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TURKEY'S AUTHORITY TO REGULATE PASSAGE OF VESSELS THROUGH THE TURKISH STRAITS

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INTRODUCTION

Passage of the landmark 1994 Turkish Straits Regulations (the 'Regulations'), while representing an important achievement for Turkey in the regulation of maritime traffic through the Turkish Straits—the İstanbul Boğaz (Bosphorus), Sea of Marmara, and Çanakkale Boğaz (Dardanelles)—sparked a flurry of criticism and, at times, vituperative objections from certain members of the international maritime community, particularly from Black Sea riparian states. The Regulations were adopted and implemented by Turkey on 1 July 1994. However, prior to their implementation the section regulating ship routing and traffic separation schemes was submitted to the International Maritime Organisation (IMO) for adoption. The proposed draft was adopted by the 19th Assembly in 1995 together with a set of recommendations and the Maritime Safety Committee was charged with receiving submissions from governments on the operation of the recommendations for suggested changes to be presented at the following 20th Assembly.¹ Still, certain member states, including Greece and Russia, opposed the Regulations on the grounds that they were in violation of the provisions for freedom of navigation and passage as stipulated in the 1936 Montreux Convention. At the 20th IMO Assembly held in November 1997, the same objections were raised and the matter was returned to the lower committees for further discussion.²

In addition to the controversial 1994 Regulations recent controversy has arisen from Turkey's decision to stop and search vessels suspected of transporting missile parts in reaction to the Greek-Cypriot Administration's decision to purchase Russia S-300 missiles for targeting against Turkey. Each of these controversies directly impacts on the question of Turkish sovereignty in the Turkish Straits and the parameters of Turkey's authority to regulate the passage of vessels.

This article seeks to analyse these questions within the framework of the 1936 Montreux Convention taking into consideration both its history and evolution, and its relation to accepted principles of international law.

A BRIEF HISTORY OF THE TURKISH STRAITS

Ottoman domination over the Straits began with the conquest of Constantinople in 1453 and peaked with the rule of Süleyman the Magnificent in the sixteenth century when Ottoman naval power exerted complete control over the Black Sea and was the dominant sea power in the Mediterranean. In 1696, however, the loss of the Azak Fortress on the coast of the Sea of Azov to Russia signalled the first chip in what was to become a slow and war-ridden contraction of Ottoman rule. Nonetheless, until 1841, the Ottoman Empire succeeded in retaining absolute control over the Straits, allowing special passage rights by bilateral treaties, while maintaining a firm proscription against the passage of any foreign war ship through the Straits. Only in 1841, when the first multilateral convention was signed in London, did the Ottoman State agree to limit the absolute control it had thus far exercised over the Straits at an international level, nevertheless, still maintaining control over the passage of foreign war vessels. The 1841 London Convention was

subsequently followed by the 1856 Paris Convention, and ultimately, the Sevres Treaty of 1920, which marked the complete demise of Ottoman sovereignty over the Straits and control of the Straits was divided by an international consortium of foreign states.

The Sevres Treaty should have marked the complete collapse of both the Ottoman Empire and any hopes for an independent Turkish state. But history took an unexpected turn when the rebel Turkish forces under the leadership of Mustafa Kemal defeated the invading foreign armies on 30 August 1922. Western hopes of partitioning the defunct Empire were dashed and the acceptance of Turkish victory and a new Turkish Republic was formally recognised at the Lausanne Peace Conference of 1923. The Peace Conference was of vital importance for the new Republic. Although it had succeeded in winning battlefield victories, the final determination of its borders, the pressing issue of the outstanding debts of the collapsed empire, and the status of the Straits remained to be resolved. The Lausanne Peace Conference produced two instruments: the Lausanne Peace Treaty and the Lausanne Treaty for the Regime of the Turkish Straits.

While Turkey was successful in attaining most of its objectives, the Straits Treaty proved to be a compromise. First, the regime created demilitarised zones in the Straits, as well as for islands in the Sea of Marmara and the Aegean Sea. Turkish security in these areas was left to an international guarantee formed by signatory states. Moreover, the regime created an international commission charged with the administration and control of the Straits, effectively depriving Turkey of complete and absolute sovereignty over the Straits.³ Given the realities of Turkey's precarious economic position the regime was accepted, but Turkey remained unhappy with its terms.

By the 1930's the geo-political alignments of the major world powers began to shift and, as the tocsin sounds of an approaching Second World War grew louder, so Turkey's discomfiture with the Lausanne Treaty increased. Japan's invasion of China and the growing militarism of Germany and Italy cast serious shadows on the viability of the international guarantee provided by the 1923 Lausanne Treaty for the Regime of the Turkish Straits. Worried that the demilitarised status of the Straits left Turkey vulnerable to acts of hostility, Turkey saw an opportunity to re negotiate the terms of the Treaty. In 1936 Turkey sent a note requesting a new conference to renegotiate the terms of the 1923 Lausanne Regime for the Turkish Straits. Turkey's request was met with favour and in 1936 a new conference was convened in Montreux. After a series of lengthy debates a new regime was created. The 1936 Montreux Convention was a great diplomatic and political success for the 15 year old Republic. Not only did it remove the proscription against militarisation of the Straits but also, most importantly, it returned full sovereignty and control of the Straits to Turkey.⁴

Since 1936, Turkey has administered the Turkish Straits regime and, until the adoption of the 1994 Turkish Straits Regulations, the international community accepted this situation with few objections.

