Chapter 1
The First Steps in the Regulation of Passage Through the Straits: From Grotius to Pardo

Unlike other parts of the *United Nations Convention on the Law of the Sea* (UNCLOS) of December 10, 1982, such as Part II concerning territorial waters and the adjacent area and Part VII on the high seas, the articles of Part III are not based on any of the Conventions on the Law of the Sea adopted at the First Convention of the United Nations on the Law of the Sea in 1958. However, this does not mean that this part does not have antecedents. Undoubtedly, Part III is the latest attempt among several which have been made by *International Law Practitioners* and Inter-Governmental Conferences in order to establish the legal regulations applicable to international straits as articles.

In this regard, it is evident that the UNCLOS not only introduces substantial progressive development of the subject, but also codifies widely established customary regulations in international legislation. Undoubtedly, both aspects are perfectly combined in the legislation set out in Part III concerning the "Straits used for international navigation", in a symbiotic relationship.

To know how these aspects evolved in practice generally accepted as law up to the Third Conference of the United Nations on the Law of the Sea, as well as to evaluate the most relevant points of the development of this Conference, constitute a *conditio sine qua non* for a proper understanding of the new legislation stipulated in the UNCLOS for navigation in international straits. This legislation is marked by its autonomy as regards the general regime on territorial waters and by the differentiation between several types of straits, and both of these factors entail a radical change in the traditional regulation of this type of maritime area, although it does have certain aspects of continuity as concerns the application of the right of innocent passage which cannot be suspended and it is codified in the *Geneva Convention on the Territorial Sea and Contiguous Zone* of 1958 to certain international straits.

The summary analysis of the most relevant aspects from a historical perspective of the status of straits in International Law up to the 1982 Convention is necessary in order to duly address the detailed study of the legislation of Part III of the UNCLOS on the passage through straits used for international navigation.

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1.1 The Legal Position of Straits from the Classical Dimension

The issue of navigation through straits "has been of concern since 222 BC, during the Peloponnesian War".[4] Since then the separation of 'freedom' or 'limitation' of passage through these narrow channels has continually involved political, military and commercial interests throughout the centuries. However, it is not until the twentieth century that the idea of specific regulations of International Law arises in order to regulate the regime governing navigation through straits. This delay was probably due to the fact that, until this time, the sovereignty of a State over its territorial waters did not go beyond 3 miles, which almost always left free passage on the high seas through these channels; consequently, the sovereignty of the adjacent shores was not threatened.

However, the lack of specific norms concerning navigation in straits must not be understood as disinterest in the matter. On the contrary, since the beginning of the seventeenth century, Grotius expressly recognised in *Mare Liberum* the right of the owner of the land to occupy gulfs, straits and those parts of the sea which can be seen from the coast,[5] international law doctrine has endeavoured to achieve a consensus regarding a legal regime concerning this, but with little success.[6]

1.1.1 The Most Relevant Traditional Doctrine in This Regard

As we have stated, Grotius was the first to put forward the extension of state sovereignty over territorial waters, including the straits.[7] However, this right does not empower the occupant to prevent unarmed or innocent navigation through these. Both principles were again formulated more precisely in his treatise *De Jure Belli ac Pacis*, with the addition of a third grand principle: the right of the occupant of one of these portions of the sea – gulfs, straits and coastal sea – to impose equitable charges on sailors if it took "upon itself the responsibility of defending navigation and providing assistance through night time fires and short signals".[8] This last principle was in force up to the middle of the nineteenth century, when it was eliminated as a consequence of Denmark signing some international treaties with European States and with the United States, whereby the ships of the other nations were released from paying levies to pass through the *Belts Straits* and

[4]Cf. Wainwright (1986, p. 366).

[5]Vid. Grotius (Trad. V. Blanco García and L. García Arias) (1956, p. 16).

[6]A detailed study of the historical evolution of the regime of straits, from the point of view of doctrine and state practice, can be found in the excellent work of Brüel (1947, pp. 48–205).

[7]Przetacznik (1977, p. 223–225) even goes back to the era of the Phoenicians in order to find claims over sea areas adjacent to the coast. For obvious reasons we will not go into a study of these remote antecedents; his analysis of these can be found in his work.

[8]Vid. Grotius (trad J. Torrubiano) (1925, p. 324).

the *Sund*.[9] This is a rough outline of principles which subsequent doctrine will make more precise.

However, for Grotius the question of the straits constituted only a small part of a more important matter, freedom of the seas. The first author to take a direct interest in the straits was Pufendorf who expressed the need for the coastal state to secure its ports, as well the need to control the part of the straits nearest to its coast. Like Grotius, he recognised the right of the coastal State to charge a toll to pass through the straits.[10]

However, a century latter, Vattel was the first to distinguish between 'straits which serve as a means of communication between two seas where navigation is common to all or many nations' and 'straits which do not have this function'. As regards the former, the nation which 'possesses' the strait cannot prohibit the passage of other nations through the straits, on condition that this passage is innocent and does not entail any risk for the security of the coastal State. However, the coastal State of the straits is authorised to take certain precautions and to request certain formalities insofar as these affect its security. Like Grotius and Pufendorf, he conditions passage through the straits to the payment of a moderate levy. Vattel bases the right of navigation of foreign ships through territorial waters, including straits, on the concept of 'right of way' in Roman law.[11] In fact, the majority of authors of the eighteenth century defend the right of the coastal State to exclude the navigation of foreign ships from its territorial waters.

