therefore it should not be possible to pick parts of it and accept them as customary law (eg Caminos (1987) 205 Rdc 4–245, 178–231; Churchill and Lowe 110–13). One can, however, assume that the quid pro quo of transit passage was the extension of the territorial sea to 12 miles and this ‘package’ is preserved since the extension of the territorial sea is also considered to be part of customary law ( R Bernhardt ‘Custom and Treaty in the Law of the Sea’ (1987) 205 Rdc 247–394, 289–90).

17 The regime of transit passage was discussed in the memorials submitted to the ICJ concerning the dispute between Finland and Denmark with regard to the construction of a bridge over the Great Belt (→ Passage through the Great Belt Case [Finland v Denmark]), but the ICJ did not render a judgment since the parties reached a compromise (see paras 23–25 below).

D. Lex specialis for Certain Straits

18 As mentioned above, certain important straits have been the subject of specific conventions concluded in the past. Some of them have been the subject of separate entries: Dardanelles and Bosporus, → Dover, Strait of, Gibraltar, Strait of, Malacca, Straits of, → Torres Strait.

19 Two additional straits are to be mentioned: the Strait of Magellan is situated in South America; it separates the Tierra del Fuego from the rest of South America. It links the Atlantic and Pacific Oceans, and hence its importance for traffic between the two oceans in case the → Panama Canal is closed. It is bordered mainly by Chile and to a small extent by
Argentina. In the Boundary Treaty between Argentina and Chile, (‘Boundary Treaty’), signed in 1881 in Buenos Aires the two littoral States agreed in Art. V Boundary Treaty as follows:

Magellan’s Straits are neutralized for ever and free navigation is guaranteed to the flags of all nations. To insure this liberty and neutrality no fortifications or military defences shall be erected that could interfere with this object. (English translation, 159 CTS 51.)

20 Although this is a bilateral convention, it creates rights of passage for all nations, like a number of other treaties dealing with waterways (see also → Treaties, Third-Party Effect).

21 The regime established by the Boundary Treaty was reconfirmed by the 1984 Treaty of Peace and Friendship concluded in the wake of the papal → mediation that followed the → Beagle Channel dispute:

The delimitation agreed upon herein, in no way affects the provisions of the Boundary Treaty of 1881, according to which the Straits of Magellan are perpetually neutralized and freedom of navigation is assured to ships of all flags under the terms of Article 5 of said Treaty.

The Argentine Republic assumes the obligation to maintain at all times and under any circumstances, the right of ships of all flags to navigate expeditiously and without obstacles through its jurisdictional waters towards and away from the Straits of Magellan. (Art. 10 Treaty of Peace and Friendship (1985) 24 ILM 11, 13.)

22 This regime seems to be similar to transit passage, but overflight is not mentioned, probably because in 1881 this was not yet an issue. Although in 1984 the question was already relevant, it was not dealt with.

23 Another important set of straits is the Danish Straits—a group of three straits connecting the → North Sea to the → Baltic Sea: the Sound (Oresund), the Little Belt and the Great Belt (Storebaelt) (→ Belts and Sund). The Treaty for the Redemption of the Sound Dues between Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and Denmark (‘1857 Treaty for the Redemption of the Sound Dues’) signed in Copenhagen by Denmark and a group of user States, dealt mainly with the payment of a lump sum to Denmark in exchange for the elimination of the dues that had to be paid to Denmark until 1857 by ships wishing to pass through the straits. The details of the payment of the lump sum by each State were settled in separate bilateral agreements. The general treaty also includes a provision that concerns the right of passage:

Aucun navire quelconque ne pourra désormais, sous quelque prétexte que ce soit, être assujetti au passage du Sund ou des Belts à une détention ou entrave quelconque (Henceforth, no vessel shall, under any circumstances, be subjected to detention or any other impediment when passing through the Sound or the Belts; Art. 1(1) 1857 Treaty for the Redemption of the Sound Dues [(1856–7) 116 CTS 357, 360]; translation by the editor).

