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Freedom of overflight: a study of coastal State jurisdiction in international airspace

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5 Overflight of international straits and archipelagic sea lanes

5.1 Introduction

UNCLOS recognises, in addition to innocent passage through territorial sea, two other passage regimes: transit passage through international straits (hereafter 'transit passage') and archipelagic sea lanes passage. Whilst innocent passage does not apply to aircraft, both transit passage and archipelagic sea lanes passage have significant implications for overflight rights. In the lanes of transit passage and archipelagic sea lanes passage the airspace retains its status as national airspace but the aircraft of other States have the right to fly through it without prior permission. As a result, these passage regimes are an exception to the special permission required under Articles 3(c), 6 and 8 of the Chicago Convention, applying respectively to State aircraft, scheduled services of civil aircraft and pilotless aircraft.[1099] Whilst this research is focused on the rights of coastal States in *international* airspace, this chapter will briefly examine these two regimes applying to national airspace to the extent that they too – like the regimes in previous chapters – involve the consideration of anomalous and sometimes ambiguous rights of the coastal State *vis-à-vis* the overflight of aircraft of other States in the maritime areas off their coast.

Both passage regimes are applicable to State aircraft and civil aircraft alike, however in practice they serve to provide access for State aircraft. This is because most States have negotiated overflight of each other's territory for civil aircraft through the Transit Agreement or through bilateral agreements for scheduled services, and through Article 5 of the Chicago Convention for non-scheduled flights.[1100] These sources of overflight rights are suspendable in the case of war though, as addressed in Section 2.6.1, and can be withdrawn in peacetime in the case a State denounces the relevant treaty.[1101] In these situations, the transit and archipelagic sea lanes passage would allow for the continued right of overflight for civil aircraft through these portions of the suspending or withdrawing State's territory, as will be discussed in Section 5.5.

As a consequence of State – military – aircraft benefiting more so from the right of overflight under these passage regimes, the examples used throughout this chapter relate to events involving military aircraft. Further-

1099 See Sections 2.3.3, 2.3.4 and 2.4.3.

1100 Only Dominica and Tuvalu are State parties to UNCLOS but not to the Chicago Convention.

1101 For example, Article III of the Transit Agreement provides that '…any contracting State… may denounce it on one year's notice'.

more, despite the application of the regimes to both civil aircraft and State aircraft, a closer examination of the provisions governing the designation of archipelagic sea lanes in Section 5.4.4.1, demonstrates that State aircraft were intended as the primary beneficiaries of the overflight provisions.

This chapter will begin, in Section 5.2, by outlining the common rights and duties in transit lanes and archipelagic sea lanes, for both aircraft and the State whose territorial sea the lanes fall within. The chapter will then examine the regime applying specifically to transit passage. Section 5.3.1 will first address the regime of non-suspendable innocent passage that applied prior to UNCLOS, with Section 5.3.2 demonstrating how concurrent developments under UNCLOS made the introduction of a more liberal passage regime particularly important for aircraft. The following section of the chapter (Section 5.3.3) will briefly consider the international straits that do not fall within the transit passage regime under UNCLOS before turning to examine its implications for overflight (Section 5.3.4). Lastly in relation to transit passage, Section 5.3.5 will address the case of the Strait of Hormuz, which is an anomaly in that Iran, as one of the bordering States, applies the regime of innocent passage in the strait for States that are not party to UNCLOS.

The chapter will then turn to consider the regime under UNCLOS applying to archipelagic sea lanes passage. It will first briefly explain what an archipelagic State is under UNCLOS and why there are so few such States (Section 5.4.1), before outlining the implications for overflight of the recognition in UNCLOS of the concept of an archipelagic State (Section 5.4.2). The next section of the chapter will consider the main ambiguities in the text of UNCLOS insofar as archipelagic sea lanes passage concerns overflight. These include two matters that are tied to the military – State aircraft – basis of these provisions, as mentioned above. First, that the text indicates that air routes must be aligned with sea lanes through archipelagic waters (Section 5.4.4.1) and second, that only approval from the IMO, as opposed to also ICAO, is required under UNCLOS for the designation of archipelagic sea lane air routes (Section 5.4.4.2). The final issue that will be considered specifically relating to archipelagic sea lanes passage, is 'partial designation' and the implications of this for access to airspace by military aircraft. Finally, Section 5.5 will examine the right of overflight in transit and archipelagic sea lanes in the case of wartime, before concluding by highlighting the remaining areas of ambiguity in this area of law (Section 5.6).