These interests of the coastal State put forward by Vattel became secondary in the nineteenth century as opposed to more liberal notions of right of way through straits, which is conceived as a natural complement to the freedom of the seas. This change of orientation was related to the emancipation of the Spanish colonies in America, which involved the consolidation of the 'open doors policy' for trade between Europe and America, with an evident repercussion on the conception of the regime regulating the passage through straits.

The nineteenth century saw the beginning of the recognition that straits must be subject to a special regime, and the point was raised that, although waters are territorial for some purposes, for purposes of transit, they are equivalent to the high seas.[12] In addition, some authors such as Holland make a distinction regarding the conditions of the navigation of straits in peacetime and in wartime; in the first case, the passage of all vessels including warships must be considered to be innocent; while in the second case, the coastal State can deal with enemy ships as it may wish.[13]

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[9]On March 14, 1857, Denmark signed treaties with Prussia, Austria, Belgium, France, England, Hanover, Mecklenburg-Schwerin, Oldenburg, the Netherlands, Russia, Sweden and the Hanseatic Cities of Lübeck, Bremen and Hamburg; on April 14, 1857, with the United States, and February 25, 1860 with Spain. Vid. the quotation in Meseguer Sánchez (1999, p. 156).

[10]Cf. Pufendorf (trad. J. Barbeirac) (1712, pp. 331–333).

[11]Cf. Vattel (trad. M.M. Pascual) (1834, p. 273).

[12]This is an approach of Godey, undoubtedly, the first author to recognise such a *sui generis* regime (cf. Brüel 1947, p. 59).

[13]Cf. Holland (1898), op. cit. in Brüel (1947, p. 60).

This liberal tendency in the interpretation of the right of way took on more importance in the twentieth century. The most extensive study of this period concerning the problems inherent to international straits was the one put forward by Schücking. This author stresses that not all the straits which connect two high seas areas are necessarily of interest for International Law, but only those which are of value for international navigation. In addition, he sustained that those straits which have high seas corridors within their half, the general rules concerning the high seas should be modified in order to restrict any war manoeuvres in this area.[14]

To sum up, the abundant literature from the classical era on navigation through straits generally tends to affirm the right of way of all vessels – both merchant ships and warships – in peacetime, while in wartime, there is almost total unanimity regarding the recognition that only merchant ships of the States which are not at war with the coastal State have right of way, unless it is a neutral coastal State as such a State cannot close its straits.

1.1.2 The First Attempts at Private Codification About the Legal Regime of Straits

In addition to the attention paid by classical doctrine, several private scientific associations have subjected the question of the legal status of international straits to examination in an attempt to systematise a group of specific rules.

In this sense, the work done by the *Institut de Droit International (IDI)* from 1894 to 1912 made decisive progress towards the formulation of autonomous legal regime for straits. In fact, the proclamation of the principle of innocent passage in straits by the IDI in 1894 was the key to the creation of a special category of straits in which the territorial rights and the rights of way converge. This formulation was accompanied by the definition of straits as those which do not "exceed double the width of the territorial sea".[15] The waters of these straits would be territorial waters, but, due to the fact that they serve as a passage from one area of free sea to another, these straits can never be closed and transit through these must be free.

In the debate on the laying of mines in 1906, it was proposed that neutral States did not have the right to lay mines in the straits which link high seas with high seas.[16] In the Paris Session in 1910, the IDI considered the passage of warships through the straits in relation to the right of neutrality. Some members were in favour of the right of way, others put forward the limiting this to one strait if there

[14]Cf. Schücking (1906), cit. in Brüel (1947, p. 65).

[15]Vid. *Annuaire del'IDI*, 1894, vol. III, p. 393. For a detailed analysis of the debates and proposals of the IDI from 1894 to 1912 see Brüel (1947, pp. 70–80).

[16]Cf. *Annuaire de l'IDI*, 1906, vol. V, p. 275.

were alternative channels, and others suggested limiting this to the 'essential' straits. The Drafter attempted to combine these ideas in one commitment formula, according to which the coastal state would not violate the right of neutrality in the event that it might decide to prevent the passage of belligerent warships on condition that this is not applied to maritime routes necessary for navigation; that is to say, it had to permit passage in those straits which constituted the only means of communication from one free sea to another. This same distinction again arose in the debate on naval warfare in the Oslo session of 1912, when it was decided to prohibit the laying of automatic mines in straits; although it was suggested that this limitation would affect those straits which were the only or essential channel of communication between areas of the high seas.[17] However, the articles project was finally brought to a halt due to the beginning of the First World War.

During this same period of time, the subject of straits was also addressed by the *International Law Association (ILA)* from 1894 to 1910. Thus, the ILA meeting held in Brussels in 1895 adopted the essential norm for communications which was that straits could never be closed.[18] In 1906, the ILA agreed that belligerents could not block straits to the extent that this would interfere with navigation. In this regard, it "Rules on Territorial Waters" adopted in 1906 contained the following provisions on straits:[19]

> ARTICLE 10.- Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'excède pas douze milles, sauf les modifications et distinctions suivantes:
>
> 1. Les détroits dont les côtes appartiennent à des États différents font partie de la mer territoriale des États riverains, qui y exerceront leur souveraineté jusqu'à la ligne médiane.
>
> 2. Les détroits dont les côtes appartiennent au même Ètat et qui sont indispensables aux communications maritimes entre deux ou plusieurs États autres que l'État riveraise ont toujours partie de la mar territoriale du riverain, quel que soit le rapprochement des côtes. Ils ne peuvent jamais être barrés.
>
> 3. Dans les détroits dont les côtes appartiennent au même État, la mer est territoriale bien que l'écartement des côtes dépasse douze milles, si à chaque entrée du dètroit cette distance n'est pas dépassée.
>
> 4. Les détroits qui servent de passage d'une mer libre à une autre mer libre ne peuvent jamais etre barrés.
>
> ARTICLE 11.- Le régime des détroits actuellement soumis à des conventions ou usages speciaux demeure réservé.