24 This provision was relied upon in a dispute which opposed Finland and Denmark in 1991–92, related to Denmark's project to build a bridge above the Great Belt. Since 1935 there exists a bridge over the Little Belt. In the 1990s, a bridge plus tunnel were built over the Sound. This project did not raise objections since part of the road is a tunnel and therefore does not hamper navigation. But when Denmark decided to build a bridge across the Great Belt—the only one among the three straits that is deep enough for big modern ships—Finland objected. It claimed that the bridge's height of 65 metres was not high enough to permit the passage of oil rigs, drill ships and foreseeable future ships. In May 1991, Finland applied to the ICJ and started proceedings against Denmark. The parties submitted their written memorials, but a few days before the beginning of the oral hearings, the parties reached a compromise and the case was withdrawn. Finland had based its claims on the Treaty for the Redemption of the Sound Dues, on Art. 16 (4) Convention on the Territorial Sea and the Contiguous Zone, and on Part III UN Convention on the Law of the Sea, which at that time was
not yet in force. Denmark claimed that none of these texts prohibits the building of a bridge above a strait, high enough for the passage of all existing conventional ships. There was no dispute between the parties as to the status of the Great Belt as a strait used for international navigation. The parties differed on the question of whether particularly high ships or cargoes—e.g., oil rigs, drill ships and ships that may be built in the future—also enjoy a right of passage that has to be respected. Another question concerned the effect of Finland's delay in protesting to the Danish plan—a matter of acquiescence. (On the arguments of the parties, see Wolfrum 38; Koskenniemi 905.)

25 The compromise reached by the parties involved the payment of 90 million kroners by Denmark to Finland. The parties disagreed on the legal nature of this payment: according to Finland it was compensation for the violation of Finnish rights, but Denmark was opposed to this characterization.

26 The special regimes established in the past with regard to certain straits have been preserved by the UN Convention on the Law of the Sea:

Nothing in this Part affects: ... the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. (Art. 35 (c) UN Convention on the Law of the Sea.)

This provision raises certain questions. First, what is meant by 'long standing'? Second, among all these special regimes, only the one established for the Dardanelles and Bosporus is detailed. The provisions relating to other straits are cursory. Should these rules be supplemented by the provisions of the UN Convention on the Law of the Sea? The answer to this question should be in the affirmative.

27 Another category of lex specialis concerns those straits for which a special regime has been established by a convention which is not considered to be 'long-standing', whatever that may mean, e.g., the regime of the Strait of Tiran established by the 1979 Egypt—Israel Treaty of Peace and by the 1994 Israel—Jordan Treaty of Peace. These two treaties have established a regime which is more liberal than that not changed by the UN Convention on the Law of the Sea for straits of that configuration: 'unimpeded and non-suspendable freedom of navigation and overflight' (Art. V (2) Egypt—Israel Treaty of Peace, Art. 14 (3) Israel—Jordan Treaty of Peace). Under what conditions would such an agreement subsist according to the UN Convention on the Law of the Sea?

28 The answer to this question is given in Art. 311 UN Convention on the Law of the Sea. In order to be valid under the UN Convention on the Law of the Sea, these special agreements have to be in conformity with the object and purpose of the general convention, and not affect the rights of States that are not parties to the special agreement. The objects of the UN Convention on the Law of the Sea have been stated in the preamble:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

The provision relevant for straits is, in particular, the wish to enhance communication. Thus, a special agreement concerning straits will continue to be valid if it enhances communication. A certain distinction is made between agreements concluded prior to the adoption of the UN Convention on the Law of the Sea (Art. 311 (2) UN Convention on the Law of the Sea) and later ones (ibid Art. 311 (3)).

E. Conclusion

29 The regime of straits has undergone changes in the course of history. While in the remote past a major problem was the obligation to pay dues to the littoral States, later the extent of the right of passage became very relevant. More recently, the danger of pollution from oil and nuclear vessels (→ Nuclear Powered Ships) had to be dealt with. The last century has witnessed a trend to liberalize the right of passage in times of peace, and it may be assumed that this trend will continue.

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