

To be cited as
(2013) BSUJPPL Vol. 1 No.2
ISSN: 2141- 8799

**BENUE STATE UNIVERSITY
JOURNAL OF PRIVATE AND PUBLIC LAW**

A Publication of the Department of Private and Public Law,
Faculty of Law, Benue State University,
Makurdi-Nigeria

A PEER REVIEWED JOURNAL

THE LEGAL REGIME OF INTERNATIONAL STRAITS

Dr. Kayode Olatoke Esq.*

Introduction

A strait is defined as "a narrow passage of water connecting two larger bodies of water."¹ defines Straits can vary in size from as narrow as 800 yards to as wide as over 150 miles² K. L Koh asserts³ as Gidel⁴ before him did, that the above geographical definition refers to natural as opposed to artificially constructed water ways, i.e. not canals like the Suez Canal or the Panama Canal. Koh went on to draw the obvious inference that the said water way must lie between areas of land, which land masses could be two continents, a continent and an island or two islands. Also, the sizes of the bodies of water that a geographic strait connects may be two oceans, two adjoining parts of the same ocean. It should be noted however, that not all straits in geography are -straits in law, i. e. a waterway to which some autonomous rule of law applies. Only straits, which are of some importance to international maritime traffic, qualify to be referred to as International Straits in law but according to D.P. O'Connell⁵ "the criterion-has oscillated between straits, which are indispensable to international navigation, such as the straits of Gibraltar and straits which are "used" for it such as the Corfu Channel."

What is International Straits?

These are also known as straits used for international navigation. These are straits for legal purposes. Kob, in his book⁶ stated and discussed four criteria, which he said qualifies a geographic strait for recognition as an international strait, i.e. one falling within a special regime in international law. These are:

- a. It must be a natural water-way.
- b. It must form a geographical connection.
- c. Utility.
- d. Breadth.

* LL.B., LL.M., Ph.D., (Ife), Lecturer, Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin.

¹. Stamp D. Ed. A Glossary of Geographical Term, 2nd Edition, (London: Longmans Green and Co., 1968) 436. See also R.R. Churchill & A. V. Lowe; The Law of the Sea (Manchester: Manchester University Press, 1983) p. 81.

². The Dardanelles (A Strait) is about 800 yards wide on its narrowest part. The Hudson Straits on the other hand are about 155 miles wide. See K>L> Koh, Straits in International Navigation: Contemporary Issues Oceana (1982) page 11

³. Op cit. Page 12

⁴. Gidel, G. LeDroit International Public de la Mer Vol 3, Mellottee, Chateauroux (1934) 730

⁵. D. P. O' Connell, International law of the Sea Vol. 1, Oxford (1982) page 299.

⁶. Koh K.L. Op cit page 13 et seq

a. Natural Water-way: This is also a characteristic of a geographic strait as already mentioned above. In law, an artificial water-way is a canal, which is governed by a different set of rules from that which governs straits. However, the question arises, must a legal strait be wholly natural? In the *ANGLO-NORWEGIAN FISHERIES CASE*⁷ it was held that the "indreleia" was not a strait but a navigational route prepared as such by means of artificial aids to navigation provided by Norway. The court however qualified its statement by stating that, "for the purposes of the present case" it is not a strait, leading Koh to conclude and logically so it is respectfully submitted that the mere fact that a strait has artificial navigational aids does not convert it into an artificial water way. Important straits like the Turkish straits and the strait of Singapore have artificial aids to help navigation but this has not given rise to any suggestion that they are artificial water-ways instead of straits.

b. Geographical Connection: This criterion is a factor in classifying which straits are sufficiently important politically, militarily or economically to justify their being classified as international. BrueI⁸ classifies straits as follows:

1. Inter-oceanic i.e. connecting two oceans (e.g. Megellan Straits).
2. Intra-oceanic, i.e. connecting parts of the same ocean (e.g. Bass Strait).
3. Inter-marine, i.e connecting two by oceans (e.g. Sand and the Belts).
4. Intra-marine, i.e. connecting two parts of the same by-ocean (e.g the Sealant and Svedberg Sound).
5. Those connecting an ocean with a by-ocean (e.g. Strait of Gibraltatar and Strait of Calais). Usually the inter-oceanic and intra-oceanic straits are the only route available and as a result are of strategic importance. Also some very important straits can be found under (v) above.

c. Utility: In the *Corfu Channel Case (Merits)*⁹ both the criterion of geographical connection and utility were considered equally important in determining whether a strait qualifies for a special regime in international law. The International Court of Justice (ICJ) held inter alia that "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."¹⁰