The position of the IDI and the ILA concerning the status of straits can be summed up in the following terms. With regard to the special rules which must be formulated for straits, both institutions highlight the importance of trade in straits. The question of the extension of territorial waters in straits which are of international importance arises in relation to the fact that the international straits must not exceed double the width of the territorial sea; and in those cases in which both

[17]Cf. *Annuaire del'IDI*, 1912, vol. VI, pp. 697–702 and p. 78, respectively for each session.

[18]Cf. *Report of the 17th Conference*, p. 102.

[19]Vid. *Report of the 23rd Conference*, p. 251, cit. in Brüel (1947, p. 80).

coasts of the straits belong to the same State, its right to consider the totality of the straits as territorial waters is recognised.

As regards conflict of interests between belligerents and neutral coastal States in straits, it is evident that the tendency in the debates of both Institutes is towards the limitation of the right to war to the benefit of the right to peace, and to place freedom and security on the sea above the interests of the belligerents; at the same time, it was maintained that the neutral coastal State could not obstruct the passage of warships belonging to belligerent powers.[20]

However, none of the recommendations of the IDI and of the ILA were incorporated into an international agreement.

These same theories were considerably extended throughout the debates of the *Inter-parliamentary Union* held from 1910 to 1915. They were dealt with in more detail and developed in a way which was more in accord with the practical evolution of the States, as was to be expected from an organism composed of politicians and practitioners. Its proposals were recorded in a Project of Agreement which should have been submitted to discussion for approval at the Conference planned for August 1915 in Stockholm.[21] The breakout of war also brought this project to a halt.

Finally, as concerns doctrine and the scientific and political associations we have referred to,[22] we can conclude from the options given that the important role of international straits required that they become the subject of a *sui iuris* legal status different from what was stipulated for other maritime areas. Nevertheless, this same retrospective view of these opinions leads to stating that these do not constitute a sufficient basis to create positive law in this regard.

1.1.3 The Incipient 'Official' Steps Towards the Regulation of Passage Through the Straits

As we have seen, the International Law doctrine was unanimous as regards the need to structure a body of autonomous norms which would regulate navigation through international straits. However, state practice fell very short of satisfying the need; the fact was that each strait had its own particular regulation, and there was no common regulation. At the beginning of the twentieth century, there occurred the first 'timid' attempts to draft a group of International Law norms in this regard,

[20]Cf. Brüel (1947, p. 80).

[21]For a study of all the debates of the de Inter-parliamentary Union as well as a detailed analysis of its project of agreement, see Brüel (1947, pp. 81–87).

[22]Besides the institutions referred to the straits issue was also debated by the American Institute of International Law (1926) – although this had scarce repercussion –, and by the Japanese Association of International Law (1926).

although it should be taken into account that the Peace Conference held in The Hague in 1899 did not address any question concerning maritime areas.

1.1.3.1 The Peace Conference of The Hague in 1907

The question of the legal status of straits was first discussed at the inter-governmental Conference held in The Hague in 1907. In this Second Peace Conference, the question of the straits arose in connection with the *VIII Convention concerning mine laying*, and the *XIII Convention on the obligations and rights of neutral States*.[23]

During the debate in the first of these Conventions, the Netherlands submitted a proposal to exclude straits from the right to lay mines. When this was referred to the Examining Committee, no one objected to the obligation to leave a passage in the Straits which would join two free seas, but the modification that the passage should be in accordance with the conditions stated by the competent authorities was also included. In fact, the provision on straits was finally omitted.

Sweden brought up the question of straits at the XIII Convention. There was agreement concerning the fact that, while passage could be prevented through territorial waters in order to preserve the neutrality of the coastal State, this was not applicable to straits which joined two areas of the high seas.

The only clear conclusion that could be drawn from this Conference was the need for separate codification for straits.

1.1.3.2 The 1930 Hague Conference on Codification

The Conference on Codification of International Law held in The Hague in 1930 and convened by the League of Nations[24] mean a new attempt in the process of codification after the failure of the attempts at private codification which were halted due to the breakout of war.

Forty-seven States sent delegates to The Hague, seven of which, including the United States, were not members of the League of Nations. Deliberations lasted three weeks from March 13 to April 11, 1930.

One of the essential points examined by this Conference in The Hague was the extension of territorial waters. On this point, the Conference was meticulously prepared on the basis of *ad hoc* studies, and questionnaires sent to the participating States. The responses related to the width of the territorial sea showed the disparity

[23]Cf. O'Connell (1984, pp. 302–303).

