Introduction

Straits, narrow passages of water surrounded by land areas and linking open seas, are vital to international navigation and overflight, both commercial and military. Their importance was made even more conspicuous with the development of claims by many coastal States in the 1960s and 1970s to extend their territorial seas to 12 nautical miles (and sometimes beyond), thereby absorbing most straits used for international navigation within the regime of innocent passage. Before these claims were made, most of these straits contained a strip of high seas where freedom of navigation and overflight applied. Although sovereignty over straits definitely played to the advantage of States bordering straits, it was far less favourable to international commercial and military interests. Hence, one of the great tasks of the Third UN Conference on the Law of the Sea (1973–1982) was to build up a new regime for straits used for international navigation, which would strike the best balance possible between these diverging and, possibly, conflicting interests. The result is Part III of the Law of the Sea Convention,[1] in which the new navigational right of transit is articulated. In parallel, Part IV of the UNCLOS addresses the concerns of island nations and third States in archipelagic waters and spells out a right of archipelagic sea lanes passage that is functionally equivalent to transit passage.

These developments are now well known, and the negotiation of the Convention and the changes it brought have already been thoroughly examined, notably in Hugo Caminos's course delivered in 1987 at The Hague Academy of International Law and the earlier work by Kheng-lian Koh, published in 1982.[2] Another account of the development of the

[1] 1833 UNTS 396, opened for signature on 10 December 1982 and entered into force on 16 November 1994. Hereinafter UNCLOS.

[2] H. Caminos, 'The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea', 1987(205) *Recueil des cours*, 9; K. L. Koh, *Straits in International Navigation* (Oceana Publications, Dobbs Ferry, 1982).

straits regime is not warranted. References to the negotiating history of particular provisions are made throughout this study when appropriate to clarify their meaning. What it is proposed to design is a general, updated book on the legal regime of straits that incorporates the many contemporary challenges to that regime and to provide lucid legal answers to the developments in State practice, some of which shed new light on the balance achieved in 1982, some of which appear to destabilize the regime enshrined in Part III of the UNCLOS. A regime is an ensemble of legal norms applicable to a given object of regulation. The UNCLOS does not, and indeed cannot, contain an exhaustive list of all rights and duties of States in relation to straits; it does not definitively settle the allocation of all possible rights and duties of States bordering straits or third States either. The UNCLOS was negotiated as a constitution for the oceans and, as such, supplies an overarching frame of reference. It was negotiated with the intent of being *capable* of addressing issues that are not expressly spelled out. It contains provisions with a high degree of generality as well as references to legal rules negotiated, or to be negotiated, in other fora. Hence, references to the right of unimpeded transit passage in Article 38, to the duty of the coastal State not to hamper transit passage in Article 44 or to the duty of ships to comply with certain generally accepted international regulations, procedures and practices leave a certain degree of indeterminacy inherent in a normative instrument of a general nature. Since the UNCLOS was concluded, and particularly since it entered into force in 1994, a range of State practice and claims have made it necessary that these facts be organised into problems that receive balanced solutions. For instance, Australia's requirement of compulsory pilotage in the Torres Strait; Turkey's unilateral changes to the legal regime in the Turkish Straits; proposals for the building of a bridge across the Great Belt or the Strait of Messina; enhanced environmental standards applicable in the Strait of Bonifacio; suggestions for cost-sharing in the management of the safety of navigation in the Malacca Straits; suggestions that the Philippines Archipelago be declared a Particularly Sensitive Sea Area (PSSA); and Canada's claims over the Arctic Route, in particular when the UNCLOS leaves undetermined such fundamental concepts as 'use' in the definition of a legal strait and when it is no secret that the melting of Arctic ice has enhanced the possibility of actual commercial use of the Northwest Passage. All these examples, together with the accompanying legal controversies, show that claims and counterclaims argued under the regime created by the UNCLOS are not free from the uncertainties and ambiguities that accompanied claims and counterclaims made under