THE TURKISH STRAITS: INTERNAL WATERS VS INTERNATIONAL WATERWAY

According to traditional international law the waterways and seas of the world were divided into two main legal classifications: territorial waters and the high seas. The former comprised internal waters, over which the coastal state had complete authority of regulation, and the territorial sea, which was subject to the rules and norms of international law. This classification was adopted in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The basic principle, which was well established and accepted, was that a state could pass and enforce local and national regulations against foreign vessels in its internal waters, not being subject to the rule of innocent passage. Whereas the coastal state's control over territorial seas, which until the 1982 United Nations Law of the Sea Convention, had usually covered a 3-mile zone, was restricted by the principle of 'innocent passage', preventing the coastal state from interfering with the transit passage of a foreign ship so long as the passage was inoffensive.

The division between internal waters and territorial waters was easy to make for harbours, ports, rivers, gulfs, bays, etc., which clearly were part of a state's territorial boundaries. However, in classifying straits which served as natural routes of communication between two high seas the

matter became complicated by the interests of both international maritime trade and military interests, particularly if the strait in question was within the exclusive geographical boundaries of the coastal state, such as is the case with the Turkish Straits. Even Grotius, the arch defender of the principle of freedom of the seas, recognised the sovereignty rights of a state over the waters of a strait enclosed by the territory of the same state.⁵ Nevertheless, the proponents for freedom of navigation argued forcefully for a rule of maritime law favouring the great seafaring mercantile nations who would most benefit from unimpeded access through the territorial waters of foreign states.

Emerich de Vattel (1714-1769) proposed the view that an international strait was one that served as a means of communication between two seas, where navigation was common to all nations. In such straits the coastal state was obligated to recognise the right of innocent passage to foreign vessels. Whereas W. E. Hall adopted a more utilitarian approach asserting that the right of innocent passage applied to territorial waters where passage was “necessary” or “convenient” for navigation in the open seas.⁶ More contemporary writers have proposed as international those straits which are “used to a substantial extent by commercial shipping or warships belonging to states other than the riparian nation or nations.”⁷

In the seminal case of the Corfu Channel, brought by Albania against Great Britain in 1949, the International Court of Justice was presented with opposing views of what constituted an international strait. Proponents of the functional view argued in favour of using a test whereby the decisive factor for defining an international strait depended upon the geographic link the waterway served between two high seas. Whereas, the opposing view argued in favour of a test based on the degree of importance of the straits for international trade.

In resolving the issue of how to define an international strait the Court took into account a number of factors, with particular emphasis on the geographic aspects of the strait and its use in international navigation. According to the Court, the amount of international traffic using the strait was not an important factor and nor was the existence of other routes.⁸ Both the 1958 Geneva Convention and the 1982 United Nations Law of the Sea (UNCLOS) adopted the Court’s definition of an international straits, but were both careful to categorise such straits as “straits used for international navigation” rather than “international straits.” This difference in terminology is significant as the term “international straits” necessarily implies a loss of sovereignty by a coastal state, as if control of the straits belonged to the international community at large. Clearly, such a result was not intended and both the 1958 and 1982 Conventions were careful to recognise the inherent sovereign authority of coastal states in the territorial waters bordering straits.

Notwithstanding the employment of the same terminology, the two conventions diverged as to the type of regime to be applied to a strait used for international navigation. The 1958 Geneva Convention essentially codified existing customary international law, including the application of the right of innocent passage to straits used for international navigation. The only difference was that the right of innocent passage in straits was non-suspendable. UNCLOS further restricted existing customary international law for the regime of straits used for international navigation by creating the entirely new regime of “transit passage”. In addition to the regimes created first by the 1958 Geneva Convention and subsequently by UNCLOS, are those regimes for straits that, for historical reasons, have their own particular regime or, stated otherwise, a sui generis regime. Shaped by long-standing treaties or international conventions, these straits have developed a set of rules, including the definition of their own waters, unique to themselves and recognised by the international maritime community. For example, a treaty of 1857 and subsequent state practice regulate passage through the Danish Straits. The areas of the Sound, the Great Belt and the Little Belt were included in the Treaty, which provided for freedom of passage. Nonetheless, the creation of a regime for freedom of navigation through the Danish Straits by the 1857 Treaty did not prevent Denmark from establishing the Little Belt as part of Danish internal waters.⁹

Similar to the unique status of the Danish Straits is the regime of the Turkish Straits. Geographically, the Turkish Straits are two separate water routes converging in the Sea of Marmara. In the north,

flowing from the Black Sea to the Sea of Marmara, the İstanbul Boğaz measures 31km in length with an average width of 1.5km, and 700 meters at its narrowest point. In the south, flowing from the Sea of Marmara into the Aegean Sea, the Çanakkale Boğaz measures 70km in length with an average width of 1.3-2km. By comparison to many other straits used for international navigation, the Turkish Straits are extremely narrow.