[24]In 1927, the Assembly of the League of Nations decided that codification would focus on three subjects: (1) Nationality; (2) International Responsibility; and (3) Territorial Waters. The norms concerning straits were included within the framework of this last subject. For a detailed analysis of the debates and proposals concerning the 1930 Hague Codification Conference, see the interesting work of Brüel (1947, pp. 175–195).

of opinions on the matter, which made it impossible to reach an agreement on the width of territorial waters and on the exercise of special jurisdiction in the zone adjacent to this area.

However, within the framework of the discussion on these matters, the Preparatory Committee of the Conference managed to direct the debates toward addressing the question of the straits, bearing in mind that the situation of straits had not been included as a specific subject in the Discussion Bases of the Preparatory Committee of the Conference, despite the fact that the principle of freedom of passage and navigation through the Turkish straits (*Bosphorus*, *Dardanelles* and *the Sea of Marmara*) had already been recognised in the Treaty of Lausanne in 1923, and in the Montreaux Convention of 1936 concerning the regime on straits. Thus, straits were addressed within the context of the delimitation of territorial waters and concerned the delimitation of the straits. Navigation through the straits in which the territorial waters of two coastal States overlapped was not considered as a subject distinct from the question of innocent passage through territorial waters in general. The most relevant aspects in this codification process were as follows.

The Security Council of the League of Nations appointed a Preparatory Committee to draft a report which would serve as a basis for the subsequent work of the Conference, together with the responses from the governments. This was prepared by Schücking. The report contained that the regime on straits subject to special agreements must be excluded from codification; it considered that the waters of the straits were territorial waters if the entry to the straits did not exceed 10 miles; and established the half way line as the method for delimiting the straits which did not exceed 10 miles or whose coasts belonged to several Sates.

However, this report complicated the analysis of the straits as it distinguished between those waters which were territorial from those which were interior, based only on the fact that there was several or only one State involved. In the case of straits whose coasts belong to more than one state, the principles related to territorial waters apply, while, in the case of straits whose coasts belong to one State, if the width does not exceed the double of the territorial waters, the principle of bays is applied. In the first case, there would be a right to innocent passage; in the second case, there would be no right of passage. Finally, the Report considered that the rule that straits can never be closed, in accordance with the idea that a coastal State has the right to completely close its territorial waters in wartime.

The questionnaire submitted to the Governments by the Preparatory Committee was even more enigmatic. The Governments were requested to comment on the conditions which determine which territorial waters in straits connect two areas of open seas, or the open sea with an interior sea when the coasts belong to one or several States. The majority of the responses were not inclined to the characteristics of a right of passage through the straits, but referred to the dimensions of the territorial waters in the straits. Among the few responses which referred to the right of passage, the response of Germany should be stressed as it stated that territorial

waters did not affect the right of innocent passage through straits for all kinds of vessels, and underlined the need to extend this right to aircraft flying over straits, but only those with a number of coastal States.

When examining the Final Report of the Preparatory Committee and the responses of the Governments, three Committees were created in order to consider each of the three Discussion Bases. The width of the territorial sea corresponded to the Second Committee, within which the specific subject of 'straits' was assigned to the Second Sub-Commission of the Second Committee.

In its report to the Principal Committee of the Conference, the Second Sub-Commission abandoned the distinction between straits which belong to one or several States, and replaced this with the distinction between straits which join two parts of the high seas and straits which only provide access to interior waters. A reference was added to the Project of Convention – made up of 13 articles – prohibiting the coastal State with straits which joined two parts of the high seas and are used for international navigation from preventing the passage of warships under no circumstances. However, when The Hague Codification Conference put forward the question of passage through straits, this was done vaguely and only in the context of the right of passage of warships through territorial waters. No express provisions were made as regards straits.

No agreement was reached. Only the statement of the Second Committee remains. This stated that, in those waters of straits which constitute territorial waters, "it is essential to ensure, in time of peace in all circumstances, the passage of merchant vessels and warships through straits between two parts of the high seas forming ordinary routes of international navigation".[25]

As regards the Spanish position at this Conference, the Spanish delegation presented an amendment to the basis of discussion number 19 on the right of innocent passage, specifically related to warships. There are three outstanding points: navigation must be on the surface, it was prohibited to discriminate between the flag of the coastal State and the foreign flags or between the foreign flags, and that the right of innocent passage can only be abolished for reasons of public security and in cases of serious events which might affect the security of the coastal State or essential interests of this State.

In conclusion, while the previous reports, the government responses, and the debates of the Second Committee have a certain value and cast light on the questions concerning straits, the same cannot be said of the final result of The Hague Codification Conference in 1930. In fact, as was stated in the United Nations, "the treatment of the question of straits in all of these exercises between 1894 and 1930 was unsatisfactory".[26]

[25]Vid. *Minutes of the Second Committee*, 1930, p. 148; document cited in Anand (1980, pp. 111–112).

[26]Office for Ocean Affairs and the Law of the Sea (1992, p. 2).

1.2 The Desired Concretion of the Legal Regime on Straits

Ambiguous and imprecise are the adjectives which best describe the legal regime on navigation through international straits until well into the twentieth century, as we have been able to verify above, with the exception of some specific straits, such as those in Turkey, Denmark and Magellan Straits, in which the passage of vessels was totally or partially regulated by particular agreements.[27] This is a situation which persisted until the International Court of Justice (ICJ) became involved in the matter.

In fact, the decision dictated by the Court in 1949 in the *Corfu Channel Case,* one of the first cases submitted to this international judicial authority, entails the confirmation of a specific singularity for these channels of communication, which would be conventionally enshrined in the *Geneva Convention on Territorial Sea and Contiguous Zone* of 1958, the result of the work of codification and progressive development carried out by the United Nations International Law Commission.

