

Foreword

The four 1958 Geneva Conventions on the Law of the Sea, which codified and progressively developed this sector of our legislation, were rather ephemeral despite the fact that they were constituent Conventions. In fact, the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) again undertook the same task with the same spirit 20 years later after a long drawn out global negotiation process in which all the marine areas and problems pending were analysed and discussed by the countries attending, and an apparently strengthened majority was attained, including the essential agreement between the principal naval powers and the third world countries, symbolised most grossly in the recognition of exclusive economic areas which were 200 miles wide in exchange for a significant alteration to the legal rules applicable to the international straits. From 1973 to 1982, the negotiations showed that there were a number of particular factors affecting the seas: “strait” countries, user countries, long range fishing countries, embedded countries, archipelagic countries, broad platform countries, etc.

In 1982 when the UNCLOS was adopted, it seemed to be a text with justified pretensions to be in force for a long period of time as the nine years of negotiations required for its adoption had taken into account the main problems pending agreement although not absolutely all. However, 25 years later this same opinion is no longer valid as the UNCLOS has real gaps concerning questions of a substantial nature. Firstly, there was the failure of the international seabed and ocean floor zone, then the high sea fishing regime especially with regard to transzonal highly migratory species, and the determination of the exterior limit of the continental platforms beyond 200 miles (which has given rise to claims by several coastal States), followed by the unjustified establishment of archipelagic statutes and the adoption of very long straight base lines over 200 miles by mixed States as well as others of lower intensity.

It is clear that during the codifying processes and in the posterior revision there are no eventualities, and, if the work carried out in 1958 was obsolete two decades later as a result of a multitude of new independent States, as a result of colonial emancipation, the patient, long and complex work of 1982 led to another basic

structural change in international society: the disappearance of the Soviet Union and the Socialist Community of States. Thus, after 1958 a crisis arose as regards the traditional approach to the contradiction of interests between the north and south, as there was an evident majority of developing countries after 1982, or more specifically after 1990, when the crisis substantially affected the previous correlation of eastern and western forces. This means that, if the first codification ended in turmoil due to economic reasons, the second was affected by the ideological and geostrategic changes. This partially explains the current difficulties faced by the UNCLOS, and the need to adjust its provisions to the new global order.

In my opinion, this is relevant when the analysis of the current judicial regime on straits used for international navigation is addressed, as included in the UNCLOS. In 1982, the Soviet Union and its allies led the antagonism to the hegemonic pretensions of the other super power and its allies. Separated by a strong ideological differences, the Soviet Union and the United States, in their balanced super power roles, were going through a warm, almost pre nuptial idyll as regards their coincident geostrategic interests as both of them were attempting to achieve a regime which would enable the maximum mobility of their respective air and sea forces through all the straits, while preserving the security of their own straits. This interest was shared with their tributary organisations for their legitimate collective defence. Thus, it was relatively easy to reach agreements and achieve the reciprocal adjustment of interests at the III Conference with the majority of the countries of the third world in order to agree on fishing boats, that is to say, a new international legal regime in the straits in exchange for economic zones of 200 miles.

However, this exchange was not made without difficulties as several “strait” countries, that is to say, the coastal States of seas and oceans whose national security was essentially dependent on the effective control of their straits became a group which was strongly opposed to the new proposals to alter the regime established in 1958. This group included Spain. It must be borne in mind that, when the two super powers claimed new regulations regarding the freedom of passage of their warships and war planes in the straits, did not refer to *all* the straits or to *any* strait, but essentially to the handful of straits (between five and nine, according to the data provided at the time by the Office of the Geographer of the United States Department of State) with authentic global geostrategic importance; in other words, those which might place the whole of the world economy in danger in times of crisis depending on who might have their effective control due to the amount of traffic and the quality of the goods transported (for example, hydrocarbon on a large scale). In short, this entailed the capacity to guarantee or strangle world trade and the international economy at a given time. This handful of straits always included Gibraltar, closely involved in the strategic defensive axis and the security of Spain (the Balearic Islands–Gibraltar–Canary Islands Axis).

