

## Chapter IV International Straits

by  
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**A**n international strait, as noted in paragraph 2.3.3 of *The Commander's Handbook on the Law of Naval Operations* (NWP 9)<sup>1</sup> is a strait used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The definition comes from articles 37 and 38 of the 1982 United Nations Convention on the Law of the Sea,<sup>2</sup> and includes both straits which at some point are overlapped by the territorial seas of the bordering State or States,<sup>3</sup> and those straits through which there is a continuous corridor of high seas or an exclusive economic zone (EEZ).<sup>4</sup> A strait is a natural waterway, "a contraction of the sea between two territories, being of limited width."<sup>5</sup> There are in the world over two hundred waterways which would appear to satisfy the requirements of being an "international strait."<sup>6</sup>

### 1. The Transit Passage Regime

According to the LOS Convention, a regime of transit passage prevails with regard both to ships and aircraft through an international strait that is overlapped at least at its narrowest part by bordering territorial seas.<sup>7</sup> Transit passage, "which shall not be impeded,"<sup>8</sup> means "the exercise . . . of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait."<sup>9</sup> There are a few carefully-phrased exceptions in the Convention to the transit passage provisions, as noted below. Passage of ships and aircraft is to take place in their "normal modes" of transit,<sup>10</sup> a term which the United States interprets as meaning that submarines may transit submerged, providing that depths in the strait are sufficient to permit such operations. This interpretation, which is reflected in paragraph 2.3.3.1 of NWP 9, is consistent with the U.S. negotiating position throughout the Third United Nations Conference on the Law of the Sea (UNCLOS III).<sup>11</sup>

**Warships and Military Aircraft in Transit Passage.** Ships and aircraft, while exercising the right of passage, "must proceed without delay through or over the strait."<sup>12</sup> The concept of transit passage, however, does not preclude passage through the strait "for the purpose of entering, leaving or

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returning from a State bordering the strait, subject to the conditions of entry to that State.”<sup>13</sup>

While in transit passage, ships and aircraft must avoid “any threat or use of force against the sovereignty, territorial integrity or political independence of the State bordering the strait,”<sup>14</sup> and “refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress.”<sup>15</sup> It is United States policy that warships, operating in their normal mode through international straits overlapped by territorial seas, may undergo formation steaming, and launch and recover aircraft.<sup>16</sup> To the extent that such activities are incidental to normal navigational practices and do not otherwise constitute a threat directed against the bordering states, this interpretation appears consistent with the transit passage regime.

Vessels in transit must comply with “generally accepted international regulations, procedures and practices” for (1) safety at sea, and (2) the prevention, reduction and control of pollution from ships.<sup>17</sup> What these provisions intend is that transit-passage vessels should comply with the international conventions adopted by the International Maritime Organization (IMO) over the past several decades, and which now are in force.<sup>18</sup> Although this restriction is set forth generally in paragraph 2.1.2 of NWP 9 it would be helpful to operational commanders (to whom the *Handbook* is directed) if it were explicitly included in paragraph 2.3.3.1, the paragraph dealing with transit passage.

With regard to safety at sea, there are two basic IMO conventions. One is the 1972 Convention on International Regulations for Preventing Collisions at Sea.<sup>19</sup> The Convention regulates the behavior of ships at sea in respect to other vessels in order to prevent collisions, and it deals with such matters as lights, sound signals and conduct under conditions of restricted visibility. There are also provisions for the establishment of ships’ routing systems. Under IMO’s direction there is now an established world-wide network of traffic separation schemes, deep water routes, and areas to be avoided.

A second convention is the 1974 Safety of Life at Sea Convention (SOLAS).<sup>20</sup> It is concerned with vessel construction issues, equipment, safety of navigation, and the carriage of dangerous goods.

The principal IMO convention relating to vessel-source pollution is the 1973 Convention for the Prevention of Pollution from Ships (MARPOL), as amended in 1978.<sup>21</sup> A State bordering a strait may adopt rules and regulations concerning vessel-source pollution, giving effect to the provisions of MARPOL. It should be noted, however, that warships, naval auxiliaries, and other vessels owned and operated by a State and used at the time being only on government non-commercial service, enjoy sovereign immunity and are exempt from the provisions of the LOS Convention regarding the protection and preservation of the marine environment.<sup>22</sup> But if a ship, entitled to

sovereign immunity, acts in a manner which is contrary to the bordering State's laws and regulations, the flag State of the ship "shall bear international responsibility for any loss or damage which results to States bordering straits."<sup>23</sup>

During transit passage, foreign warships may not carry out research or survey activities without the prior authorization of the State bordering the strait.<sup>24</sup> They must also respect designated sea lanes and traffic separation schemes, if these were established in conformity with generally accepted international regulations.<sup>25</sup> The latter of these restrictions is in paragraph 2.3.3.1 of NWP 9, but curiously the former is not.

Military aircraft in transit passage shall normally comply with the Rules of the Air established by the International Civil Aviation Organization (ICAO), "and will at all times operate with due regard for the safety of navigation."<sup>26</sup> They also shall "at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency."<sup>27</sup>

NWP 9 articulates the view that the transit passage regime of the 1982 Convention remains viable in time of conflict. This approach to the Law of Neutrality posits that neutral nations cannot suspend, hamper or otherwise impede the right of transit passage of surface ships, submarines and aircraft of belligerent States through international straits. Under this view, belligerent forces in transit must proceed without delay, and must refrain from the threat or use of force against the neutral nation, or from acts of hostility or other activities not incident to their transit. The forces may not use international straits as a place of sanctuary or a base of operations, and warships may not exercise the belligerent right of visit and search in such waters. When in transit, however, belligerent forces may take such defensive measures as are consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.<sup>28</sup> This application of the transit passage regime to the traditional law of neutrality seeks to preserve the balance between the rights of neutral States to preserve the inviolability of their territorial seas and the rights of belligerents to conduct armed conflict at sea. To what extent this approach will be embraced by other States remains to be seen,<sup>29</sup> although recent practice in the Straits of Hormuz would seem to indicate acceptance of this position.