1.2.1 The Cornerstone for Settling the Regime on Straits: The 'Corfu Channel Case'

On May 15, 1946, two British cruisers were sailing through the North Channel of the Strait of *Corfu,* which separated the Greek island of Corfu from the Albanian mainland, and came under Albanian artillery fire. The warships were undamaged and did not return the fire, but the United Kingdom protested. The United Kingdom claimed that the waters were open to international traffic while Albania stated that the waters of the straits belonged to it and that passage through these straits required permission from Albania. After some diplomatic correspondence, the United Kingdom affirmed its right to send warships through the straits and warned that if these were fired upon, they would return the fire.

Some months after the first incident, on October 22, 1946, a British squadron made up of the cruisers *HMS Mauritius* and *HMS Leander*, and the destroyers *HMS Saumarez* and *HMS Volage*, crossed the north of the Straits of *Corfu* on a routine mission. Near the Bay of Saranda, first the *Saumarez*, and then the *Volage* were struck by mines which had been laid in the straits, exploded, and were seriously damaged; 44 naval personnel were killed and another 42 were seriously injured. On November 13, 1946, the North Channel of *Corfu* was swept by several minesweepers of the Royal Navy which found another 22 mines.

[27]These straits regulated by special agreements will be the subject of more attention in Chap. 4 of this book when reference is made to those straits which remain beyond the regulation of Part III of the UNCLOS; specifically, as regards what is stipulated in article 35(c), which excludes the straits regulated by *long standing* agreements still in force from this legal regime, such as the Straits in Turkey, Denmark and the Straits of Magellan.

In a Resolution of April 9, 1947, the Security Council of the United Nations recommended that the two States involved (the United Kingdom and Albania) submit their dispute to the ICJ. The United Kingdom filed a written request at the Court Registry, based on article 40.1 of the Statute. Albania answered this request before the ICJ, arguing that it was not in consonance with what was stipulated by Security Council which required an agreement by both parties in order to submit the case to the Court. On March 25, 1948, the ICJ rejected the objection of Albania to its jurisdiction, by 15 votes to 1. On that same day, both States submitted the case to the Court through a Special Agreement.

The United Kingdom[28] accused Albania of infringing the right of innocent passage through straits which connect two parts of open seas, as well as the specific rules on mine laying established by The Hague Convention of 1907.

Albania argued[29] that, from the time that a state of war existed between Albania and Greece, the passage of foreign vessels could not be considered to be a simple question of freedom of passage, but, in these circumstances, it should be considered to be a matter of national security. In addition, Albania held that there were two different classes of straits, those which constituted a necessary route between two parts of the high seas and are of interest for the international community due to international trade, and those whose transit is not essential for the international community. For Albania, there was no doubt that the North Channel of *Corfu* constituted strait in a the geographical sense, but it denied that this channel belonged to the category of international maritime channels through which there was a right of innocent passage. It considered that this channel was only of secondary importance, which was used exclusively for local traffic, and was not a necessary route between two parts of the high seas.

In its decision of April 9, 1949, the ICJ stipulated the following:

> It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But, **in the opinion of the Court, the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation**. Nor can it be decisive that this Strait is not a necessary route between two parts of high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic. . .
>
> Having regarded to these various considerations, the Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which the passage cannot be prohibited by a coastal State in time of peace.[30]

Thus, in the opinion of the Court, the decisive criteria for the application of the right of passage through straits were the geographical situation that the straits

[28]Cf. *The Corfu Channel Case. Pleadings, Oral Arguments and Documents*. ICJ *Reports*, 1949, vol. I, p. 21.

[29]Cf. *The Corfu Channel Case. Pleadings, Oral Arguments and Documents*. ICJ *Reports*, 1949, vol. III, p. 383.

[30]Vid. ICJ *Reports*, 1949, pp. 28–29 (letters in bold are ours).

connected two areas of the high seas, and that they were used for international navigation.

Albania also argued that, in the case of classification as international straits, the passage of warships was conditioned to previous notification; therefore, the United Kingdom had infringed Albanian sovereignty when it sent its warships with no previous authorisation of Albania. In this regard, the Court held that:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of the coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[31]

Concerning mines, it argued that there was no evidence relating this with the incident, nor was there any evidence that this was known, therefore, the principles of The Hague Convention of 1907 were not applicable, an allegation rejected by the Court.[32]

The decision in the *Corfu Channel Case* was presented[33] as a "judicial victory" and a "naval failure". It was a victory as it recognised the right of passage of warships with no authorisation, contrary to the intentions of the Albanians; a failure as the British demonstration had required substantial resources (an aircraft carrier, cruisers and other warships) and the requirement that its conduct be 'innocent' placed it in a position of relative inferiority as regards the coastal States.

In synthesis, we can conclude that the decision of the ICJ in April 9, 1949 introduced the following specifications as regards the regime of innocent passage through international straits:[34]

- Warships have the right to innocent passage.
- This right cannot be suspended or conditioned by the requirement for previous authorisation by the coastal State of the straits when the straits are used for international navigation between two parts of the high seas.
- The defining components of international straits are the geographical component involving the geographical component of connecting two parts of the high seas and the functional component involving its use for international navigation.
- In order to classify straits as 'used for international navigation', it is sufficient that the straits in question are a useful route for international maritime traffic, they do not have to constitute a main route.