The Sea of Marmara serves as the convergence point for both Straits. And, while the legal status of the İstanbul Boğaz and Çanakkale Boğaz is a subject of some debate, it has been recognised and accepted that the Sea of Marmara is an internal sea of Turkey. This fact was expressly stated during the Montreux Conference and no objection to the contrary was made.¹⁰ From a purely logical standpoint, if the Sea of Marmara is an internal sea of Turkey, then the Straits flowing through it are also internal waters.

Without question, the Turkish Straits are firmly embraced by Turkish territory, thereby, in a purely geographical sense, constituting internal waters of Turkey. Yet, despite this geographic reality, there is some discord and uncertainty as to whether the Straits are internal waters or territorial waters.¹¹ Some writers have even gone so far as to characterise the Turkish Straits as international waters by virtue of the 1936 Montreux Convention. The mere fact that a state has subjected its internal waters to an international instrument does not change the essential and legal character of the waterway. The case of Denmark provides an example of an international instrument that does not ipso facto transform internal waters or territorial waters into international waters.

Historically, the Turkish Straits were treated as internal waters of the Ottoman Empire. Throughout the five hundred-year reign of the Ottoman dynasty, the sultans retained control over the Straits, granting free passage to certain states by bilateral treaties while denying passage to others. Even when the Empire for the first time in 1841 granted the right of free passage through the Straits in a multilateral convention to all foreign merchant ships, the same right was not accorded to foreign war vessels. The only period when the Straits were put under the control of an international commission was during the period between the 1923 Lausanne Straits Treaty and the 1936 Montreux Convention. During this time the Straits were administered by an international commission, in which Turkey was only one party. But Turkish sovereignty and complete control over the Straits was reinstated in full with the 1936 Montreux Convention. Implicit with the return of sovereignty was the de-internationalisation of the Straits and the return to their original status as internal waters of Turkey.

DETERMINING THE LEGAL REGIME OF THE TURKISH STRAITS

There are two international conventions which must be consulted to better clarify the legal regime of the Turkish Straits: (a) the Convention Regarding the Regime of the Turkish Straits, Montreux (1936) (MONCON) and, (b) the United Nations Convention on the Law of the Sea (1982) (UNCLOS).

I. THE 1936 MONTREUX CONVENTION

The Montreux Convention replaced the Turkish Straits regime created by the 1923 Lausanne Treaty and brought fundamental changes. While retaining the principle and protection of “freedom of passage and navigation” for all foreign merchant vessels, the new Convention returned to Turkey full sovereignty rights over the Straits.¹² The proscription against militarising the Straits by the Turkish Republic was removed making Turkey free to establish the military presence necessary for her protection. And while foreign military vessels were also accorded the right of passage, Turkey’s paramount security interests, as well as the interests of the Black Sea riparian states, were recognised. However, most importantly, the functions once given to the international commission were transferred to the Turkish government.¹³

MONCON, effectively, returned to Turkey full control over the Straits, including all the powers once retained by the International Commission, while still recognising “complete freedom of passage and navigation” to all merchant vessels. However, the meaning to be accorded to the provision recognising freedom of navigation should not be given a meaning more restrictive than was

originally intended. A review of the discussions held during the extensive debates at the conference clearly show that the right of passage was not intended to be absolute but to be subject to the principles of “innocent passage.”

In his opening statement the Turkish representative at the conference, T. R. (Tevfik Rü_tü) Aras made quite clear Turkey’s expectations and understanding that “free passage” meant “inoffensive” passage, and that Turkey would not, as a result of the Convention, forfeit its sovereignty rights to intervene when vessels were disruptive. The importance of this position was reiterated during the debates concerning Article 22 of Turkey’s proposed draft agreement wherein Turkey explicitly included language to ensure that nothing in the Convention would be interpreted to the detriment of Turkish sovereignty. When the representatives of some of the participating States raised concerns over the language of the proposed article, particularly Great Britain’s representative Lord Stanhope, the Turkish representative, Numan Menemencioğlu, replied “[d]o not, however, one day come to us and assert that vessels can come and go through the Straits as if they were in the open seas.”¹⁴

At a later stage of the conference when T. R. Aras decided to withdraw the contentious article he made it quite clear for the record that his withdrawal was based on Turkey’s certainty of international recognition of Turkish sovereignty in the Straits.¹⁵

At no time was any question that the regime providing for “freedom of passage and navigation” through the Turkish straits was intended to be restrictive of Turkish sovereignty in the Straits. Freedom of passage was intended to be within the framework of international law, including the rights and duties of “innocent passage”, but never to the detriment of Turkey’s sovereign interests.