We have just pointed out the general aspirations of the naval powers in this matter in order to explain that, once a basic consensus was achieved on the two crucial questions (the binary classification of the straits and an introduction to the right of transit passage), the basic geostrategic interests were fulfilled and the road was clear to achieving a *package deal*. A small group of strait coastal countries

showed their belligerence to the technical-legal aspects of the new regime announced, which was a sign that the stipulations agreed to failed to resolve some of the substantive problems of certain straits or gave rise to questions which were not fully answered or entailed contradictions with no solutions provided. Having said this, what was put forward at the time was the basic agreement on what were considered to be tiny legal nuisances which subsequent practice would solve.

The drastic changes in the position of some coastal States of straits after 1982 which previously had championed the right to innocent passage, as is the significant case of Spain, cannot be ignored. After the consolidation and normalisation of democracy, Spain chose to join its strategic future to that of the United States and NATO, which explains why it ceased to be a persistent objector to the new regime on international straits and embraced the advantages of the right to transit passage through the Strait of Gibraltar in order not to become involved in an insurmountable contradiction with the winds of History. In fact, the allies of Spain were strongly in favour of this and it was considered that the effective control of the strait guaranteed by the regime of 1958 was more nominal and formal than real as Spain lacked a dissuasive military force to combat nuclear submarines with strategic nuclear weapons. In fact, in 1982 the effective control of Gibraltar was located in the British military base on the rock and the United States military base in Rota, which meant that Spain was superfluous and could only be invited to the banquet after joining NATO. Thus, it had to take back what it had said earlier.

Besides the factors mentioned above regarding the reconsideration of the regime for navigation through international straits, there are other reasons endogenous to the evolution of the law of the sea which follow the same route. Among these reasons was the progressive extension of the territorial sea as, according to the 1958 regime with territorial seas usually limited to 3 nautical miles, a substantial number of straits understood from the geographical point of view were not the same in the legal sense as the breadth of the strait was greater than 6 miles and there were areas of high seas open to free navigation and overflight. However, the simple fact that the 12 mile territorial seas became generalised led to a 101 straits being considered as such in strict legal terms. In other words, the question of the straits and their legal regime ceased to be a minor question and became a common problem in practically all the geographical straits. This generalisation was due to the hasty conversion of the provisions regarding innocent passage to a general regime within less than two decades when this had only been applied to a limited number of straits since 1958.

More specifically, as regards the provisions of the 1982 UNCLOS, one of its outstanding aspects is the fact that it does not give a definition of the "straits used for international navigation", and, although this data was not of any special concern in the 1958 regime, it did become important in the 1982 regime for the reasons mentioned above. This silence was not a result of forgetfulness or improvisation during a codifying conference involving numerous political and legal controversies, but was rather due to the calculated ambiguity which would serve to understand the new right of transit passage; that is to say, this lack of definition was to the advantage of the great sea and air powers, and gave the coastal countries of straits new possibilities within this lack of definition. Thus, the provisions of Part III of the

UNCLOS were made to prevail over those of Part II, the expired and obsolete heir of the 1958 provisions, giving prevalence to the right of transit passage over the right of innocent passage, that is to say, giving more freedom to the countries using these straits, the main naval powers. This means that an objective component which cannot be appealed against (geography and geology have decided that a State is a coastal State of a strait) is to the advantage of the interests of the vessels with flags of convenience and other users.