Nevertheless, some members of the Court were not fully in agreement with this decision, and held that there was no right of innocent passage in International Law. The dissident opinion of Judge Krylov illustrates this philosophy when he stated:

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[31] Vid. *Ibidem*, p. 28.

[32] Cf. *Ibidem*, pp. 11–12 and p. 29.

[33] Cf. O'Connell (1975, p. 107).

[34] Cf. Yturriaga Barberán (1991a, p. 30).

> There is no common regulation of the legal regime of straits. Every strait is regulated individually... by convention. The regime of the Corfu strait has not been judicially regulated. If the regime of the strait is not defined by a multilateral convention, it appertains to the coastal State or States to regulate it.[35]

1.2.2 The Work of the International Law Commission and the United Nations Conferences on the Law of the Sea Held in Geneva

The decision of the ICJ in the *Corfu Channel Case* clarified certain aspects of law which regulated passage through international straits. However, for reasons of legal security, it was necessary to codify this matter, just as the early doctrine and the States had unsuccessfully attempted to do since the nineteenth century. This background and, especially, the 13 articles on territorial waters prepared by the Second Codification Conference of The Hague of 1930, constitute important material for the work of codification carried out by the International Law Commission (ILC), brought about in the hope of rendering the incipient legal regime more specific.

1.2.2.1 The Achievement of Consensus: The Geneva Convention on Territorial Sea and Adjacent Areas of 1958

The key or 'critical' date for the commencement of consensus regarding a number of rules which govern navigation through international straits was 1949. At the same time as the ICJ was dictating its important decision resolving the *Corfu Channel Case*, the ILC began its work in the area of the Law on the Sea, and chose the regime on territorial seas and the high seas as subjects which required codification.[36] However, considering that the problems concerning territorial waters, the adjacent zone, the continental platform and the high seas were closely linked to each other, both physically and legally, in 1953, the General Assembly decided not to begin to deal with these aspects until the ILC had analysed them all and issued a Report.

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[35]Vid. ICJ *Reports* (1949, p. 74).

[36]For a detailed analysis of the work of the ILC Law of the Sea and the development of the First Conference of the United Nations on the Law of the Sea in 1958, see the publication of Office for Ocean Affairs and the Law of the Sea (1992, pp. 4–20); as well as the important study of Caminos (1987, pp. 44–56). Also of interest are the works of Koh (1982, pp. 35–47); Lapidoth (1972) and Yturriaga Barberán (1991a, pp. 31–37), among others.

In 1953 and in 1955, two projects were sent to the governments so that they might comment on them; only 25 States responded. Finally, in 1956 the Commission completed its definitive projects.

In its Final Report in 1956, corresponding to its eighth session, the ILC recommended that a Conference of Plenipotentiaries be convened in order to examine the legal, technical, biological, economic and political aspects of the Law of the Sea. It also understood that this conference should be carefully prepared by a Project of Articles which appeared as an annex to its Report.[37] In February 21, 1957, by Resolution 1105 (XI) the General Assembly approved requesting the Secretary General that he convene the First Conference of the United Nations on the Law of the Sea, stipulated for the beginning of 1958 in Geneva. On April 29, 1958 the four Geneva Conventions were adopted: territorial sea and adjacent area; continental platform; high seas and high sea fishing.

The question on navigation through international straits was addressed within the general regime of navigation through territorial waters. A circumstance which was undoubtedly surprising if we take into account that all the previous doctrine, which we have referred to, unanimously claimed the creation of an autonomous regime of passage through straits. In the same way, attention should be drawn to the treatment which the ILC granted to the straits where it repeats the classification used in the formula of The Hague Codification Conference of 1930 and other similar formulas based on the mere 'use' of the straits, creating a complete abstraction of the patterns of classification established by the Court in 1949, for which straits are a legal and not merely a geographical institution.[38]

The question of the straits also arose within the ILC in two different contexts. In connection with innocent passage in general and in relation to the delimitation of the territorial waters of States with coasts opposite each other.[39]

In the first case, attention was drawn directly to the straits because it as suggested[40] that, if the straits are subjected to one rule of innocent passage, this circumstance could result in treating all the straits as identical, when there are three categories in fact: those which are subject to international agreements, such as the Bosporus; those which, although they are not regulated by any international agreement, are important for international navigation; and those straits used for international navigation. This leads to noting[41] that the difference between innocent passage in territorial waters used for international navigation is that, in the first case, the warships do not have absolute right of passage, while in the second case

[37]Cf. ILC, "Report to the General Assembly Covering the Work of its Eighth Session", *GAOR*, 1956, Supl. no. 9.

[38]This 'peculiar' circumstance, undoubtedly, had much to do with the fact that the special Drafter of the ILC in this respect was Professor Françoise, who had already been the Drafter of the Second Sub-Committee of The Hague Conference in 1930.

[39]As regards both these questions, see O'Connell (1982, pp. 314–316).

[40]This is the suggestion of Zourek (*ILC Yearbook*, 1955, I, p. 150).

[41]This proposal was put forward by Fitzmaurice (*ibidem*, p. 150).

they do. This proposition connects with the suggestion[42] that the coastal State could prevent warships suspicious of acting against the Charter of the United Nations passing through their straits.