D. Breadth: This criterion has always been tied up with the breath of the territorial sea because under traditional international law the extent of freedom of passage through straits depended on the nature of the breadth of a legal strait and the nature of the waters forming the strait. For example, if a geographic strait is wider than the double breadth of the territorial sea leaving in the middle

⁷ ICJ Reports (1951) 116

⁸ Bruel E., *International Straits Vol. 1* (Copenhagen: NYT Nordisk Forlag, 1947) p.20

⁹ International Court of Justice. *Corfu Channel Case*, ICJ Pleadings Vol. 9 (1949) page 28

¹⁰ See MS. McDougal and W.T Burke: *The Public Order of the Oceans* Vale University Press, New Haven, Connecticut (1962) page 202

a strip of high sea which is navigable, no problem relating to passage arises because the waters would be high sea. In this case, there is complete freedom-of navigation, but where the navigable part of the strait lies in the territorial or internal waters of a strait; state(s), the question of freedom of passage depends on the application of special rules relating to territorial or internal waters.

Regime of International Straits

The uses and strategic character of straits cannot be overemphasized. Passage through them by this saves ships time and money and reduces the distance ships would have had to travel if the strait had not been used. In fact, there are straits, as already stated which are of even more strategic nature than stated above in the sense that some oceans and some states are accessible only through them¹¹ K. L Koh¹² listed the number of international straits in the world as 220. Straits in West Africa are the strait between Canary Island and Morocco, and the Entrance to Cameroon Bay. However, despite the widespread use of straits today and the fact that the title of this paper presupposes the existence of a legal regime of straits, the existence of legal regime of straits has not always been taken for granted. In fact, as recently as in 1949, doubts were still being expressed in international law as to whether a legal regime of international straits existed. For instance, in the Corfu Channel Case (Merits)¹³ Albania, one of the parties contended that there was no legal regime applicable to straits in general¹⁴. Also, in that case, Judge Azevedo (dissenting) noted that apart from the existence of special rules governing certain straits that are applicable under special conventions, there was no special regime for straits and that the position was assimilated with the territorial sea¹⁵. It was the general belief then that the major differences of straits from each other in size, location and importance rendered illusory any attempt to adopt any general rule in relation to straits.

However, Judge Azevedo himself in the same case later advocated the recognition of "the adoption of a general regime for straits of a certain kind, supplemented by special rules for individual cases"¹⁶. The majority of judges in this case agreed with this view. This view was obviously more desirable as can be gleaned from Baxter's summary of the position as follows:¹⁷

The logical consequence of the assimilation of the waters of straits and of the territorial sea would be the elimination of any separate body of doctrine relating to straits, for the law respecting passage through waters within a strait would differ in no respect from the principles having application to passage

¹¹ Example are the straits of Gibraltar, Dardanelles and Kattegat

¹² Op. Cit. pp 24-26

¹³ Supra

¹⁴ See Koh op. Cit page 30

¹⁵ International Court of Justice Reports (Supra) Fn 3, page 104

¹⁶ Ibid

¹⁷ Baxter, R. T. *The Law of International Waterways with Particular Regard to Interoceanic Canals*, Harvard University Press, Cambridge, Massachusetts (1964) pa 166-167

through the territorial sea of a state which does not form part of a strait. The absence of any distinction between the law of straits and the law of the territorial sea would entail as one of its consequences the ability of the coastal state to suspend the right of innocent passage of merchant vessels in a strait, as in other territorial waters, for the protection of its security. The passage of warships through a strait might likewise be made subject to the regulations of the coastal state. To recognize such powers in the riparian state would impose needless and undesirable limitations on any "right of free passage."

Long before the Corfu Channel (merits) case, ever since the principle of *Mare Clausum* had been abandoned by the European countries during the nineteenth century, and the freedom of the seas universally embraced. The industrial revolution and the colonization of Africa and Asia had brought home to the maritime powers, the importance of keeping the oceans free and open as international highways without any restrictions in time of peace to enhance their domination of the "third world". This need for freedom of the seas on their part resulted inter alia in some international bodies being set up to attempt to formulate an autonomous regime for international straits.¹⁸ However, these codification exercises all held between 1894 and 1930 did not treat the question of straits in a satisfactory manner. According to D.P.O' Conell¹⁹ the various tests offered in these exercises as to what constituted a legal strait were based upon its geographical location and the fact that ships made use of it. The question as to how important to the ship the use of the strait was however not seriously addressed. Also, the question whether innocent passage through legal straits especially of warships was an exceptional right or an application of the rule relating to the sea remained unaddressed.