With respect to belligerent military aircraft, NWP 9 provides that the airspace above international straits remains open at all times to transit passage. Such passage must be continuous and expeditious, and must be undertaken in the normal mode of flight for the respective type of aircraft. The aircraft must refrain from any acts of hostility, but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.<sup>30</sup> Again, state practice in the Straits of Hormuz during the Iran-Iraq conflict seems to support this interpretation.

**Rights and Duties of the Bordering State.** The State bordering an international strait may, as noted earlier, “designate sea lanes and prescribe traffic separation schemes . . . where necessary to promote the safe passage of ships.”<sup>31</sup> These sea lanes and traffic separation schemes must conform to standards set by IMO. Moreover, the bordering State may, when circumstances require, substitute other sea lanes or traffic separation schemes for those previously designated, although prior to the actual substitution, the bordering State must refer proposals to IMO with a view to the proposal’s adoption.<sup>32</sup> States bordering straits “shall clearly indicate all sea lanes and traffic separation schemes . . . on charts to which due publicity shall be given.”<sup>33</sup>

A State bordering an international strait may adopt laws and regulations relating to “the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations” of the bordering State.<sup>34</sup> Any bordering State’s laws or regulations relating to sea lanes and traffic separation schemes, or to the loading or unloading of any commodity, currency, or person “shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage.”<sup>35</sup>

According to the LOS Convention, there are two additional duties of a state bordering a strait. One is that it “give appropriate publicity to any danger to navigation or overflight within or over the strait of which [it has] knowledge.”<sup>36</sup> The second is that it should by agreement with user States cooperate in the establishment and maintenance of “necessary navigational and safety aids or other improvements in aid of international navigation.”<sup>37</sup> NWP 9 would benefit from inclusion of these duties in its treatment of international straits.

Summarizing the rights and duties of warships and military aircraft passing through straits used for international navigation between two parts of the high seas or exclusive economic zones, it is clear from the LOS Convention that such vessels or aircraft enjoy unimpeded transit passage in their normal modes of continuous and expeditious transit. The vessels must respect IMO-sanctioned sea lanes and traffic separation schemes and the aircraft shall normally comply with ICAO safety measures and monitor assigned radio frequencies. Warships must not carry out marine scientific research while in transit without authorization of the bordering State, and cannot load or unload commodities, currencies or persons in contravention of the laws and regulations of the bordering State. While the Convention’s provisions regarding the protection and preservation of the marine environment do not apply to vessels having sovereign immunity, if the warship, in violating the bordering State’s laws and regulations, causes loss or damage, the flag State

(e.g., the United States) bears international responsibility for such loss or damage.

What can the crew of a warship expect from the bordering State? That its sea lanes and traffic separation schemes conform to IMO standards. That any laws and regulations applying to warships do not negatively impact on the right of transit passage. That the State give publicity to any danger to navigation or overflight of which it has knowledge. That it establishes and maintains in the strait necessary navigation and safety aids. That under no condition does it suspend the right of transit passage to warships or military aircraft of States at peace with the bordering State, but involved in conflict with another State. NWP 9 accurately reflects these important principles.<sup>38</sup>

**Archipelagic Sea Lanes Passage.** Independent island countries possessing certain geographical characteristics may delimit straight baselines encompassing the archipelago, joining together the outermost islands and drying reefs.<sup>39</sup> Single baselines must not exceed 100 nautical miles in length,<sup>40</sup> nor may they depart to any appreciable extent from the general configuration of the archipelago.

Seaward of the baselines the archipelagic State may measure its territorial sea and exclusive economic zone. Within the baselines, the waters are termed "archipelagic waters," and have virtually the same status as territorial waters.<sup>41</sup> NWP 9 notes that the United States recognizes the right of qualifying States to establish archipelagic baselines and waters.<sup>42</sup> Traversing the archipelagic State are archipelagic sea lanes and air routes; these corridors join international straits located on the periphery of the enclosed State. The sea lanes and air routes include "all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters."<sup>43</sup> Through such sea lanes and air routes, warships and military aircraft enjoy "the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit."<sup>44</sup>

The sea lanes and air routes are defined by a series of continuous axis lines from the entry to the exit points of the archipelago, and ships and aircraft in archipelagic sea lanes passage must not deviate more than 25 miles to either side of such axis lines during passage. In cases where the width of the waterway is less than 50 miles, transiting ships and aircraft must not navigate closer to the coast than 10 per cent of the distance between the nearest points on islands bordering the sea lane.<sup>45</sup> The depiction of an archipelagic sealane provided in Figure 2-1 of NWP 9 provides a visual illustration of this latter concept.

As in the case of international straits, the bordering or archipelagic State may designate sea lanes and traffic separation schemes within the archipelagic sea lanes, conforming to IMO standards. When circumstances require, the State may substitute other sea lanes and traffic separation schemes, after first submitting proposals to IMO. Warships must respect sea lanes and traffic

separation schemes established in accordance with IMO procedures. Other rights and duties of warships and military aircraft in international straits apply *mutatis mutandis* to archipelagic sea lanes passage.<sup>46</sup>

NWP 9 states the position that belligerent ships or aircraft, including submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under archipelagic sea lanes. Such forces may engage in those activities that are incident to their normal mode of continuous and expeditious passage, are consistent with their security, and, in the case of aircraft, are consistent with the security of accompanying surface and subsurface forces.<sup>47</sup> Again, as with international straits, it is not clear whether other States will agree with superimposing the newly emerged principles of archipelagic waters on the traditional law of neutrality.<sup>48</sup>

Although a number of island nations have declared themselves to be “archipelagic States” and have delimited straight baselines about their territory,<sup>49</sup> none have formally designated archipelagic sea lanes and air routes. In these cases, the right of archipelagic sea lanes passage may be exercised through the inter-island routes normally used for international navigation.<sup>50</sup>

## 2. The History of the Transit Passage Regime

The concept of transit passage through international straits, and of the analogous regime through archipelagic sea lanes, is a relatively recent phenomenon. Even in the years immediately following World War II, there were no universal principles concerning straits passage, and no consideration of archipelagic sea lanes even existed.