2. UNITED NATIONS CONVENTION ON LAW OF THE SEA (1982)

In 1982, after years of debate, the United Nations finally adopted the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS represented a historical international effort to codify existing international law of the sea as well as create new law and clarify areas of international law where traditional custom and usage had not had the time to fill the lacunas created by modern industry and technology. This exhaustive legislative instrument, in its attempt to tackle virtually every maritime issue, devoted an entire section to the regime of straits used for international navigation. UNCLOS, after much opposition from many strait states, created a historic new “transit” regime for passage through straits.

According to Article 38 of UNCLOS, the traditional right of non-suspendable innocent passage was replaced with the right of transit passage. In comparison with the broad authority given to coastal states to regulate and intervene in the passage of foreign vessels through territorial seas, the new regime of transit passage significantly restricts the authority of the coastal state to both regulate passage and intervene. But the regime of transit passage materialised only after a number of exceptions from its applications was negotiated. Among those exceptions is Article 35, subsection (c) which expressly excludes the application of “the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits” from the section of UNCLOS regulating straits passage.¹⁶

The Turkish Straits regime falls under the exception of Article 35(c), and is therefore not subject to the “transit passage” regime.¹⁷

As already stated, prior to 1982 UNCLOS, no separate regime for “transit” passage existed. All passage through territorial waters was presumed to encompass the principle of “innocent passage.” However, UNCLOS specifically created a distinction between “freedom of transit” for straits and “freedom of passage” for territorial seas; the latter right encompassed the principle of “innocent passage”. Under UNCLOS, innocent passage conferred upon the coastal state a number of areas in which the state could regulate the passage of vessels traversing its territorial waters, placing particular emphasis on the coastal states’ interest to protect its shores and waters from pollution.¹⁸ Whereas, a ship passing in “transit” through straits used for international navigation did not have to meet the stricter standards of “innocent passage”, consequently limiting the regulatory and

intervention powers of the coastal state.¹⁹

Despite the “transit regime” created by UNCLOS and adopted by the signatory states, in practice national interests to preserve the environment, or other equally pressing national interests have in some cases superseded international maritime interests in favour of unimpeded passage through straits. Italy, during the drafting and lengthy negotiations for the 1982 UNCLOS, was a fervent supporter of the “transit” regime for straits used for international navigation. Yet, when the safety of its own straits became threatened after a number of serious accidents in the Messina Straits in 1985, Italy unilaterally suspended passage of all tankers over 50,000 tons carrying oil and any other dangerous material. Despite protests, particularly from the United States, the suspension has remained in force.²⁰

Italy has also restricted “free passage” through its territorial waters with several pieces of national legislation. According to a law enacted in 1990, the Italian authorities can stop, visit and search any foreign vessel suspected of transporting psychotropic drugs or narcotics.²¹ Prima facie, this law appears to be in conformity with Article 27(d) (1) of the 1982 UNCLOS, permitting the coastal state to take necessary measures for the suppression of the illicit trafficking of such drugs. Nevertheless, it digresses from the view which interprets innocent passage to encompass only the manner of passage of the vessel not taking into account its cargo, its flag, its objective or destination. By allowing its authorities to interfere with a vessel suspected of transporting restricted or illegal drugs, Italian law focuses on the type of cargo, and opens the door to taking into account other subjective factors such as the flag of the ship, its destination, and a number of other criteria unrelated to the vessel’s manner of passage. Therefore, if Italy’s right to engage in such intervention is sanctioned by UNCLOS, “innocent passage” has not been restricted solely to the manner of passage, as was the position of traditional principles of international law. Otherwise, Italy has violated the provisions UNCLOS with the adoption of such legislation.²²

THE TURKISH STRAITS: A SUI GENERIS REGIME

The regime for the passage of ships through the Turkish Straits was established by MONCON, and has been developed with 61 years of practice. The Convention itself, in recognising the principle of “freedom of passage and navigation”, except for those express provisions making pilotage and towage optional, does not provide for a detailed legislation for the passage of merchant ships. Consequently, over the years, as the sole and ultimate administrator of the Straits, the Turkish government has exercised its inherent sovereign powers to meet those needs as they arrived, and in doing so created a regime of custom and usage. The following two examples of such established practice can best illustrate the point made:

1- The Convention did not address the passage of ships in tow, or stated in another manner, the situation of multiple vessels linked together. Turkey could have viewed such vessels as not falling within the scope of MONCON. Whereas Turkey, recognising the maritime needs for towage adopted a liberal interpretation of the principle of “freedom of passage” and applied it to multiple vessels incorporating it, by practice, into the Convention.

2- Turkey, in not requiring that either the structure being towed or doing the towing be a ‘vessel’, has accorded the principle of freedom of passage to floating docks being towed by one or multiple tugboats, drilling platforms and other similar structures which may not necessarily constitute ‘vessels’ within the traditionally accepted definition. Consequently, by practice, these have also become part of the Convention.