When the ILC considered demanding authorisation or notification of the intention of warships to pass through territorial waters, it then became really necessary to treat straits as autonomous, and legally define them. The decision was taken to identify them by reference to their 'use' in international navigation, rather than due to their being 'essential'.[43] The text which appeared transformed straits into an exception in the case of warships in territorial waters.

Subsequently, there arose the question of straits which do not join two parts of the high seas, but lead to internal waters belonging to coastal States. Discussion took place on the convenience of applying the regime on bays to these straits, and it was proposed that the requirement formulated in the *Corfu Channel Case* concerning the fact that straits connect two parts of the high seas be modified and that the definition of straits be reopened in order to value their usefulness to maritime traffic.[44]

Besides this debate, a proposal was put forward for a new provision concerning straits whose coast belonged to one State. When the project of the ILC was sent to the governments for comments in 1955, Israel realised what this meant for the Gulf of Aqaba and claimed that, regardless of their location, the straits which constitute the only access for a port belonging to a State must not come under the territorial waters regime of another State, which could decide on the suspension of innocent passage.[45]

However, the ILC decided not to include this second class of straits and limited itself to including what was established by the ICJ in the *Corfu Channel Case*. Likewise, no express reference was made to the innocent passage of warships. Finally, article 17, paragraph 4 of the Project on definitive articles on territorial seas drafted by the ILC was drawn up as follows:

> There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.[46]

From February 24 to April 27, 1958, the *First Conference of the United Nations on the Law of the Sea*[47] took place. During this Conference, this paragraph of the project of the ILC was adopted, but with two significant changes: the suppression of

[42]A suggestion made by Scelle (*ibidem*, p. 151).

[43]Zourek submitted a motion in favour of the 'essential' nature of straits, which was rejected (cf. *ibidem*, p. 151).

[44]Cf. *Ibidem*, p. 98.

[45]Cf. *ILC Yearbook*, 1956, II, p. 59.

[46]Vid. ILC, "Report to the General Assembly. . .", *op. cit*., p. 273.

[47]The position adopted by the Spanish Delegation at this Conference was similar to the one adopted at the Codification Conference of The Hague in 1930 (vid. *supra* note 19), as can be deduced from the proposals presented concerning articles 24 and 25 of the definitive project of the ILC (cf. Doc. A/CONF.13/C.1/L.36).

the word 'normally' and the addition of a new category of straits in which the right of passage cannot be suspended.

The suppression of the term 'normally' was proposed by the United States, which argued that "the Court's opinion did not qualify this phrase by use of the word *normally*".[48] This proposal was withdrawn in favour of a more substantial amendment co-sponsored by the Netherlands, Portugal and the United Kingdom, which included the suppression of the word 'normally', together with the addition of a new kind of straits.[49] This involved the fundamental distinction between straits which join two parts of the high seas and straits which lead to interior waters, and led to most discussion among the delegations at the Geneva Conference. Both promoters and detractors considered that this amendment was specifically aimed at the Gulf of Aqaba and the Straits of *Tiran*. It was approved by the First Committee of the Conference by a narrow margin of 31 votes in favour, 30 against and 10 abstentions. At the plenary meeting, the article was passed with 60 votes in favour and 9 abstentions.[50]

Thus, the only *ad hoc* provision concerning navigation through straits is found in Section III of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958, within the "Innocent Passage in the Territorial Sea". This is article 16, paragraph 4:

> There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas, or a part of the high seas and the territorial sea of a foreign State.[51]

Thus, the fact that international straits are a part of the territorial sea is enshrined in law, "precisely that part in which the right of innocent passage as a commitment of the interests of the coastal State and the International Community as regards navigation takes on its authentic, unquestionable significance".[52]

This means that, except for the possibility of suspension, the regime on navigation in straits is characterised by the same right of innocent passage as in the rest of the territorial sea (article 14); that is to say, all the ships which might cross the straits while they navigate through territorial waters and do not enter interior waters, or move towards interior waters or come from interior waters in order to sail towards the high seas; this passage includes stopping and anchoring on condition that these are ordinary navigation incidents or are due to force majeure. The

[48]Vid. Doc. A/CONF.13/C.1/L.39, of March 25, 1958.

[49]Cf. Doc. A/CONF.13/C.1/L.71, of March 28, 1958.

[50]This is due to the fact that the complete article was submitted to a vote, a motion to vote paragraph 4 separately put forward by Saudi Arabia was rejected by 34 votes against 32 and 6 abstentions. The representative of Saudi Arabia, Shukairi, declared that "the amended text no longer dealt with general principles of international law, but it had been carefully tailored to promote the claims of one State" (vid. *UNCLOS I*, 1958, vol. II).

[51]We must point out that this text differs from the formula of the *Strait of Corfu*, as it refers to the "suspension" of passage and not to "prohibition".

[52]Vid. Remiro Brotóns (1975, p. 475).

passage is innocent insofar as it does not harm peace, public order or the security of the coastal State, and it will not be considered innocent if the laws and regulations laid down by the coastal State to prevent boats fishing in its territorial waters are not complied with. The coastal State cannot hinder the innocent passage and is obliged to publicise any danger to navigation it may know of (article 15).

As regards the transit of submarines, the project of the ILC only laid down that these must navigate on the surface, but the Conference accepted a French amendment[53] which required the clear hoisting of the flag. Therefore, submarines must navigate on the surface and show their flags while they cross the straits (article 16.6).