**Pre-UNCLOS I.** Prior to 1949 the regime of passage through international straits overlapped by territorial seas was generally regarded as one of innocent passage, which “requires no supporting argument or citation.”<sup>51</sup> Whether innocent passage referred to both warships and merchant vessels was not firmly established.<sup>52</sup> Where the minimum breadth of the strait was greater than the combined territorial sea breadths, a belt of high seas existed through the water way; within such a belt the high seas freedoms of navigation and overflight prevailed. The United States watched with considerable anxiety the gradual extension of territorial sea claims to breadths of up to twelve miles,<sup>53</sup> for this in effect closed off to air and subsurface navigation a considerable number of important straits, among them Gibraltar, Hormuz, and Malacca.

The first international action to regulate the regime of passage through international straits came in the 1949 *Corfu Channel Case*, between the United Kingdom and Albania, which was decided by the International Court of Justice.<sup>54</sup> Two British destroyers were damaged by Albanian mines while

passing through the Corfu Channel between the Greek island of Corfu and the Albanian mainland, with the resultant killing of 44 British seamen. Albania argued before the Court first, that the Corfu Channel was not an international strait, and second, that the British warships had no right of transit through the waterway without prior authorization by Albania.

The Court held that Corfu Channel was indeed an international strait, not because of the volume of traffic moving through the waterway, nor of the importance of the strait to world commerce, but because of "its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."<sup>55</sup> In other words, "it is sufficient that a strait be a 'useful route for international maritime traffic for it to be considered an international strait.'"<sup>56</sup>

With regard to the right of British warships to transit the Corfu Channel, the Court held that in time of peace a State has the right to send its warships through such straits without prior authorization by the coastal State, provided such passage is innocent.

Seven months later, the International Law Commission, established within the framework of the United Nations, began work on a codification of the regime of the high seas and the territorial sea. One result was a draft article on straits, which read "There must be no suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two parts of the high seas."<sup>57</sup> The word "normally" had been included at the suggestion of the Soviet member and over the objections of the United States member.

**The 1958 Territorial Sea Convention.** The International Law Commission's draft was used as a basis for negotiations at the 1958 Law of the Sea Conference (UNCLOS I), and article 16(4) of the subsequent Convention on the Territorial Sea and the Contiguous Zone reads "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."<sup>58</sup>

Three points are noteworthy in this article. First, innocent passage is non-suspendable, although it remains up to the coastal State to determine when passage by foreign vessels is non-innocent. Second, the word "normally" is omitted, adding to the confusion of the meaning of the phrase "used for international navigation." Third, there is inclusion of the term "the territorial sea of a foreign State," an obvious reference to the Strait of Tiran, bordered by Egypt and Saudi Arabia, which leads to the Gulf of Aqaba, at whose northern end are small areas of the territorial waters of Israel and Jordan. In 1958 the status of passage through the Gulf of Aqaba was a burning issue between Israel and Egypt.<sup>59</sup>

The Convention on the Territorial Sea and the Contiguous Zone came into force in 1964, but already there were evident deficiencies in the straits articles.

How subjective was a State's decision to declare certain types of passage as "non-innocent" and therefore disallowed? Were nuclear submarines, armed with ballistic missiles, expected to travel on the surface through international straits and show their flag—as is required for innocent passage through territorial waters? Could the overflight of territorial seas within straits be undertaken without the consent of the coastal State? And what did Article 23 of the Convention mean when it stated "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea" it may be required to leave the area? Did this apply to the territorial waters of international straits?

Another problem soon arose with respect to archipelagic States. Indonesia, in 1957, purported to close off its inter-island waters by a series of straight baselines, declaring the waters within the baselines to be internal. The United States and other maritime powers refused to recognize this closure, but in the early days of the Third Law of the Sea Conference (UNCLOS III) starting in 1973, efforts were made to achieve some form of compromise with States composed solely of one or more archipelagos.<sup>60</sup>

**UNCLOS III.** The United States, the Soviet Union, and other major maritime States were determined, at UNCLOS III, to improve on the non-suspendable innocent passage regime for international straits, but their efforts were opposed by a number of States, among them Spain and Morocco (bordering the Strait of Gibraltar), Southern Yemen (Bab el Mandeb), Iran and Oman (the Strait of Hormuz) and Malaysia and Indonesia (Malacca-Singapore Straits). The United Kingdom advanced, and both the U.S. and the Soviets supported, the concept of transit passage, and articles 37 through 44 of the 1982 Convention spell out the details of this regime. Also article 53 defines the regime of passage in archipelagic sea lanes. These provisions are supplemented by other Articles of the Convention relating specifically to the rights of Government-owned vessels and aircraft (except those used for commercial purposes) through international straits.<sup>61</sup>

The LOS Convention was adopted at Montego Bay, Jamaica, in December 1982 by a vote of 130 in favor, 4 against (including the United States), and 17 abstentions. The basic cause of the U.S. non-support was Part XI of the Convention, dealing with the international seabed regime. Since the United States not only voted against the final text, but has subsequently refused to sign, and has indicated its intention not to ratify or accede to the Convention, the question could arise, are all of the navigational rights contained in the text, necessarily applicable to the United States? This issue might conceivably become more acute if and when the Convention ultimately enters into force.<sup>62</sup>

The United States' position is that the non-seabed portions of the Convention are declaratory of emerging customary international law, and are therefore binding on all States, whether or not they are parties to the Convention.<sup>63</sup> Scholars may, however, debate what the bases for emerging



customary international law really are, and why the United States, despite its views on the sanctity of the non-seabed articles, chooses to interpret article 64 on highly-migratory species (e.g., tuna) in a way which appears at variance with the text.<sup>64</sup>

### 3. Exceptions to the Transit Passage Regime

NWP 9 acknowledges, in a fleeting fashion,<sup>65</sup> that some straits are governed by the regime of non-suspendable innocent passage rather than transit passage. The text would be enhanced by a broader coverage of the exceptions.