These two examples are important for interpreting MONCON. Both reflect the importance Turkey has given to maritime needs and the due care it has accorded to protecting the principle of freedom of passage. Other examples of the Turkish Straits sui generis regime include:

a- Between 1936 and 1982, the rule of ‘left-side passage’ was adopted for passage through the Istanbul Straits, and not the ‘narrow water’ rule required by the International Regulations for

Preventing Collisions at Sea 1972 (COLREG).

b- There has been a maximum speed limit of 10 knots applied in the Istanbul Straits for the past 40 years

c- Since the 1970's, pursuant to the Istanbul Harbour Regulations, the administration is authorised to suspend traffic in the Straits. In practice, traffic has been temporarily suspended after a collision, or because of a fire resulting from an oil spill, or during the construction of the two Bosphorus bridges, or when visibility has fallen to zero due to fog, and other similar hazardous situations

d- In 1982, traffic lanes were established for vessels passing through the Straits

e- During the 1940s, a submarine net was placed in the Istanbul Bosphorus and remained there for many years

f- During the 1970s, Turkey created its own Traffic Separation Scheme for passages through the Istanbul Bosphorus and no objection was raised.

As can be seen from the above-cited examples, MONCON has provided the framework while Turkish practice has provided the details of the Turkish Straits regime. The absence of any objection from the international community over many years until the 1994 Regulations clearly shows the acceptance of the regime in force.

As a sui generis regime the Turkish Straits is not alone. The case of the Danish Straits bears strong similarities. As mentioned earlier, the Danish Straits serves as an important route between the Baltic Sea and the North Sea. They are comprised of three main bodies of water: the Sound, the Great Belt and the Little Belt. The existing regime has been formed by the 1857 Treaty and 140 years of State practice. Article 1 of the 1857 Treaty provides for the freedom of navigation to merchant ships through Danish territorial waters, including the straits. However, over the years, the Danish authorities have expanded the Treaty by actual state practice. For example, although the Treaty did not provide for freedom passage to foreign war ships, state practice adopted a liberal interpretation of the Treaty and applied it to such vessels. Moreover, despite the apparent liberal interpretation of the Treaty, Danish practice over the years also included suspension of the passage of merchant ships during wartime or when a threat to Danish security was perceived. Another example of Denmark's sui generis regime is the development and creation of a buoyage zone. Based on the duty of the Danish state to safeguard safe passage through its territorial waters, as provided by Article 2 of the Treaty, Denmark created a regime for state removal of wreckage that created a danger for the safe passage of vessels, as well as marked routes. However, the issue arose as to whether the Danish state could seek the cost of the removal of a foreign vessel wreckage from the foreign owners. The Danish Supreme Court provided the answer in 1873 and 1940 deciding in favour of the Danish state.²³

The above examples illustrate the acceptance by the international community of a state-created regime built upon the framework established by an international treaty. The Turkish Straits presents a similar model of a regime for the passage of vessels that has been developed over the years according to the unique geography of the Straits and the arising needs of both international navigation and the state. Until the 1994 Straits Regulation little objection had been raised by the international maritime community against the regime of the Turkish Straits as developed by state practice based upon the 1936 Montreux Convention.

TURKEY'S AUTHORITY TO REGULATE AND ITS LIMITS

As internal territorial waters, the power and authority to regulate maritime activity through the Turkish Straits belongs solely to Turkey. Article 24 of MONCON reflects this. Referring to the Straits as "international straits" does not change this reality, and even those who insist on employing this erroneous terminology have accepted Turkey's sovereignty over the Turkish Straits. The sole question then is to what extent has Turkey's sovereignty been limited, if at all by MONCON?

The answer to this question leads back to the Convention itself. However, first, an understanding of what sovereignty entails is a necessary background to this inquiry. The sovereignty of a state includes vital powers to enact laws and to enforce those laws. Laws without the power to enforce them have only the force of the paper upon which they are written. Only Turkey retains the power to police the Turkish Straits. Therefore, only Turkey retains the power to regulate them.

Nonetheless, in exercising its sovereignty, Turkey may accord foreign nations certain rights within its national boundaries. Only as a function of its sovereignty rights has Turkey granted “freedom of passage and navigation” to foreign merchant vessels passing through the Turkish Straits, agreeing to the limitations expressly provided for by MONCON. However, in granting “freedom of passage” Turkey did not forfeit its inherent sovereign authority, including its regulatory and policing powers, and did not ‘internationalise’ the Straits.

The limits on Turkey’s regulatory power are only those which have been expressly provided for by MONCON and 60 years of practice. That is, so long as Turkey does not violate the spirit of the regime created by MONCON, Turkey may exercise its regulatory and policing powers over the Turkish Straits in accordance with international law and the international standards set out by the International Maritime Organisation (IMO).