As result of the lack of general agreement between maritime nations as to the legal regime of international straits and its extent, recourse is to be had to treaties with straits states to keep the more strategic Straits open to traffic by treaty or otherwise. A number of agreements were concluded to declare freedom of passage through straits in the late nineteenth and early twentieth century's that are valid even today. The Turkish straits for instance, are regulated by the Montreux Convention of 1934; the straits of Magellan by the Treaty between Argentina and Chile of 1881 opening the straits to vessels of all nations; the straits of Gibraltar by the Anglo-French Declaration of 1904 to which Spain adhered by the Franco-Spanish Treaty of 1912; the Danish Straits by notes exchanged between Denmark and Sweden accompanying the Danish-Swedish Declaration of 1932²⁰.

¹⁸ See O' Conell op. cit pp 301-304 where they are listed as; (1) The Institute de Droit International, 1892-1912; (2) The International Law Association, 1895-1910; (3) The Hague Peace Conference, 1907; (4) The Codifications 1924-1929.

¹⁹ Op. cit page 305

²⁰ See K.D. Shaw, Juridical Status of the Malacca Straits in international Law Vol.14

Ambiguity and lack of general consensus in the law of the sea as regards the legal regime of international straits persisted until the CORFU CHANNEL CASE²¹ where the question of the passage of warships (which would equally apply to merchant ships) through straits in territorial waters was clarified.

The Corfu Channel Case

The facts of this landmark case were as follow. On 15th May, 1946, British Warships passing through the Corfu Channel were fired upon by Albanian Shore batteries. Sequel to this, the British government protested to the Albanian government alleging that the attack was a breach of international law and arguing that in peace or war there is a right of passage for warships and merchant ships through straits forming highways of international maritime traffic¹. Albania on her own part contended that prior authorization was required of foreign warships entering Albanian territorial waters in the Channel. There followed a series of diplomatic correspondences between both countries without the position being clarified or the issues being resolved.

Subsequently, on 22nd October, 1946 to test Albania's stance on the matter, the British government sent a naval squadron through the Channel without having obtained prior authorization from Albania with the aim of asserting its (Britain's) claim of innocent passage. Two British warships hit mines in the North Corfu Channel Strait and 44 Officers and men of the Royal Navy were killed with many more injured. Britain sent mine sweepers to sweep the Channel on 13 November, 1946 and 22 moored mines were cut.

One of the questions for determination before the court was whether the "United Kingdom had violated Albanians sovereignty by her actions in sending her warships through the strait without previous authorization of the Albanian Government. The Court stated²²

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 a 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

The court held *inter alia* that Albania was responsible under international law for the mine explosions and the damage to the ships and subsequent casualties. The court also held that the Channel is an international strait and as such, passage through it could not be prohibited in peace time.

It is noteworthy here, that the North Corfu Channel, where the ships hit the mines constitutes a frontier between Albania and Greece with a part of it being within the territorial waters of both states and before the incidents which led to this case, Greece had made territorial claims on a part of Albanian territory

²¹. *Supra*

²². International Court of Justice (*Supra*) fn 3 page 28 quoted In Koh *op cit* page 32.

bordering on the Channel and had declared that she considered herself technically at war with Albania and Albania cited this as her reason for taking certain security measures in this region²³. However, despite the circumstances, the court held that Albania could not prohibit passage and neither could she subject such passage to special authorization. The court stated that "in view of these exceptional circumstances, (Albania) would have been justified in issuing regulations in respect of the passage of warships through the strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization."²⁴

However, it must be noted that the said passage must be innocent, innocent passage" was given a rather wide application in this case by the Court on the premise that the purpose of the British Naval force's passage was to assert a right against previous and anticipated forceful attempts to deny the right.

Based on the court's ruling it was concluded and rightly said that the authority of the coastal state over passage of warships and other ships is limited to the exclusion of non-innocent passage and that even under such a restrictive interpretation of the coastal state's right to refuse passage, it still has wide discretion and the authority at least in the first instance, to decide whether a passage is or is not innocent.²⁵

The Regime of International Straits under the 1958 Geneva Convention

ARTICLE 16(4) of the 1958 Geneva Convention states:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state. This is a proviso to paragraph 3 of the same Article that... the coastal state may suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security.