**Innocent Passage Straits.** Innocent passage is defined in the LOS Convention as “passage which is not detrimental to the peace, good order, or security of the coastal State.”<sup>66</sup> The Convention lists a series of activities as non-conforming with innocent passage, among them any threat or use of force against the coastal State, collecting information to the prejudice of the coastal State’s defense or security, or the carrying out of research or survey activities.<sup>67</sup> Innocent passage is the regime for transiting the territorial sea. It also applies to navigation through straits which connect the high seas or an EEZ with the territorial sea or a bordering State, or straits excluded from the regime of transit passage by article 38(1).<sup>68</sup> In the case of such straits, the regime of innocent passage is non-suspendable by the bordering State.<sup>69</sup>

There are two potential situations in which innocent passage straits may exist. One is where the strait leads from the high seas/EEZ directly into a coastal State’s territorial waters without later re-emerging into the high seas or an EEZ. Such is the case, for example, with Canada’s Queen Charlotte Strait between the northern end of Vancouver Island and the mainland of British Columbia. Relatively few of the waterways of this type are officially named.<sup>70</sup>

A second situation is where the strait connects the high seas/EEZ with an historic bay—whose waters are by definition internal. Such a bay would be closed off by a straight baseline, seaward of which are territorial waters. There are no generally-accepted criteria for establishing claims to historic bays, and the United States, which itself has few historic claims,<sup>71</sup> tends to resist such claims by other States.<sup>72</sup> But there are some straits connecting with water bodies where the coastal State asserts strong historic claims.<sup>73</sup>

**Straits Not Overlapped by Territorial Seas.** According to the LOS Convention, transit passage does not apply to a strait “if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.”<sup>74</sup> Through such a route, or “corridor,” the high seas freedoms of navigation and overflight would automatically exist.

If all States claimed a twelve-mile territorial sea, then all straits with least widths of less than 24 miles would have no such corridor. But a number of

States, including Australia and Finland, have territorial seas of less than twelve miles. This will permit a high seas/EEZ corridor through such waterways as Bass Strait, separating Tasmania from the Australian mainland, and the Entrance to the Gulf of Finland.<sup>75</sup> Any international strait, greater in least width than 24 miles, would *ipso facto* have a high seas/EEZ corridor passing through it.

Three questions arise with respect to this provision. A first concerns the meaning of "similar convenience." The navigable channel, for example, might not coincide with the high seas/EEZ corridor. Associated with this is the issue of the minimum width the corridor must have in order to be a viable transit route. In The Bahamas, for example, a twelve-mile territorial sea would leave a corridor of only a quarter of a mile width through Providence Channel at its narrowest point. How could a foreign naval squadron utilize such a narrow space? In order to qualify as being of "similar convenience," the corridor should probably be two or three miles in width at its narrowest point.<sup>76</sup>

Finally, there is the question of the status of the territorial waters adjoining the high seas/EEZ corridor. Presumably the status is one of suspendable innocent passage, with no right of overflight by foreign aircraft, nor of passage submerged by foreign submarines.<sup>77</sup>

**The "Messina Exception."** There are certain specific exceptions provided for in the Convention to the transit passage regime, even for straits connecting two parts of the high seas or an EEZ with one another. One of these is the "Messina exception," which was intended primarily to cover the situation of Italy's Strait of Messina, between the mainland and the island of Sicily. This waterway, which has a minimum width of about two miles, was of concern to the Italian Government in the event that a potentially hostile fleet might seek transit passage rights through the strait. In response to Italy's fears, a provision was included in the Convention stating that a right of transit passage is excepted "if a strait is formed by an island of a State bordering the strait and the mainland" provided "there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."<sup>78</sup> Although the Convention does not so state, a right of non-suspendable innocent passage would exist through any strait as defined by article 38(1).

There are some uncertainties regarding the article. First, as noted earlier, what does the phrase "of similar convenience" mean? Should conditions of fog, ice, channel depth, or travel distance associated with the alternative route be no more adverse than with respect to the original waterway? In the case of distance, a ship utilizing the Strait of Messina on a voyage from Marseilles to Trieste would save approximately 60 miles from a route traveling around the island of Sicily.

Looking at straits other than Messina, article 38(1) might apply to the U.K.'s Pentland Firth between the Scottish mainland and the Orkney Islands, to Sweden's Kalmar Sund in the Baltic, and to Canada's Northumberland Strait in the Gulf of St. Lawrence. But there are definitional questions. For example, what constitutes the "mainland"? Can South Korea claim Cheju Strait as an article 38(1) exception when the mainland is actually a series of small islands and islets? In the western Aegean there is Keas Strait, close to Athens, which Greece might claim as an exception, although the "mainland" here is formed by the island of Mikronisos, about a mile off the true mainland coast.

No matter what the geographic situation might be, it would appear from a reading of article 38(1) that a strait, in order to be excepted, should at some point be closed off by overlapping territorial seas. Further, the alternative route must include through it a high seas or EEZ corridor. Given the propensity of States to alter their territorial sea claims, there exists considerable uncertainty as to which straits of the world would qualify as article 38(1) exceptions. United States policy is that the number of straits excepted under this article should be kept to an absolute minimum.