customary law, with which the great Danish jurist Erik Brüel struggled in his magisterial treatise published in 1947, before the codification brought about by the First Geneva Conference in 1958.[3] Sometimes, controversies are resolved by agreement; sometimes, they are resolved by judicial decision; more often than not, the opinion of writers helps in clarifying the law and helping assuage tensions. This increased interest in the regime of straits is not the only concern of the present writers. The entry into force of the UNCLOS saw the publication of a book on the topic,[4] and more recently, two works were published in 2010,[5] the former placing strong emphasis on definitional, geographical considerations, the latter, in Italian, devoting extensive analyses to individual straits. Such a contemporary interest is not fortuitous. In his 2008 Report on Oceans and the Law of the Sea, the UN Secretary-General noted that 'in the territorial sea, in straits used for international navigation, archipelagic sea waters and in the exclusive economic zone (EEZ), a coastal State can take enforcement measures to ensure compliance with its laws and regulations', without raising the differences in the enforcement jurisdiction in the three zones concerned. He also noted that 'as regards the Torres Strait, concerns continue to be expressed regarding the introduction of compulsory pilotage in the Strait by Australia and Papua New Guinea in 2006 . . . Views differ on whether the compulsory pilotage scheme is in conformity with UNCLOS' and, finally, that 'in straits used for international navigation, user States and States bordering straits should cooperate regarding navigational and safety aids and other improvements and the prevention, reduction and control of pollution'.[6] When the International Straits of the World Series (published by Nijhoff) was relaunched, the new editors, Charles Norchi and Nilufer Oral, noted:

> The regime [of straits] regulates the rights and duties of coastal states and vessels over these potential chokepoints and, owing to new demands, it is under enhanced stress. The post–9-11 security environment and the resurgence of piracy have elevated the defence demands of maritime powers and coastal States. Non-state actors, including private armies, have acquired an enhanced capability to limit access to straits. Environmental concerns have

[3] E. Brüel, *International Straits: A Treatise on International Law*, 2 vols. (Sweet & Maxwell, London, 1947).
[4] B. B. Jia, *The Regime of Straits in International Law* (Clarendon Press, Oxford, 1998).
[5] A. G. López Martín, *International Straits: Concept, Classification and Rules of Passage* (Springer, Berlin, 2010); M. Fornari, *Il regime giuridico degli stretti utilizzati per la navigazione internazionale* (Giuffrè, Milan, 2010).
[6] UN Doc. A/63/63 (2008), paras. 102, 190, 215.

> created an added dimension of complexity to these narrow shipping lanes where coastal States increasingly demand additional regulatory measures such as mandatory pilotage and designation of PSSAs. The emergence from the current global financial crisis depends upon global trade including petroleum shipping. Most of that trade moves through the restricted ship operating areas of densely trafficked straits. Thus the public order of the oceans depends upon international straits for navigation, power and wealth. At no point in history, has the erosion or reinforcement of straits norms been more critical for the world community.[7]

We propose to re-assess the entire regime of straits used for international navigation. The contemporary body of State practice raises the fundamental question of the overall purpose and consistency of the UNCLOS, as the claim has been made that the legal regime applicable to straits and agreed upon in 1982 had been overly generous to navigational interests, but that since then, considerations of equal importance, notably the protection of the environment, call for increased powers of coastal States. The suggestion here is not that coastal States' unilateral action should be made outside of the UNCLOS but that the UNCLOS allows for an interpretation justifying enhanced riparian control over straits. Sweeping legal bases such as Articles 192 and 194 of the UNCLOS have been suggested, which raises the question of the compatibility, or perceived incompatibility, between various norms in the same instrument. Whether the way to proceed emanates from States singly or from debates within the IMO on the legality of a proposed measure, the old tension between freedom of navigation and territorialisation of maritime spaces is part of the equation. The fact that some straits are now the object of superposed legal regimes, namely Part III of the UNCLOS and such environmental protection umbrella designation as a PSSA,[8] and the nature of associated protective measures internationally adopted or recommended there render the need for legal answers even more acute. A fundamental principle guiding us throughout this study is that such legal answers are predicated on multilateral, not unilateral, action and that a balance among all interests should be achieved at all times. In its 2013 resolution on Oceans and the Law of the Sea, the UN General Assembly called 'upon the International Maritime Organization, States bordering straits and user States to continue their cooperation to keep straits [used for

[7] www.brill.com/printpdf/1930.