At this point, mention should be made of the effective application of international responsibility as regards the users mentioned above. Undoubtedly the regime of the straits must maintain a balance between the general interests of international navigation involved in the transport of goods and those concerned with the security of the coastal countries. Logically, in 1982 the security of the coastal countries was focussed on military, geostrategic and defensive factors as a consequence of the bipolarity of the time; however, at the present time, this component is no longer the decisive one as the concept of security is perceived in broader terms and, in a mono-polar world, the military argument is no longer relevant – especially as regards the coastal States belonging to alliances with the *hegemonic power* –, and those threatened by a serious risk of massive pollution due to accidents involving vessels transporting hydrocarbons. The most recent sea catastrophes recorded in coastal States were generally the result of sea and land pollution as a result of accidents involving oil tankers and not the result of military action. This gives rise to the question of international responsibility, especially in the case of the numerous vessels sailing with flags of convenience which systematically fail to comply with the required security conditions or which do not respect the stipulations regarding the separation and ordering of traffic in the straits laid down by the coastal States. In these cases, when a vessel in passage is involved in internationally illicit events, the possibility that the coastal State might initiate an action regarding international responsibility against the State of the vessel becomes merely virtual and illusory, especially when this country is underdeveloped. The only way to repair the damage is privately through the insurance contracted by the ship-owner, which may not exist or is simply illusory as there is a scarcity or total lack of adequate premiums.

Similar to this problem and apart from international responsibility there is the passage of other types of merchant vessels through the straits, such as nuclear driven vessels, those with special characteristics and those used for the transport of highly hazardous or toxic goods. In these cases, the risk inherent to the pollution of the waters and coasts of the coastal States multiplies, together with the risk from aircraft. In other words, the balance of interests must take into account the permanent risk of pollution felt by the coastal State; consequently, international legislation must provide precise regulations in this regard, especially when the provisions of the UNCLOS contain wide areas for development in this area. Notwithstanding the above, its guarantee rules are extremely generic and insufficient concerning the protection of the interests of the coastal State against certain users. As an example, there is article 19 of Part II (curiously related to innocent passage) for warships and warplanes related to the rules contained articles 38 et sequitur of Part III specifically dedicated to the right of transit passage. In conclusion, the Convention gives

prevalence to the mobility of the large sea and air fleets over the security of the coastal State in the straits included in its Part III.

Both from the quantitative and qualitative point of view, what was common currency in the 1958 system, the right of innocent passage came to an end as from 1982 as the right of transit passage through the main straits, that is to say, those included in article 37, became dominant as regards the number of straits affected and their intrinsic importance in the context of international navigation, as well as with regard to the absence of sufficient guarantees to safeguard the security of their coastal States. The UNCLOS avoided the possibility to establish a precise catalogue of all the specific obligations affecting the user countries and the corresponding correlative rights of the coastal States. A hasty, superficial reading may lead the reader to feel that the regulation of the right of transit passage includes sufficient, necessary regulations, but a more conscientious and deeper analysis, as provided in this work, highlights the fact that this would be a vain, optical illusion with no grounds. The leaks detectable in the hull of the right of transit passage are so serious, although this may seem paradoxical, that they forebode the total sinking of the undeniable interests of the coastal States, not only as regards the defensive military risks, but also the wider risks to security.

This unavoidably leads us to a theoretical question which is of evident, practical interest. I do not refer to the codifying content, but to the progressive development in Part III of the UNCLOS, in relation to its possible consideration as new law in force and, therefore, its hypothetical opposition to all the coastal countries, regardless of whether they are parties or not to UNCLOS. This would be the equivalent of eliminating the right of innocent passage from the straits in Part III, including its possible application by the States which are not parties to UNCLOS. The problem can be examined from different legal perspectives: first, in relation to the possible maintenance of the strait countries as persistent objectors to the new regime for straits in article 37. The response cannot be classified as satisfactory and clarifying as many countries of this former group are currently in favour of the new regime (Spain), others which seemed to maintain the former regime have recently surrendered (Morocco), and only a minority of countries remains loyal to their original positions. The second perspective involves the process of creation and modification of the international norms, more specifically, the conduct of the coastal States affected. It appears to be clear that a legal regime of several centuries (the right of innocent passage) cannot be demolished in a brief period of 20 years (those years which have elapsed from the entry into force of UNCLOS) by the right of transit passage becoming implemented as law in force. Clearly this requires the opposition and clear conduct of the coastal States affected. As we have just seen, this is far from being systematic, constant and coherent practice by a sufficient number of objector States. However, it would be necessary to explore the possibility that it is precisely the vagueness, insufficiencies, contradictions and silences of the new regulation, which are sufficiently fertile field for the practice of certain coastal countries, even without opposing the new regime, might constitute a clear framework of reference in order to offset these deficiencies, a question of undoubted interest for countries such as Spain.