Furthermore, Turkey’s right to regulate the safety and protection of its extensive and densely populated coast finds support under current international law. Many new international conventions have been drawn up reflecting the growing international concern over pollution and the protection of the marine environment. For example, UNCLOS specifically recognises the right of coastal states to protect their environment against pollution and other similar hazards. Foreign ships must abide by the laws and regulations enacted by the coastal state. UNCLOS further reflects the heightened international awareness of the very serious safety and environmental hazards modern maritime activities create by imposing a duty on all states to protect the marine environment.

Another example under current international law recognising a coastal state’s right to intervene is the section of the International Conference on Safety of Life at Sea (1974) on nuclear ships. Regulation 19 of chapter I and regulation 11 of chapter VIII gives the coastal state the right to inspect a ship’s certificate and the ships’ potential danger to the environment. Turkey, as a party to this convention clearly is entitled to conduct an investigation of the ship, including its certificate. In light of MONCON, does this violate freedom of passage? Clearly the convention recognised the overriding safety interest of a state against a potential nuclear disaster and has imposed a limit on the principle for “freedom of passage and navigation.”

The historical importance of Istanbul was recognised by UNESCO in 1972, which accorded it a special status. Turkey has a duty and obligation to protect the world’s cultural inheritance in Istanbul. Likewise, the international community has a similar duty to support Turkey’s efforts in preserving the ancient walls and structures unique to its timeless skyline.

Turkey, without infringing upon the essence of the principle of freedom of passage and navigation, can enact and impose regulations to promote the safety of ships, passengers, cargo, its coast, cities, residents and environment. No maritime expert can reject this regulatory authority, although one could debate on the details. Freedom of passage without any regulation, allowing ships to travel at any speed, in any route, stopping whenever and wherever, disposing of waste into the sea however the master chooses, travelling in a manner that creates waves destructive to the coast, or travelling at night without lights is chaos. The principle of freedom of passage and navigation did not license chaos.

Given the overwhelming attention UNCLOS and other conventions have accorded to the protection of the environment, any interpretation of MONCON excluding Turkey’s right to protect its coastal environment and waters would be discriminatory and unconscionable.

THE PROBLEM OF INTERPRETING MONCON WITH OTHER RELATED INTERNATIONAL AGREEMENTS

Certain international conventions have established mandatory regulations for merchant vessels {eg. The International Convention for the Prevention of Pollution from Ships 1973/1978 (MARPOL), COLREG, The International Convention for Safety of the Life at Sea 1974 (SOLAS)}. The first of these conventions to establish enforcement and inspection powers for Port States is the agreement known as the "Paris Memorandum." With the power to enforce the mandatory navigation requirements imposed by international conventions, the coastal state may inspect a foreign vessel to ensure that it has met international standards. This 'port state control' includes the inspection of documents, physical survey of the vessel and interviewing both the captain and officers. The general purpose is to ensure the safety of the ships, their passengers, the crew and the safety of the environment.

Another example can be found in COLREG, according to which a ship must have a navigational light meeting certain specifications. If then, a ship wishes to pass through the Turkish Straits without meeting the navigational light requirements of COLREG, does the principle of "freedom of passage and navigation" set out in MONCON prevent Turkey from interfering with the ship's passage? The answer should be "no." Turkey can stop the ship by notifying it that has not met COLREG's requirements without being in violation of the spirit of "freedom of passage and navigation."

Another interesting scenario emerges if on 3 July 1998, the day after the date the International Safety Management code (ISM) comes into effect, a ship not possessing the required certificate seeks passage through the Turkish Straits. Will Turkey be able to demand proof of a certificate made mandatory by an international agreement? Or, does MONCON prevent Turkey making such an inspection? If it does, Turkey will be put in the untenable position of granting passage through its most sensitive regions to a ship not possessing the certificates made mandatory by international agreement. Why should Turkey place its security at risk when other nations, in accordance with international norms, have promulgated safety measures to protect their own?

It is unacceptable to interpret the meaning of "freedom of passage and navigation" as granting a "free-for-all" passage through the narrow and heavily populated Turkish Straits. MONCON was negotiated and adopted during a certain period in history. Since then many new international agreements regulating maritime activity have come into being. A reasonable interpretation of MONCON must take into consideration both the changing nature of maritime traffic, including the serious dangers, and new international agreements.

THE POSITIVE AND NEGATIVE ASPECTS OF TECHNOLOGICAL ADVANCEMENTS

The speed of new technological advancements has surpassed those of past eras. A brief look into the rear view window of maritime history shows the rapid changes that have occurred. At the beginning of this century there were only a few tankers in the world whereas today, in the Turkish Straits alone, each day several tankers with capacities in excess of 100,000 dwt pass. The difference in size and speed between modern vessels and those dating to the time of the Montreux Convention is vast. Modern ships employ highly sophisticated navigational apparatus, with increased speed, allowing them much better manoeuvrability through waters with strong currents, and are equipped with much better communication capabilities. At the time MONCON was adopted there were no gas carriers or chemical carriers as there are now, with all that that implies for a toxic disaster.