**Straits Regulated by International Conventions.** Another exception to the transit-passage regime is contained in article 35(c) which exempts straits in which passage "is regulated by long-standing conventions in force specifically relating to such straits." The obvious reference here is to the Turkish Straits,<sup>79</sup> which are regulated by the 1936 Montreux Convention.<sup>80</sup> This Convention guarantees freedom of transit through the Straits for merchant vessels of all nations at all times. But there is no corresponding right of free overflight of the Turkish Straits. The Convention also contains certain restrictions on the transit of warships of both non-Black Sea powers and Black Sea powers, one of them being that the maximum aggregate tonnage of warships of non-Black Sea powers within the Black Sea at any one time must not exceed 45,000 tons.

Another waterway to which this article might apply is the Danish Straits (Little Belt, Great Belt and Oresund), the subject of an 1857 Convention which lifted the dues requirements for ships transiting the Straits.<sup>81</sup> Since foreign warships at that time were not subject to such dues, some recent writers have argued that Denmark has no legal grounds for interfering with the passage of foreign warships through the Straits. But a 1976 Danish Ordinance requires advance notification for the passage of foreign warships through the Straits, demands that foreign submarines operate on the surface flying their flag, and notes that military aircraft can overfly Danish territorial waters (including those within the Straits) only if advance permission has been obtained.<sup>82</sup>

Two other straits that might conceivably be affected by the article are Gibraltar and Tiran. A 1904 Declaration between Great Britain and France regarding Egypt and Morocco guaranteed freedom of navigation through the Strait of Gibraltar, but made no mention of overflight rights.<sup>83</sup> The

Government of Spain has on occasion held that since Gibraltar is governed by the 1904 Declaration, freedom of overflight through the Strait does not exist. In 1973, at the outset of fighting between Israel and Egypt, U.S. military aircraft flying east from the Azores in order to supply Israeli forces, navigated through the approximately two-mile wide high-seas belt at the narrowest point in the Strait in order to avoid the three-mile territorial seas (then recognized by the United States) of Spain and Morocco. But in the 1986 air strikes on Libyan terrorist support infrastructure (after the United States had acknowledged other States' rights to a twelve-mile territorial sea) U.S. military aircraft operating from bases in Great Britain utilized the transit passage regime, as provided for in the LOS Convention, to justify overflying the Strait of Gibraltar.

In the case of the Strait of Tiran, the waterway, as noted earlier, connects the high seas/EEZ of the Red Sea with the territorial waters of the two bordering States, but also with the territorial seas of Israel and Jordan. Article 45(1)(b) of the LOS Convention provides for a regime of non-suspendable innocent passage through straits "between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State." Following the independence of Israel in 1948, Egypt sought to restrict the movement of Israeli shipping through the Strait on the grounds that it did not constitute "innocent passage" so far as Egypt was concerned. Twice Israeli forces occupied the Egyptian heights overlooking Tiran to ensure that the Strait would be open to Israeli shipping. The 1979 Treaty of Peace between Egypt and Israel provides "The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight."<sup>84</sup> Does this 1979 Treaty represent a "long-standing international convention," and what is its effect on Saudi Arabia, guarding the eastern shore of the Strait, since that country is not a party to the Egyptian-Israeli Peace Treaty?

**Internal Waters in a Strait.** The transit passage regime does not apply in any areas of internal waters within a strait, "except where the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which had not previously been considered as such."<sup>85</sup> The relatively few cases where internal waters exist within a strait are in connection with juridical<sup>86</sup> or historic bays, river mouths, harbor systems and roadsteads, and with straight baseline regimes. In the Corfu Channel, for example, a juridical bay exists along the western (Greek) shore and serves to narrow somewhat the width of the belt through which the transit passage regime applies. Other affected straits include the Oresund and the Strait of Hormuz. In the case of the Oresund, Copenhagen's roadstead extends about three miles into the main waterway, forcing the traffic lane eastward toward Sweden.

In the Strait of Hormuz, the Omani straight baseline system joins the mainland with the offshore islands out to the Great and Little Quoin, with the result that the traffic separation zone, landward of the Quoins, passes within the baseline. Although to date Oman has not sought to limit in any way passage along this sea lane, it might conceivably argue that the waters within the baseline had previously been considered as internal, and therefore were not subject to the transit passage regime.

**Straits Connecting With the Territorial Sea of a Foreign State.** A final exception to transit passage is a convention provision which calls for non-suspendable innocent passage in a strait “between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.”<sup>87</sup> Mention has already been made of the Strait of Tiran, for which this provision was intended. The only other straits to which this provision might apply are Head Harbour Passage, leading through Canadian waters off the Province of New Brunswick to Passamaquoddy Bay, shared by New Brunswick and the State of Maine; Guatemala’s Entrance to the Bay d’Amatique; and two shallow waterways in the Persian Gulf—the Bahrain-Qatar Passage leading to Saudi Arabian waters; and the Bahrain-Saudi Arabia Passage connecting with the waters of Qatar.