I refer to the national legislations both before and after 1982, but which remain in force in the first case and regulate particular aspects of navigation through the straits, as is the cases of Albania, China, Djibouti, Estonia, Finland, Italy, India, Montenegro, Samoa, Saint Vincent, Sweden, Uruguay, Yemen, etc., which, protected by the ambiguities of the UNCLOS and the possible coincidence of the 1958 Geneva system and the new 1982 regime, regulate very relevant aspects of the security of the coastal States with regard to the passage of warships, merchant vessels, those engaged in the transport of hazardous substances and others. Thus, in many cases State regulation of their straits involves a curious cocktail of the old codifying norms and the new norms to be progressively developed, with no apparent difficulties. The difference regarding the approaches explained above lies in the fact that a small group of strait countries have chosen persistent objection to the new regime (as in the cases of Iran, the United Arab Emirates or Venezuela), while others actively maintain particular positions with respect to new, very specific rules even though they are parties to UNCLOS. This entails a type of specific objection, manifested through legislation, which displaces the burden of opposition or non-opposition towards the States using these straits which either choose protests and formal opposition (with the risk this involves for the vessels flying their flags), or they accept the particular situations in specific straits. In other words, they manage to maintain the general terms of UNCLOS but they modify it as regards third party users as concerns specific rules and always in defence of interests of national security while observing a appreciable balance between the general interests of navigation and their own interests.

This possible approach is of undeniable interest for countries such as Spain, a coastal State of one of the five most important straits in the world from the geostrategic point of view, as this would make it possible for Spain to have systematic and specific regulation of certain modalities of navigation through the Strait of Gibraltar which will reasonably guarantee the interests of national security in this geographical scenario. Precisely, the position of Spain would be symptomatic in this regard as it is a coastal State which changed its position as a State which was a persistent pre-objector of the new regulation to that of a new convert to its excellences in a very short period of time. We all know the reasons for this transformation which involved making an agreement on defence cooperation with the United States and joining NATO. However, the strategic options and imperatives do not necessarily have to come into contradiction with other demands of national security, as happens with the obligations concerning precautions to be taken as regards over 60,000 vessels which pass through the Strait of Gibraltar every year, an obligation which cannot be renounced. In my opinion, this is a possibility which should be studied and applied although I believe it is not one of the priorities of the Spanish Foreign Ministry despite the problems occurring there due to accidents involving petrol tankers and the breakdown of nuclear submarines.

One final criticism of the UNCLOS which I should mention is the cataloguing of the international straits contained in its Parts II and III, and the lack of definition of the concept. When International Law defines and regulates certain marine areas

which are the primary object of knowledge of other scientific disciplines, as is the case of bays, islands, archipelagos and continental platforms widely studied in geography and marine geology, it always adds authoritarian and arbitrary components. In fact, for International Law, an island, a bay or a continental platform are what the law says they are, and not what other sciences consider them to be. Clearly arbitrariness has certain limits, as an example, it does not make sense to consider a geographical accident to be a bay when it does not have the slightest appearance of a bay. This consideration is fully applicable to straits since, when the UNCLOS distinguishes between primary and secondary straits, and defines them incompletely or ambiguously; the 200 plus straits are infallibly included within one or other concept, with no possibility of escape and with no doubts. However, geography is richer, more varied and stubborn than the definitions of the jurists, and teaches us that there are straits with particular conditions which would not be included in the above distinction, or they are of a mixed nature or have decisive, differential factors which are not stipulated in law. Which regime is applicable to these straits without incurring arbitrariness incompatible with a healthy legal system? Again, geographical particularities (that is to say, objective particularities) call the law into question and also claim particular treatment in the legal regime.