In addition, the size of maritime traffic has grown immeasurably when compared with the past. The Turkish Straits has witnessed a dramatic increase in the number of vessels increasing from approximately 4,500 annually in 1934 to 46,914 in 1995, marking a ten-fold rise in 57 years. Today, an average of 12 tankers and more than 1,000 vessels, including local ships, pass through the Turkish Straits each day, making it one of the busiest waterways open to international navigation.

Nevertheless, with the good comes the bad, and so, together with the positive aspects of these advancements come the negative. For example, the dangers created by today's tanker accidents are incomparable to those in the past. The Turkish Straits, unfortunately, have also seen their share of serious accidents. The following are but a few examples:

1. The 1960 collision of the 'World Harmony' and the 'Peter Zarovich' resulted in the 'Peter Zarovich' burning for days after hitting the shore near several crude oil tankers at Kanlıca.
2. In 1966 the collision between two USSR ships, the 'Lutsk' and the 'Kransky Oktiabr', off the shore of Üsküdar poured gallons of burning crude oil into the Straits completely destroying a Turkish ship and a large floating pontoon
3. The 1979 collision between the Romanian tanker Independența and the Evriali resulted in the death of 41 Romanian crewmen, the partial burning of a grounded tanker, and millions of dollars in damage to the environment
4. The 1990 collision between the "D. T. Shau" and "İambur" tankers poured 2,000 tons of crude oil into the İstanbul Bosphorus.
5. The 1994 collision between the tanker 'Nassia' and the dry bulk carrier 'Shipbroker' resulted in the burning for days of the Nassia and the death of over 30 crewmen. The İstanbul Boğaz was forced to close for seven days and over 500 ships had to wait for passage.

The seriousness such disasters pose for both human life and the environment cannot be overstated. Many other straits used for international navigation have equally witnessed calamitous accidents. States such as Italy have responded by suspending the passage of tankers completely, others such as France and Britain have implemented sophisticated technology in addition to traffic separation schemes. Turkey has adopted a traffic regulation scheme taking into account its obligations under international law and in accordance with its obligations to such international organisations as the IMO.

S-300 MISSILES

MONCON created different regimes for the passage of both commercial vessels and military vessels depending upon whether Turkey was at peace, at war, or neutral during a time of war. During the debates at the Montreux Conference, although Turkey agreed that the right of free passage should apply to merchant vessels during times of peace and neutrality, express reservations were made for the passage of vessels during times Turkey considered her security to be threatened. In response, Great Britain voiced concerns over any provision restricting the passage of merchant vessels during any period. However, in support of Turkey's concerns, the Greek representative, Mr. E.B.M. Politis, stated that "[i]f it is assumed that Turkey is on the verge of war, and armaments or other ammunitions useful for war are being transported by vessels to a state which could practically be considered an enemy of Turkey, I do not think that Turkey would permit the passage of these vessels through the Straits."²⁴

The statement made by Mr. Politis, 61 years ago, is of particular relevance in light of the recent decision by the Greek Cypriot administration to purchase S-300 missiles from the Russian Federation to be targeted against Turkish aircraft. The Turkish government viewed the missile purchase as an act of belligerence raising the spectre of potential armed conflict. The Turkish government made it quite clear that the Turkish authorities would prevent the transport of the missiles or any of their parts through the Turkish Straits. When two vessels suspected of carrying missile parts were stopped and searched, objections were voiced that Turkey had violated the provisions of Montreux for freedom of passage and navigation through the Straits.

The Montreux Conference debates contain repeated statements made assuring the Turkish representatives that Montreux would never be interpreted to the detriment of Turkish security and sovereignty. The preamble of MONCON itself clearly states the parameters of the Convention by providing that "Desiring to regulate passage and navigation in the Straits of the Dardanelles ... in such a manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea, of the riparian States..." From this and from the minutes of the debates held during the Conference, it is clear that at no time was it intended for MONCON to be interpreted in such a

fashion as to impinge on or prejudice Turkish security and sovereignty.

Turkey's right to stop, visit and search vessels suspected of transporting weapons or other munitions posing a threat to Turkish security is a natural extension of its sovereign right to protect itself against attack. It would be hard to conceive of any state allowing free passage to a vessel suspected of transporting armaments to be potentially targeted either directly against its territory or against its military forces. In an ironic twist of prophecy the Greek representative at the Montreux Conference best articulated this political reality. Furthermore, Turkey's right to interfere with the passage of a vessel based on suspected dangerous cargo is analogous to Italy's law allowing Italian authorities to stop, visit and search a foreign vessel suspected of transporting psychotropic drugs or narcotics. Article 27 (d) carved out an exception to the otherwise objective standards adopted by the 1982 UNCLOS allowing coastal states to take the necessary action for preventing the trafficking of illicit drugs. Clearly, the international community, including Italy views the illegal drug traffic as a menace to the national and international interests for peace and order. Likewise, Turkey views missiles purchased with the open intent to be poised against Turkish aircraft as contrary to its national interest.