## 5. The Record of State Practice

NWP 9 does not address the record of State compliance with the transit passage regime. Given the stated purpose of that publication, this is probably unnecessary. It would be appropriate here, however, to examine what that record has been. The principal deviations from the Convention’s straits articles have occurred in the Arctic. In 1985, the Canadian Government delimited a series of straight baselines about its Arctic Archipelago in reaction to the transit through the Northwest Passage of the U.S. Coast Guard vessel, POLAR SEA.<sup>88</sup> The Government also announced that the waters within the baselines were henceforth to be considered internal waters, with no right of free navigation existing through them. The legal justifications for Canada’s actions have been variously described as environmental protection, the exercise of historic rights, the non-application of articles 37 and 38 to the Northwest Passage, or simply the delimitation of straight baselines in accordance with the provisions of the LOS Convention.<sup>89</sup> The United States protested Canada’s enclosure action, but three years later concluded an agreement with Canada which, on the one hand, provided for prior notification by the U.S. in the event of its sending ice breakers through the Northwest Passage, and on the other reserved the U.S. position with regard to the Canadian assertion that the Northwest passage did not qualify as an international strait.<sup>90</sup> The United States was particularly concerned that if

it acquiesced in the Canadians' action, other States might also close off bordering straits on environmental or other grounds.

The Soviet Union considers the waters of the Laptev, East Siberian, and Chuckchi Seas, north of Siberia, as having a "special status" of their own. In 1967, for example, the Soviets turned back two U.S. Coast Guard vessels, the EDISTO and the EASTWIND, which were traveling eastward from the Barents and Kara Seas, and attempting to pass through Vil'kitsky Strait into the Laptev Sea. The Soviets never explained the rationale for their action, but so far as is known, no foreign-flag vessels since then have travelled in the Soviets' northern waters to the east of Vil'kitsky Strait.<sup>91</sup>

Outside of the Arctic basin, the Soviets apparently consider the Sea of Okhotsk, off the eastern Siberian coast, as a "closed sea," not open to foreign warships. Most of the coastline of the Sea is Soviet territory, although Japan controls some 50 miles of the coast on the island of Hokkaido. The Soviet position affects the passage of foreign warships through the straits of the Kurile Islands, leading into Okhotsk. Elsewhere, China considers Hainan Strait, connecting the South China Sea with the Gulf of Tonkin, to be an "historic" strait, although nowhere in the LOS Convention is there provision for an international strait to be claimed as historic.

One situation which might in time prove troublesome is Greece's policy toward the regime of passage through the inter-island waters of the Aegean Sea. The islands are controlled by Greece, but the waterways lead to Turkey. Because the islands are a part of Greece—basically a mainland country—they cannot be closed off as an archipelagic State, and Greece has maintained, first, that not all the inter-island passages are international straits, and second, that Greece reserves the right to designate the waterways to which the transit passage regime applies.<sup>92</sup> The issue of passage through non-archipelagic island groups was never settled at UNCLOS III.

## 6. The Relative Importance of International Straits

There is no fixed method for determining which straits are more important than others. One possible index is the number of transiting ships per day. In this respect, the leading straits are: Dover, Malacca-Singapore, Kattegat (at the northern approach to the Danish Straits), Gibraltar, Hormuz, and the Turkish Straits. It is difficult to obtain reliable statistics on many other straits, since no generally-available method of counting numbers of transits through these waterways exists.

**Choke Points.** Straits constituting strategic choke points are of critical economic and military importance. The term "choke point" implies that in the case of a particular waterway there is an opportunity for a State to close off, or at least restrict, the flow of ocean-borne traffic which is critical to a nation or nations. Three issues would appear to be of importance with

respect to choke points. First, there is no readily available alternative waterway to use if passage through the choke point is denied or restricted. The Strait of Hormuz is an obvious choke point in this regard; a strait, such as Anegada Passage, connecting the Caribbean with the Atlantic, would not be a prime choke point because of the number of alternative waterways available.

Second, a choke point is relatively narrow, and thus capable of being blocked—by mines, sunken ships, shore batteries, etc. Third, the waterway is of importance to the commercial and/or military traffic of some State or States. With respect to this last point, a distinction might be made between “global” and “regional” choke points. Gibraltar is a global choke point, of concern to many of the world’s nations; the Turkish Straits are more regional in nature, of particular significance to the countries bordering the Black Sea.

Various listings of choke points are periodically compiled but with most analysts agreeing on the basic seven: the Danish Straits, Dover, Gibraltar, Bab el Mandeb, Hormuz, Malacca-Singapore, and Lombok (or Sunda) at the southern approaches to Indonesia. The Suez and Panama Canals are also choke points. Other frequent candidates are the Turkish Straits, Magellan, Bering Strait, Korea Strait, Osumi (Colnett) Strait—a major approach to the Sea of Japan and South Korea—Formosa Strait, and Windward and Mona Passages in the Caribbean. Some listings also include the Greenland-Iceland-UK gap, although this is hardly a narrow international waterway.

**Other Important Straits.** In addition to the straits noted above, some sixteen others would seem to be of concern to the U.S. and its allies. These are: Anegada Passage, Balabac Strait, the Straits of Florida, Kasos and Kithira Straits in the eastern Aegean, Luzon Strait, Makassar Strait, the Strait of Otranto, San Bernardino Strait, Soya-kaikyo (La Perouse Strait), Surigao Strait, Strait of Tiran, Torres Strait, Tsugaru-kaikyo, Unimak Pass, and Verde Island Passage. This is not meant to imply that other straits are not also significant, but perhaps these are the most strategic at this point in time.

For the United States, *all* straits are of potential importance, since no one can forecast where future military operations may be necessary.<sup>93</sup> Who, for example, in 1940, could have predicted that within two years the U.S. would be vitally concerned with the geography of Indispensable, Manning and Bougainville Straits in the Solomon Islands—or, a short time later, with Dampier, Vitiaz and Isumrud Straits off northeastern New Guinea?

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## Notes

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1. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987) (hereinafter NWP 9 or Handbook).

2. United Nations Conference on the Law of the Sea, 3d, *United Nations Convention on the Law of the Sea*, A/CONF. 62/122 (n.p.: 1982) (hereinafter LOS Convention).