Moreover, it is clear and interesting that the studies referring to the regime of straits in the comparative bibliography are almost all restricted to explaining the characteristics of the 1958 Convention on territorial seas and the UNCLOS, while extending their analyses to the work and the positions maintained at the respective codifying conferences, and, in the best cases, this involved analyses of some national legislations in this regard together with conclusions which, depending on their quality, we consider to be the last word on the matter. Nevertheless, in fact security and control measures concerning sea and navigation are adopted, respectively, by the International Maritime Organization (IMO) and by the International Civil Aviation Organization (ICAO), and knowledge of the internal acts of both organizations on the regime of each strait is essential in order to draft a diagnosis of the regime effectively applied to the straits. Thus, a large number of these studies provide merely formalist and nominal results regarding what is stipulated, but not with regard to the regime which is effectively operative in each strait, and this is more decisive as concerns such substantial and central matters as those concerning the security and control of international navigation, that is to say, to questions which are highly important for the security of the coastal States and are adopted on proposal by them.

This book does not contain any of these flaws. It evidently attempts to explain what happened after 1982, analysing the regime currently in force in each strait, and once and for all overcoming the bibliography obsessed by the UNCLOS and not by the results of its application in practice. The great majority of straits have been the subject of study concerning the regime effectively applicable to date, the result we have reached today through total or partial application or non-application of the UNCLOS. This responds to a dynamic and evolutionary perspective of International Law, as appears in reality and not in a photo of the 1982 Convention. The intention is to explain the law as it is and not as it should formally be.

In my opinion and in the light of these concepts, the following work of Professor López Martín contains a balanced analysis within the conventional abstract provisions and has a real application to the main straits in the context of the interests in question, once light has been shed on the ambiguities, insufficiencies and silences of UNCLOS. Among its undeniable merits is the fact that it has reviewed the physical and geographical characteristics of the straits as a previous question to the determination of the applicable legal regime, a task which has several results, among which is the particular situation which entails few areas in consonance with conventional regulations, together with a possible accumulation of regimes or an absence of legal concepts which are undoubtedly applicable. Furthermore, it contributes the provisions of the de la IMO applicable to the security and control of navigation through the international straits, important information which is a relevant component of the work. There is also a rich legal bibliography although the author does not simply recreate it but uses it selectively for operative not merely speculative or theoretical-objective purposes.

As in her previous books, this task has been carried out by Professor López Martín with the legal precision and meticulousness of her works, while she also achieves a difficult balance between the macrocosm contained in the UNCLOS and the microcosm of each international strait, regardless of whether this is primary or secondary. Thus, the long list of straits is broken down into different types with different characteristics. The final result is an uncommon work within the bibliographical panorama, that is to say, less doctrinal and generalist and with more attention given to the reality of the straits, while remaining loyal to the spirit and finality of the work, which is to show the real state of the question in 2010 and not become bogged down in reminiscences of the 1982 provisions as the number of years elapsed between these dates render this essential. Some years ago, doctrinal interest in international straits was obvious in Spain although this was due to a large extent by the situation of Gibraltar although currently this interest seems to have decreased substantially. However, the objective data and the facts continue as they were apart from the new Spanish geostrategic options. Moreover, global analyses were always carried out within the framework of the bipolar scheme which dominated international relations at the time, and it seems that the perceptible transit from a bipolar situation to the current system with a single super power has reduced interest in the legal regulation of straits when the new situation seems to demand the opposite as the only defence of the weak against the hegemonic nation lies in International Law, and not in the comfortable protection of the friendly super power. A calm and balanced examination from, by and for International Law, while taking into account contradictory State interests, is the concealed unexpressed objective of this work, an objective which has been achieved with no reservations.

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