[8] E.g. the Torres Strait is now part of the extended Great Barrier Reef PSSA; parts of the Dover Strait are included in the Western European PSSA.

international navigation] safe, secure and environmentally protected and open to international navigation at all times, consistent with international law, in particular the Convention'.[9] The need for a new and comprehensive book on the legal regime of straits that looks to the future, that provides legal answers to contemporary dilemmas and that re-assesses problems the solutions of which have been left unresolved in legal literature is, therefore, well established.

The right of transit passage is conferred on States through their ships and aircraft via the link of nationality. Throughout this study, ships and vessels will be used interchangeably. The UNCLOS does not contain a definition of ship or aircraft, although the terms are used widely.[10] The question raised controversy in the *Passage through the Great Belt* case before the International Court of Justice, as will be seen in Part IV, Denmark arguing that mobile offshore drilling units did not come within an internationally recognized definition of ship. The International Law Commission did not devote much attention to the matter; in his 1950 Report, J. P. A. François referred to the definition given by Gidel: 'A surface sea-vessel is not only any floating structure but any structure whatever its dimensions or denominations, capable of traversing maritime areas (in exclusion of other media) with the equipment and the crew necessary to her in view of the services required by the activities in which she is engaged'.[11] In his Sixth Report, François included an Article 6 defining a ship as 'a device capable of traversing the sea but not the air space,

[9] UN Doc. A/RES/67/78 (2013), para. 116.

[10] The UNCLOS uses 'vessel' (e.g. Article 292), 'ship' (e.g. Article 91) or 'boat' (e.g. Article 111(1)), but the distinction is not necessarily made in the same way in the other official languages. There is a definition of 'warship' in Article 29 which is not of much help. The Drafting Committee noted that the word 'ship' is used in Parts II, III, IV and VII, whereas 'vessel' is used in Parts XII, XIII and XV; the problem only affects the English and Russian versions. UN Doc. A/CONF.62/L.40, UNCLOS III, XII Official Records (22 August 1979), 97. The UNCLOS makes a difference between vessels, installations and structures, but it is not consistent. The Drafting Committee noted these inconsistencies: UN Doc. A/CONF.62/L.57/Rev.1, UNCLOS III, XIII Official Records (1 August 1980), 118. The 1958 Geneva Conventions use the term 'ship', although Article 14 of the Convention on Fishing and Conservation of the Living Resources of the High Seas refers to 'fishing boats or craft'.

[11] UN Doc. A/CN.4/17, Yearbook of the ILC, vol. II (1950), 38. The Special Rapporteur added that floating docks, seaplanes and floating islands would not be considered vessels but that lighthouse-boats and dredgers must be considered vessels if they are capable of navigation; it is irrelevant that the craft concerned are not equipped with their own means of propulsion. Ibid.

with the equipment and crew appropriate to the purpose for which it is used'.[12] During the discussion of the Draft in 1955, François himself expressed doubts on the necessity of a definition. After a short discussion, it was unanimously agreed to delete Article 6.[13] Various definitions may be given in: specific conventions;[14] domestic laws;[15] and by various writers.[16] There is much force in Meyer's view that it is impossible to give one uniform definition which would be valid for the whole law of the sea.[17] It is suggested that, for the purpose of the right of passage, technical restrictions are not warranted. The definition in the US Code is thus helpful: 'A vessel is generally defined as including every description of watercraft or other artificial contrivances used, or capable of being used, as a means of transportation on water'.[18] Similar considerations apply to aircraft.[19]

This study is designed as a general regime for straits and, therefore, focuses on Part III and Part IV of the UNCLOS, the latter of which contains the analogous concept of archipelagic sea lane. The study also aims at offering analytical guidelines that may be implemented in particular straits with specific issues to address. This study is not meant to be a catalogue of straits of the world, but individual references will be made when

[12] UN Doc. A/CN.4/79, Yearbook of the ILC, vol. II (1954), 9. The Rapporteur included amphibian vessels.

[13] Yearbook of the ILC, vol. I (284th meeting, 4 May 1955), 10, paras. 28–29.