Article 16(4) had its origins in the controversy at that time, between Israel and the Arab states regarding the right of Israel to pass through the strait of Tiran to the Israeli Port of Eilat in the northwest of the Gulf of Aqaba. The Corfu Channel rule refers²⁶ only to straits used for international navigation between two parts of the high seas and was not applicable in the instant case to the strait of Tiran and the Gulf of Aqaba because to pass through the strait to go to the Port of Eilat, Israeli ships have to pass through the territorial seas of Saudi Arabia and Egypt.

Israel argued that the strait should be at parity with straits linking areas of the high seas as provided by the Corfu Channel rule because it provided a route from the territorial sea to the high seas and vice versa. The United States

²³. See *Koh op. Cit.* Page 32

²⁴. *Corfu Channel case (Supra)* page 29 (Emphasis added).

²⁵. F.P. Anand "Transit Passage and Over flight in International Straits" *Indian Journal of International Law* Vol.26 No. 1 & 2 January-June, 1980 pp 86-87

²⁶. See *Koh op. Cit* page 36

of America, seeing this as a great opportunity as a major maritime power to extend its freedom of the seas ideology, threw its considerable weight behind Israel²⁷ and when the issue was raised at the Geneva Conference on the law of the sea, the conference by a very narrow margin of sixty-two votes in favour to sixty-one against with nine abstentions, extended ARTICLE 16(4) to cover, "the territorial sea of a foreign state."

However, the Arab states because of this clause, refused to sign the 1958 Convention and have consistently disputed Israel's right to use the strait by threatened or actual closure of the strait on several occasions.

Jurists generally held the view that as regard the regime of straits, the 1958N Convention was a failure. R.P. Anand stated that the assimilation of the regime of straits with that of the territorial sea in the 1958 Convention was a step backward for all these supporting a special regime for straits.²⁸

R.R. Baxter²⁹ expressed the view that this assimilation would eliminate any separate body of doctrine relating to straits because the law regulating passage through territorial waters in a strait would be the same as that regulating passage through territorial waters which do not form part of a strait and as a result, the coastal state would have the power to suspend the passage of merchant vessels³⁰ in straits for the protection of its security.

D. P. O'Connell put it succinctly thus³¹

If the right of passage through straits is only a corollary of a right of passage through the territorial sea, and not an autonomous institution of international law, there would be serious doubt whether the Geneva text would literally apply in such cases. If it does not apply, there is no text forbidding the suspension of passage in the interests of security, and indeed, no text whatever on the right of passage in such cases.

This writer respectfully agrees with the point of view of the above quoted jurists on the ground that before the 1958 Geneva Convention, it was obvious from the Corfu Channel case that straits were progressively acquiring a legal regime of their own different from that of the territorial sea but the lumping together with the territorial sea of straits by ARTICLE 16(4) of the Convention took the process of the evolution of an autonomous legal regime of international straits back to pre-historic times, so to say.

²⁷ . Op. Cit page 37

²⁸ . Op cit page 88

²⁹ . Baxter quoted in Kob op cit. Page 30

³⁰ . Article 23 of the Convention also gave the coastal state the right to order a warship to leave its territorial sea if did not comply with the regulations of the coastal state as regard rules of passage.

³¹ . D.P.O'Connell op. Cit page 316

The Territorial Sea and the Regime of International Straits

This sub-topic is of great importance in any study of the regime of international straits because of the fact that its limit have always been a subject of dispute among states with the great maritime powers especially Great Britain claiming as little as three miles while Russia claimed as much as 100miles³². Disagreement as to the scope of the territorial sea continued well into the twentieth century with each state claiming the distance it felt it was in its best interest to claim. After World War II, with the heightened awareness of the potential of the seas as a source of natural resources, many coastal states sought to extend their territorial waters to facilitate future exploitation of these resources, so the controversy as to the scope of territorial waters increases. The International Law Commission in its 1956 report to the United Nations General Assembly stated that "the extension by a state of its territorial sea to a breadth between three and twelve e miles was not characterized by the commission as a breach of international Law (but that) international law did not just (an extension of territorial sea beyond twelve miles."³³

The 1958 and 1960 United Nations Conferences on the law of the sea did not reach any agreement on the breadth of the territorial sea. However, by 1974, just before the first substantive session of the 3 UNCLOS 54 states were claiming a 12 mile territorial sea. Another 17 states claimed territorial waters ranging from 15 to 200 miles. Another group of 25 states which includes most of the Western Maritime powers continued to adhere to the three mile territorial sea³⁴