3. In this Chapter, the term "bordering State" will be used in connection with the regime of straits, whether or not there are one, two, or three States actually bordering a particular strait.
4. Within an exclusive economic zone, the high seas freedoms of navigation and overflight prevail. LOS Convention, *supra* note 2, art. 58(1).
5. Erik Bruel, *International Straits: A Treatise on International Law* (1947), p. 19.
6. Lewis Alexander, *Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States* (Peace Dale, R.I.: Offshore Consultants, 1986), p. 99.
7. LOS Convention, *supra* note 2, art. 38(1).
8. *Id.*
9. *Id.*, art. 38(2).
10. *Id.*, art. 39(1)(c).
11. For an analysis of this position see Bruce A. Harlow, "Comments Concerning the 1982 Law of the Sea Convention," *Law and Contemporary Problems*, Spring 1983, v. 46, pp. 130-135.
12. LOS Convention, *supra* note 2, art. 39(1)(a).
13. *Id.*, art. 38(2).
14. *Id.*, art. 39(1)(b).
15. *Id.*, art. 39(1)(c).
16. NWP 9, *supra* note 1, par. 2.3.3.1.
17. LOS Convention, *supra* note 2, art. 39(2).
18. The International Maritime Organization, headquartered in London, is a specialized agency of the United Nations, and has, *inter alia*, the function of setting world-wide standards of pollution prevention, navigation efficiency, and marine safety.
19. International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, *United States Treaties and Other International Agreements*, v. 28, p. 3459, T.I.A.S. 8587.
20. Inter-Governmental Maritime Consultative Organization: International Convention for the Safety of Life at Sea, 1974, *International Legal Materials*, July 1975, v. 14, p. 959.
21. International Conference on Marine Pollution: International Convention for the Prevention of Pollution from Ships, 1973, *International Legal Materials*, Nov. 1983, v. 12, p. 1319.
22. LOS Convention, *supra* note 2, art. 236; NWP 9, *supra* note 1, par. 2.1.2.
23. LOS Convention, *supra* note 2, art. 42(5).
24. *Id.*, art. 40.
25. *Id.*, art. 41(3) and (7).
26. *Id.*, art. 39(3)(a).
27. *Id.*, art. 39(3)(b).
28. NWP 9, *supra* note 1, par. 7.3.5.
29. See Mark W. Janis, "Neutrality," *infra* Chapter VI; A.V. Lowe, "The Commander's Handbook on the Law of Naval Operations," *infra* chapter V.
30. NWP 9, *supra* note 1, par. 7.3.7.
31. LOS Convention, *supra* note 2, art. 41(1).
32. *Id.*, art. 41(4).
33. *Id.*, art. 41(6).
34. *Id.*, art. 42(1)(d).
35. *Id.*, art. 42(2).
36. *Id.*, art. 44.
37. *Id.*, art. 43(a).
38. NWP 9, *supra* note 1, par. 2.3.3.1.
39. An archipelagic State is one wholly constituted by islands, and to be entitled to draw straight baselines, the area of water to the area of land within the straight baselines must be between 1 to 1 and 9 to 1. LOS Convention, *supra* note 2, arts. 46 and 47.
40. *Id.*, art. 47(2). Up to 3 percent of the total number of baselines enclosing the archipelago may exceed 100 miles, up to a maximum length of 125 miles. *Id.*
41. The only difference between territorial and archipelagic waters is that in the latter, traditional fishing rights of adjacent neighboring States shall continue and be respected.
42. NWP 9, *supra* note 1, par. 1.4.3.
43. LOS Convention, *supra* note 2, art. 53(4).
44. *Id.*, art. 53(3).
45. *Id.*, art. 53(5).
46. *Id.*, art. 54.
47. NWP 9, *supra* note 1, par. 7.3.6.
48. See Janis, *supra* note 29.



49. Among these States are Antigua and Barbuda, Cape Verde, Comoros, Fiji, Indonesia, Kiribati, Maldives, Mauritius, Philippines, Sao Tome and Principe, Solomon Islands, Trinidad and Tobago, Tuvalu, Vanuatu.

50. LOS Convention, *supra* note 2, art. 53(12).

51. Philip Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York, N.Y.: G.A. Jennings, 1927), p. 120.

52. *Id.*

53. In 1945, 77 percent of the world's 60 coastal States had 3-mile territorial sea claims; by 1979, this figure had dropped to 18 percent of 131 States.

54. Hague, International Court of Justice, *Corfu Channel Case* ([The Hague]: The Court, 1949), v. 4.

55. *Id.*, p. 23.

56. R.R. Baxter, *The Law of International Waterways* (Cambridge, Mass. Harvard University Press, 1964), p. 9.

57. United Nations, General Assembly, International Law Commission, *Report*, 8th Session, A/3159 (New York: 1956), art. 17.

58. Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, *United States Treaties and Other International Agreements*, v. 15, p. 1606, T.I.A.S 5639, 516 *United Nations Treaty Series*, v. 516, p. 205, art. 16 (4).

59. *See, e.g.*, Baxter, *supra* note 56, pp. 160 and 209.

60. For a discussion of the LOS negotiations on archipelagic States, see Patricia Rodgers, *Midocean Archipelagos and International Law* (New York: Vantage Press, 1981).

61. *E.g.*, LOS Convention, *supra* note 2, art. 236.

62. The LOS Convention enters into force twelve months after the sixtieth ratification or accession. LOS Convention, *supra* note 2, art. 308(1). As of December 1989, 42 states had ratified the Convention. Council on Ocean Law, *Ocean Policy News*, Dec. 1989, p. 1.

63. *See, e.g.*, the remarks of Brian Hoyle, Director, Office of Oceans Law and Policy, U.S. Department of State, in Lawrence Juda, ed., *The United States Without the Law of the Sea Treaty: Opportunities and Costs* (Wakefield, R.I., Times Press, 1983), p. 65 and 70; Restatement (Third) of the Foreign Relations of the United States, Part V, Introduction, v.2, p. 5.