CONCLUSION

During the five century rule of the Ottoman Empire and on into the 74 years of existence of the modern Republic of Turkey, the waters comprising the Turkish Straits have always been deemed by Turkey to constitute internal waters. The existence of an international convention did not alter this long-standing geographic and political reality. The Turkish Straits have always been and continue to be considered an integral and inseparable part of Turkish territory. However, Turkey has recognised the principle of freedom of passage to apply to all vessels traversing the Turkish Straits. The basic principles regulating the regime for passage through the Straits were established by the 1936 Montreux Convention and with state practice has developed into a sui generis regime over a period of 61 years. Only Turkey retains the authority to interpret the Convention and adopt the necessary rules and regulations for administering the Straits. The 1994 Turkish Straits Regulations were adopted taking into account Turkey's responsibilities under Montreux, as well as trying to fulfil the international objectives of the IMO. So long as Turkey has met these obligations Turkey is free to regulate traffic through the Straits.

1 A/19 Resolution 827, 15 December, 1997.

2 A/20/9/2, 11 November, 1997.

3 The Commission includes representatives from France, Great Britain, Italy, Japan, Bulgaria, Romania, the Kingdom of Serbo-Croatia-Slovenia, Russia, the Ukraine, and Georgia.

4 For a detailed summary of the history of the Turkish Straits see, Gürkan Y. (1995), 'The Turkish Straits Regime in Historical Perspective (1453-1936)', *The Turkish Straits*, p.165; and Aybay, G. (1996), 'Osmanlı İmparatorluğu Devrinde Boğazlar Meselesi Adli İnceleme Kitabı Hakkında' in *Deniz Hukuk Dergisi*, Year 1, No. 3-4, September-December, pp.5-9.

5 Truver, S. *The Strait of Gibraltar and the Mediterranean*, 1980, p. 148.

6 *Ibid*, pp. 148-149.

7 Professors Baxter, Richard R. and Triska, Jan F. (1964), *The Law of International Waterways*.

8 *The Corfu Channel Case, Judgement of 9 April, 1949, I. C. J. Reports (1949)*.

9 Bangert, K. 'Denmark and the Law of the Sea', in Treves, T. (ed.) (1997), *The Law of Sea*, p. 106.

10 Meray, S. L. (1976), *Montreux Boğazlar Konferansı, Tutanaklar ve Belgeler*, pp. 25 and 40.

11 In this paper, entitled 'Implications for the Montreux Agreement and its Future', Dr. Glen Plant describes the Turkish Straits as "falling entirely within Turkish internal or territorial waters," p. 8. Presented at the Hyatt Carlton Tower Hotel, London, March 1995.

12 Section I, Article 2 of the official French text of the 1936 Montreux Convention provides for "la complète liberté de passage et de navigation" to all foreign merchant vessels through the Straits. However, the English translation has employed the word "transit" as the corollary to "passage".

13 Article 24 of the Montreux Convention provided as follows: "The functions of the International Commission set up under the Convention relating to the regime of the Straits of the 24th July, 1923, are hereby transferred to the Turkish government."

14 Montreux Boğazlar Konferansı, p. 164 (English translation by Nilüfer Oral).

15 In withdrawing Article 22 (former Article 12) of Turkey's proposed Draft Agreement, Menemencioğlu made the following statement: "[a]s the Turkish Straits region is an inseparable part of Turkey's integral whole and that because we feel no hesitation over our sovereignty rights over this area, and because we are here only to establish a passage regime through the Straits, I propose withdrawing the entirety of this provision from the text." Montreux Boğazlar Konferansı, p. 240 (English translation by Nilüfer Oral).

16 Part III of UNCLOS, entitled 'Straits Used for International Navigation.'

17 Turkey to date has not signed the 1982 UNCLOS.

18 See Article 19, subsection (1) and (2) et al.; and Article 21.

19 See Article 42, subsection (1) a-d.

20 Treves, T. (1997), 'Italy and the law of the Sea', in *The Law of the Sea*, p. 335.

21 *Ibid.*, p. 332. Italian national law has further restricted freedom passage through its territorial waters by a law which allows the Italian authorities to prohibit for national defence reasons the "transit and sojourn" of vessels within 10 nautical miles of its coastline. In 1991, Italy restricted both national and foreign ships from stopping, transiting, anchoring and fishing within one nautical mile of the islands of Asinara and Pianora because of prisons located on these islands.

22 The criteria for what constitutes 'innocence' is divided between those in favour of an objective test, where only the behaviour of the vessel during passage is considered, and those in favour of a subjective view, taking into consideration various factors such as the flag of the ship, its cargo, its destination, the ship itself, etc. In the 'Corfu Channel' case the Permanent Court of International Justice expressly rejected Albania's argument that 'innocent passage' included subjective factors such as the purpose of the vessel in making passage, and adopted the objective test taking into consideration only the manner of passage of the vessel.

23 See Bangerd, 'Denmark and the Law of the Sea', *op. cit.*, pp. 110-111.

24 Montreux Boğazlar Konferansı, p. 196.