One does not have to look far to understand why the major maritime powers were at the best of time lukewarm about the extension of the territorial sea to twelve miles. This extension, they knew, would include within the maritime zone jurisdiction of coastal states, a great number of international straits which hitherto had a strip of high seas running through them³⁵. Many of these coastal states had just gained independence and nations and in many cases their former colonial masters, was like most of their socio -economic and political policies - to their (the newly independent coastal states) disadvantage because it would undermine their security and economic interests³⁶. By extending their territorial waters, these coastal states could also guard against things like dumping on the high seas and oil spills and thus protect their environment. Indonesia and the Philippines for example, sought to employ the method of straight baseline joining the outermost parts of the outermost islands of the archipelagoes for delimitation of their extended territorial water³⁷, thus enclosing

³² . Russia later in 1912 declared a 12 mile territorial sea

³³ . Y.B.I.L.C., 6012 (1956), page 265

³⁴ . See Anand, Freedom of Navigation Though Territorial Water and Straits, "Indian Journal of International Law" Vol. 14(1974) page 171.

³⁵ . Dover strait, Strait of Gibraltar, & Bering straits for example would come under their coastal states territorial sea jurisdiction

³⁶ . See Anand *Tyranny of the Freedom of the Seas* "International studies" Vol.12 (1973) pps 4 16-29

³⁷ . See Anand *Mid-Ocean Archipelagoes in International Law: Theory and Practice*, I.J. IL. Ed. 19(1979) pps 238-

within these territorial waters very important straits like Sunda, Lombok, Ombai-Wetar, Macassar and Malacca.

The maritime powers found this trend to be totally at variance with their push for "free passage" through international straits. It was obvious that a compromise had to be found between the two extremes, and what better forum to reach such a compromise than the 1982 United Nations Convention on The Law of The Sea.

The Regime of Straits and the 1982 United Nations Convention on the Law of the Sea

At the Caracas session of the 1982 UNCLOS the maritime powers stressed that unless unimpeded passage on, over and under straits used for international navigation was conceded to all commercial vessels and warships including submarines, there was simply no possibility of coming to an agreement on the subject of national jurisdiction and other issues³⁸

Eventually, as finally adopted, the 1982 Convention provides for a guaranteed non-suspendable transit passage through straits and archipelagic waters, but this right is subject to the power of the coastal state to make rules for navigational safety, rules guarding against pollution and rules relating to fishing.

Provisions of the 1982 UNCLOS dealing with straits are contained in Part III. One of the most notable things about this convention is its provision for separate regimes for "innocent passage" through territorial seas as provided for in Articles 17 to 32 and "transit passage" through international straits and provided for in Articles 37-45. By providing separate regimes for territorial sea and international straits, the 1982 UNCLOS succeeded in reversing the reversal brought upon the evolution of a separate regime for international straits by the lumping together of the 2 (two) regimes by the 1958 Convention.

We shall now examine the important provisions of the 1982 UNCLOS relating to straits. Article 34 provides that apart from the regime of passage through international straits the sovereignty or jurisdiction of strait states shall not be infringed upon subject to other rules of international law. Section 2 Part III of the 1982 UNCLOS deals with transit passage and applies to straits 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.³⁹

Transit passage, as defined in Part III⁴⁰ is...the exercise in accordance with this part of the freedom of navigation and over flight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high

³⁸. See Anand, *Transit Passage and Overflight in International Straits* I.J.L.L. Vol.26 Nos. 1 & 2 January/June, 1986 page 94

³⁹. Article 44

⁴⁰. Article 38(2)

seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a state bordering the strait, subject to the conditions of entry to that state.

Since the regime of innocent passage in territorial waters is different from that of transit passage in straits, ships posing through international straits do not have to satisfy the conditions for innocent passage and the phrase "In straits" referred to in article 37, all ships and aircraft enjoy the right of transit passage which shall not be impeded. In article 38(1) to my mind include both warships and aircraft used for purposes of war. Section 38(3) is to the effect that any activity that is engaged in by any ship or aircraft in the strait that is not solely for the purpose of continuous and expeditious transit shall be subject to "the other applicable provisions of this convention" i.e. such activity would bring the ship under the regime of innocent passage which applies to territorial waters which implies that passage can now be denied the vessel or aircraft if the coastal State deems such passage as not innocent.