64. The United States, almost alone among coastal States, asserts that the coastal State has no jurisdiction over highly migratory species, but requires international agreement for effective management. See Proclamation No. 5030, 3 C.F.R. 22 (1983 Compilation), and accompanying press statement, *Weekly Comp. of Pres. Doc.*, v. 19, p. 384 (April 14, 1983).

65. NWP 9, *supra* note 1, par. 2.3.3.1.

66. LOS Convention, *supra* note 2, art. 19(1).

67. LOS Convention, *supra* note 2, art. 19(2). NWP 9 contains a listing of those activities that a warship may not undertake while in innocent passage. NWP 9, *supra* note 1, par. 2.3.2.1.

68. *Id.*, art. 45(1). Those excluded by article 38(1) are straits between the mainland and an island of the bordering State where a route of similar convenience exists seaward of the island. See discussion of "The Messina Exception," *infra*, in text following note 76.

69. *Id.*, art. 45(2).

70. There are no named straits, for example, given to the waterways connecting the Atlantic Ocean with Boston Harbor, Narragansett Bay, New York Bay, or the Chesapeake Bay.

71. In *United States v. Louisiana*, 470 U.S. 93, 105 S.Ct. 1074, 84 L.Ed.2d 73 (1985), the Supreme Court ruled that the Mississippi Sound was an historic bay, notwithstanding the formal renunciation by the United States in 1971 of its earlier assertion of historic bay status of those waters. All other bays claimed as historic by the United States would now qualify as juridical bays.

72. The United States recognizes very few historic bay claims by foreign States, unless the bay could also be closed off as a juridical bay. One claim recognized is to the Gulf of Manner off the southeast Indian coast.

73. Canada, for example, strongly defends its historic claim to Hudson Bay, thereby affecting the regime of Hudson Strait.

74. LOS Convention, *supra* note 2, art. 36.

75. Prior to President Reagan's 1989 Proclamation of a 12-mile territorial sea for the United States (see Proc.No. 5928, 53 Fed. Reg. 777, January 9, 1989) this list would have included the Strait of Juan de Fuca between the United States and Canada.

76. Three nautical miles is the most frequently used width for sea lanes established under IMO auspices.

77. There is no provision in the LOS Convention for any status for bordering waters other than that of the territorial sea.

78. LOS Convention, *supra* note 2, art. 38(1).

79. The Turkish Straits consist of the Bosphorus, Sea of Marmara, and the Dardanelles.

80. Convention Regarding the Regime of the Straits, with Annexes and Protocol, July 20, 1936, *League of Nations Treaty Series*, v. 173, p. 213.

81. 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, March 14, 1857, C. Parry, *Consolidated Treaty Series* (Dobbs Ferry, New York: Oceana Publications, Inc., 1969), v. 116, p. 357.

82. Gunnar Alexandersson, *The Baltic Straits: International Straits of the World* (Boston: Nijhoff, 1982), p. 22.

83. "Declaration Between Great Britain and France Respecting Egypt and Morocco, Together with the Secret Articles, April 8, 1904," *British and Foreign State Papers* (London: His Majesty's Stationary Office, 1912), v. 101, p. 1053.

84. "Treaty of Peace Between the Arab Republic of Egypt and State of Israel, 1979," *International Legal Materials*, March 1979, v. 18, p. 362.

85. LOS Convention, *supra* note 2, art. 35(a).

86. A juridical bay is described in article 10 of the LOS Convention as a well-marked indentation of the coast, whose distance across at its mouth does not exceed 24 miles and whose area is at least as large as a semi-circle whose diameter is a line drawn across its mouth. *See also, supra* note 1, par. 1.3.3.

87. LOS Convention, *supra* note 2, art. 45(1)(b).

88. In August 1985, the U.S. Coast Guard vessel POLAR SEA, with the support and participation of Canada, transited the Northwest Passage, from east to west. Since the U.S. Government, prior to the voyage, refused to formally request the Canadian Government's permission for the transit, the Canadian press categorized the voyage as an infringement on Canadian sovereignty. *The New York Times*, Sep. 11, 1985, sec. I, p. 9:1.

89. Article 7 of the LOS Convention provides that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands in the immediate vicinity, a method of straight baselines may be employed . . . [which] must not depart to any appreciable extent from the general direction of the Coast." Critics of the Canadian action argue that the baseline system in the Arctic Archipelago does not conform with these criteria.

90. Agreement Between the Government of the United States of America and the Government of Canada on Arctic Cooperation, Ottawa, Jan. 11, 1988, *International Legal Materials*, Jan. 1989, v. 28, p. 142. The Agreement provides that "all navigation by U.S. icebreakers within waters claimed by Canada to be internal" will be undertaken only with the consent of the Canadian Government. *Id.*, p. 143, para. 3. But the agreement does not affect the U.S. position that Canada's declaration that the Northwest Passage is not an international strait is without legal foundation. *Id.*, par. 4.

91. The September 23, 1989, joint statement of U.S. Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze, issued at Jackson Hole, Wyoming, although not relating directly to straits but rather to innocent passage, may indicate the current position of the Soviet Union toward passage through the territorial sea generally, including such straits as Vil'kitsky. The "Uniform Interpretation of Rules of International Law Governing Innocent Passage," which were attached to that statement, provides, "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither notification nor authorization is required." (Emphasis supplied) (Copy in possession of Editor).

92. Statement by the Delegation of Greece to the Third United Nations Conference on the Law of the Sea, A/CONF. 62/WS/26, *Third United Nations Conference on the Law of the Sea*, Off. Rec., v. 16, p. 266 (1982).

93. Richard Grunawalt, "United States Policy on International Straits," *Ocean Development and International Law*, v. 18, no. 4, 1987, p. 445.