[14] E.g. MARPOL 73/78 defines a ship as a vessel of any type whatsoever operating in the marine environment, and it includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms (Article 2(4)). The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties defines a ship as 'any sea-going vessel of any type whatsoever, and any floating craft, with the exception of an installation or device engaged in the exploration or exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof' (Article II(2)).

[15] E.g. UK Merchant Shipping Act 1995 (c.21), sec. 313(1): 'Ship includes every description of vessel used in navigation'.

[16] E.g. Heyck defines a ship as a water craft which moves on water according to nautical laws. This aptitude for navigation is the deciding factor. H. Heyck, *Die Staatszugehörigkeit der Schiffe und Luftfahrzeuge* (Bode, Pforzheim, 1935), 10.

[17] H. Meyers, *The Nationality of Ships* (Nijhoff, The Hague, 1967), 17.

[18] 1 US Code 3.

[19] The Annexes to the 1944 Chicago Convention on Civil Aviation define aircraft as any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface (hence, excluding hovercraft). The 1962 Draft Code of Rules on the Exploration and Uses of Outer Space prepared by the David Davies Memorial Institute of International Studies defines aircraft as 'any craft which depends, as means of flight, upon the consumption of air, or upon aerodynamic lift, or both' (Article 1). The US Code defines aircraft as 'any contrivance invented, used, or designed to navigate, or fly in, the air'. 49 US Code 40102(a)(6).

appropriate. Furthermore, as the UNCLOS in Article 35(c) addresses the question of special conventional regimes in certain straits, these will be studied separately.[20]

This study is structured around six parts. Part I addresses the status of straits under the law of the war, as the rest of the study focuses on the peacetime regime. Part II defines straits used for international navigation and looks at geographical and functional criteria in order to distinguish, from other straits, legal straits that come within the ambit of Part III of the UNCLOS; it examines under which circumstances the newly articulated right of transit passage applies and when other passage rights apply. Part III places the right of transit passage in context in order to differentiate it from the freedom of navigation and from innocent passage. The analogous right of archipelagic sea lanes passage in archipelagic waters, also a creation of UNCLOS III, is presented, too, notably the archipelagic sea lanes designated in the Indonesian archipelago. This part defines transit passage and the conditions for lawful transit, as well as the beneficiaries of the right of transit. It also examines the consequences of passage that is allegedly not compliant with the conditions for lawful transit. Part IV may be considered the central analysis of the right of transit/archipelagic sea lanes passage. It looks at the effect of the right of transit passage on the territorial jurisdiction of the coastal State and argues in terms of restrictions of such jurisdiction, both legislative and executive (enforcement). The counterpart is that ships and aircraft must notably comply with an array of international norms in matters of navigational safety and environmental protection. Although the duty to guarantee unimpeded or unhampered passage limits the type or scope of activities of the coastal State in relation to a strait, a balance between right of passage and sovereignty over the territorial sea is, it is argued, achievable if certain criteria are taken into account. Part V examines in detail the kind of co-operative scheme recommended by Article 43 in order to distribute equitably, among users of a strait, the burdens associated with ensuring safety and environmental protection in a strait. The mechanism implemented in the Straits of Malacca is presented as well. Part VI argues for an

[20] Jia notes that the British Naval Chart of the World Ocean Routes (No. 5307) lists 31 straits. The estimates by jurists are more comprehensive. Thus Brüel mentions 35 important straits, Alexander enumerates 254 internationally used straits and the *Times Atlas and Encyclopedia of the Sea* displays a map of 274 international straits. By the criterion of minimum width, Commander Kennedy has studied 33 straits less than 26 nautical miles wide, Lay, Churchill and Nordquist select 137 and Larson lists 134. Jia in n. 4, 2 (and references cited).

analytical frame that preserves the regime of Part III of the UNCLOS as the normative framework of reference for straits, including when specific environmental protection is sought under other applicable instruments or provisions of the UNCLOS itself. Finally, Part VII recapitulates points on dispute settlement made throughout the study and addresses the question of compliance with the UNCLOS, as well as the customary status of the rights of transit and archipelagic sea lanes passage, before closing remarks are made.

PART I

Law of peace and law of war