However, even after the passage has been deemed not innocent by the coastal state, from the provisions of article 30 the passage of warships cannot be impeded, it can only be asked by the coastal state to leave the territorial sea immediately and if it does not comply then the only option open to the coastal state is to pursue the matter through diplomatic channels, probably by taking the matter to the International Court of Justice for redress. At first glance it may seem that this provision is inadequate and that the recourse to the ICJ would be belated in practice when the offending warship could probably have been off the territorial sea by a warship of the coastal state, but this would distort the essence of the whole of Parts II and III of the Convention i.e. the movement towards the concept of freedom of the seas. In the same vein, transit passage under article 44 of the 1982 Convention is not suspendable by the strait state for any reason

Article 39 states the duties of ships and aircraft in transit passage. They are required under sub-section (1) to proceed without delay over the strait, to refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the strait state and to refrain from any activities other than activities incidental to their normal modes of transit except that which is caused by force majeure or by distress.

Sub-section(2) requires ships in transit passage to comply with generally accepted regulations, procedures and practices for preventing collisions at sea and for the prevention, reduction and control of pollution from ships.

Sub-section (3) refers to aircraft in transit passage. They are required to, if civil aircraft, observe Rules of the Air established by the International Civil Aviation Organization. State aircraft are subject to a lesser degree of regulation. They are only required to operate with due regard to the safety of navigation. All aircraft in transit are also required to monitor at all times the radio frequency

assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency

Still on international safety standards, article 41 provides that strait states may designate sea lanes and prescribe traffic separation schemes for navigation in straits but this proposals must first be referred to the competent international organisation⁴¹ for adoption. According to CHURCHILL AND LAOWE in their book⁴² this sort of check on the power of the strait states to prescribe regulations for vessels in transit passage precludes the exposure of merchant ships to a mass of differing and possibly inconsistent regulations as they sail around the world. In the same vein, article 42 provides that strait states may adopt laws and regulations relating to transit passage, subject to the provisions for part III of the Convention.

Article 40 prohibits foreign ships in transit passage from carrying out any research or survey activities without the prior authorization of the states bordering straits.

Section 3 of Part 3 of the Convention deals with innocent passage. Article 45 provides that the regime of innocent passage shall apply in international straits excluded from the application of the regime of transit passage under article 38(1) or between a part of the high seas and territorial seas of a foreign state. Paragraph 2 of the article provides that there shall be no suspension to innocent passage through such straits. This is the main point of departure between the regimes of innocent passage through territorial waters as provided for in Part II of the Convention, and innocent passage in straits because under Part II the coastal state may for security reasons temporarily suspend innocent passage in specified parts of the territorial sea⁴³

The 1982 Convention rules on transit passage do not oust those applicable under long-standing international conventions, which regulate passage through particular straits in whole or in part⁴⁴. The implications of the application of this principle could be a bit difficult to apply because of the peculiar nature of each strait and the different terms used in each of these long standing conventions, for example a treaty made in 1881 between Argentina and Chile provides that "the straits of Magellan are neutralized forever, and free navigation is guaranteed to the flags of all nations" but does not elaborate upon the nature of this right of "free but navigation."⁴⁵

Conclusion

This article carefully studied the 1982 United Nations Convention on the Law of the Sea and the far-reaching contributions it has made to the regime of international straits. However, we must bear in mind that the 1982 UNCLOS has

⁴¹. This is the International Maritime Organisation

⁴². Op cit page 85

⁴³. Article 25(3)49.

⁴⁴. See Article 36@50

⁴⁵. See Churchill and Lowe op cit. Page 86

not, up till the present, received the required number of ratification's. The leading maritime states, Britain, United States of America and Germany have refused to ratify the 1982 UNCLOS choosing Instead to accept the provisions which are of benefit to them and refusing to accept the burden of others. United States of America has been especially guilty of this. This policy was described by Anand⁴⁶ as "Heads I win, tails you lose."

For instance, the United States has accepted the 1982 UNCLOS provisions as regards the rights of navigation and over flight but rejected the Convention's deep seabed mining provisions, 'as contrary to the interests and principles of industrialized nation.⁴⁷ However, states, which are parties to the Convention, are not prepared to accept the U.S. Policy of picking and choosing lying low. In March, 1983 the group of 77 declared. It is firm opposition to any action by states which have not signed the Convention to apply selectively, whether unilaterally or jointly, the provisions of the U.N. Convention on the Law of the sea while continuing to reject the provisions relating to the international seabed area.

⁴⁶. Anand, "Transit Passage and Overflight in International Straits" *Journal of International Law* vol. 26 Nos 1 & 2 January— June, 1986 page 100.

⁴⁷. *Ibid* page 99