This right of passage does not include aircraft. The question of navigation was examined by the ILC, including the special Drafter who was interrogated regarding the possibility of extending the right of innocent passage in the air space. The response of François was definitive, insofar as the *Chicago Convention on Civil Aviation* of December 7, 1944 did not recognise the right of innocent passage, and that the 193 Codification Conference of The Hague had expressly stated that there was no customary right of innocent passage over the air space of the territory.[54] Along the same lines, the OACI pointed out in its comments on the Project of the ILC that any foreign aircraft did not have any right of passage over the terrestrial superficies of a State or its adjacent territorial sea.[55]

In the light of the above, the ILC does not include any provision regarding aircraft flying over the straits. In fact, the only provision in the Geneva Convention on Territorial Sea and Contiguous Zone of 1958 as regards aerial matters is the article 2 which recognises the sovereignty of the coastal State over the air space above its territorial sea.

There is no doubt that the assimilation of the regime of the straits as regards territorial waters perpetrated by the Geneva Convention of 1958 constitutes a step backwards as regards the creation of a special regime for international straits.

1.2.2.2 The Second Conference of the United Nations on the Law of the Sea

The debates of the First Conference of the United Nations on the Law of the Sea showed that there were important questions on the Law of the Sea pending, such as the width of the territorial sea or the creation of a fishing zone, either because these were not included in the Project of the Articles of the ILC, or because the required agreement of the States is not achieved. Due to this, a final resolution was adopted, in which the General Assembly was requested to study the following session, "the

[53]Cf. Doc. A/CONF.13/C.1/L.6, of March 14, 1958.

[54]Cited in Yturriaga Barberán (1991b, pp. 362–363). This opinion was shared by Professor Pepin, who affirms that the movements of aircraft in both areas are subjected to identical conditions given that the air space over the territorial sea is totally assimilated to the air area over the terrestrial superficies (cf. Doc. A/CONF.13/14, of October 4, 1957).

[55]Cf. Doc. A/CONF.13/31, of June 24, 1958.

advisability of convening a second international conference of plenipotentiaries for further consideration of the question left unsettled".[56]

Resolution 1307 (XIII) of the General Assembly approved the convening of the Second Conference of Nations on the Law of the Sea in order to address the breadth of the territorial sea and the fishing zones. This Conference took place from March 17 to April 26, 1960, in Geneva. Up to this time, 22 States had established the width of their territorial waters at 3 miles, 16 had established between 4 and 11 miles, 13 States had established at 12 miles and 2 States over 12 miles.[57] However, despite the fact that all the proposals of the States on the width of the territorial sea exceeded 3 miles, none of these achieved the required consensus.[58]

None of the proposals submitted referred to the international straits although, during the final discussions of the Second Conference, the sea powers made it clear that a regime of unrestricted passage for ships and submarines through the straits, as well as the freedom for aircraft to fly over these was essential, not only regarding the extension of the territorial sea to 12 miles, but also as regards other questions such as the adoption of the concept of the exclusive economic zone.

However, no agreement was reached and this Second Conference entailed no modification of the regime for the navigation of straits enshrined in the *Geneva Convention on Territorial Sea and Contiguous Zone* of 1958.

Only the tendency which can be seen in the extension of the width of the territorial sea involves a change, to the extent that the number of geographical straits which are considered to be international straits will increase substantially.

If we had to **synthesise** the legal situation of the straits addressed by the III Conference, we can say that *in peacetime* the majority of the straits in the world have been completely free, in such a way, that the type of right which exists in practice approximates more to passage on the high seas than to innocent passage. While *in wartime* a transit channel which is more equivalent to an innocent passage has always been available.[59]

We believe that it should be pointed out that, until this date, the width of territorial sea oscillated between 3 and 6 miles, which means that there were scarcely **ten international straits** included in territorial waters. Evidently, the regime of the 1958 Convention is applied to these, while a regime of freedom applies to the rest as there is a corridor to the high sea. A triviality if we consider that the existing straits amount to over 200.

Thus, the state practice we have referred to concerning navigation in the straits existing previously to the III Conference cannot be fully considered to be a consolidated norm of International law, while, to an even lesser extent, can it be applied to the new legal situation which will arise from this Conference. In fact, the

[56]Vid. Res. VIII, 27 April 1958, *UNCLOS II*, 1960, p. 145.

[57]A synoptic table of the widths of the territorial seas at this time can be consulted in Doc. A/CONF.19/4, in *UNCLOS II*, 1960, pp. 157–163.

[58]For a study of the proposals submitted, see Yturriaga Barberán (1991a, pp. 37–41).

[59]Cf. O'Connell (1984, p. 327).

enshrinement of 12 mile territorial waters by the UNCLOS will substantially change the legal scenario of straits, taking into account that this extension will involve an increase from 10 to more than 100 international straits whose waters fall within the territorial waters of one or several States.[60]

The position of the "new" coastal States with international straits will be underpinned by the defence of their sovereignty over these waters and, therefore, of the right of innocent passage codified in 1958, which will crash head on with the insurmountable wall of the Great Sea Powers which will apply pressure in order to achieve the freedom to navigate and fly over these straits.

[60]A map made by the United States Department of State raised to 116 the number of straits which would become international straits with the extension of territorial waters to 12 miles (cf. U.S. Dept. of State, Office of the Geographer, *World Straits Affected by a 12 Mile Territorial Sea*, Chart #510376, 1971).