The consequences of the lack of uniformity in the rules applying to transit passage in respect to some international straits, on the one hand, and in the ambiguity in the application of the UNCLOS rules for archipelagic sea lanes passage, on the other, results in a situation where there are conflicting views between the coastal States and the States whose aircraft use the airspace over these maritime areas. This chapter complements the previous chapters of this research on this basis. The matters discussed in this chapter are not highly topical at this point in time, in that there are not frequent incidents arising out of the lack of uniformity or ambiguity in the

application of the law, or particularly grave repercussions that stem from incidents that do occur. This will not necessarily always be the case though. For example, in the context of heightened political tensions between two of more States (for example, South China Sea, Strait of Hormuz, Eastern Mediterranean Sea), such an incident could be the impetus for something much more serious. As stated in the previous chapter, an attack on an aircraft amounts to the use of force against the State of registry of the aircraft.[1102]

5.2 Rights and duties of aircraft in passage and of coastal States

The key duties of the coastal States and of aircraft operating in each of these forms of passage are identical and are set out in Article 39 UNCLOS.[1103] Aircraft in transit passage and in archipelagic sea lanes passage must observe the rules of the air, as adopted by ICAO[1104] and the coastal State may not file differences to them as they apply over the transit or archipelagic sea lanes.[1105] The article also provides that State aircraft 'will normally comply with such safety measures' and will operate with due regard for the safety of navigation.[1106] Soon after the adoption of UNCLOS, ICAO noted that 'normally' was not defined in the convention but that a vote during the drafting process for its deletion from the article was defeated.[1107] Aircraft exercising their right of transit passage and archipelagic sea lanes passage are also required to 'monitor the radio frequency assigned by the competent *internationally designated* air traffic control authority' (emphasis added),[1108] as they are required to do over the high seas. This refers to the authority approved by the Council of ICAO under the applicable regional air navigation plan,[1109] consistent with the arrangements in international airspace. Aircraft also have the duty to proceed without delay; to refrain from the threat or use of force against the coastal State and from any other

1102 See Section 4.3.5.

1103 Under Article 54 UNCLOS the key duties of aircraft and ships in transit passage, and the duties of the States that border straits, apply *mutatis mutandi* to archipelagic sea lanes passage. The key duties are those in Articles 39, 40, 42 and 44. Article 40 applies only to vessels and is therefore not relevant to overflight.

1104 UNCLOS, Article 39(3)(a) for transit passage and Articles 39(3)(a) and 54 for archipelagic sea lanes passage.

1105 ICAO WP/5-1, *Secretariat Study on Agenda Item 5: Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes and other International Air Law Instruments'*, Presented at the Legal Committee 26th Session, Montreal (4 February 1987), reproduced in (1987) 3 Int'l Org & L Sea: Documentary YB 243, 252.

1106 UNCLOS, Article 39(3)(a). The latter of which is a restatement of their obligation under Article 3(d) of the Chicago Convention.

1107 ICAO *Secretariat Study on Agenda Item 5* (n 1105) 254.

1108 UNCLOS, Article 39(3)(b) for transit passage and Articles 39(3)(b) and 54 for archipelagic sea lanes passage.

1109 ICAO *Secretariat Study on Agenda Item 5* (n 1105) 252.

violation of the UN Charter; to refrain from any other activities external to expeditious transit unless necessary by force majeure; and, to comply with the relevant provisions of UNCLOS.[1110]

Coastal States bordering an international strait or archipelagic sea lane, whichever the case may be, are not permitted to impose their national civil aviation regulations in the areas of passage.[1111] They are restricted in their prescriptive jurisdiction concerning the passage to a limited scope of areas including, for the purposes of aviation, pollution control and, although far less relevant than to vessels, the prohibition of unloading commodities, currency or persons in contravention of certain national laws.[1112] The coastal States have the obligation not to hamper the passage, the requirement to adequately publicise danger to navigation or overflight that they are aware of within the strait or archipelagic waters; and, the inability to suspend the passage.[1113] Furthermore, UNCLOS provides the coastal State with very limited enforcement jurisdiction in transit lanes and archipelagic sea lanes, none of which relate to aircraft.[1114] As a result, Caminos explains, the coastal State is required to 'pursue the matter as a breach of international law through diplomatic channels and through other dispute settlement procedures'.[1115]

1110 UNCLOS, Articles 39(1)(a)-(d) for transit passage and Articles 39(1)(a)-(d) and 54 for archipelagic sea lanes passage.

1111 P de Vries Lentsch, 'The Right of Overflight Over Strait States and Archipelagic States: Developments and Prospects' (1983) 14 Netherlands Yearbook of International Law 165, 200.

1112 UNCLOS Articles 42(1)(b) and (d) for transit passage and Articles 42(1)(b) and (d) and 54 for archipelagic sea lanes passage. These articles address, respectively, 'the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait'; and, 'the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

1113 UNCLOS, Article 44 for transit passage and Articles 44 and 54 for archipelagic sea lanes passage.

1114 UNCLOS, Articles 233 and 234 both apply only to vessels. Article 233 provides the States with enforcement jurisdiction in transit lanes over foreign ships – excluding those entitled to sovereign immunity (Article 236) – regarding protection of the marine environment (this also arguably also applies in archipelagic sea lanes, as to which see, Hugo Caminos and Vincent P Cogliati-Bantz, *The Legal Regime of Straits* (CUP 2014) 285). Article 234 provides prescriptive and enforcement jurisdiction of non-discriminatory laws applying to vessels for the protection of the marine environment in ice-covered areas.

1115 Hugo Caminos, 'The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea' (1987) 205 Recueil des Cours 19, 150. See also, for discussion on the absence of enforcement jurisdiction, Donald R Rothwell, 'International Straits', in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 123.

5.3 International straits

5.3.1 Aircraft excluded from non-suspendable innocent passage

The beginning of the law applying to international straits under modern international law can be marked by reference to the 1949 case of *Corfu Channel (United Kingdom v. Albania)* ('*Corfu Channel Case*'), in which the ICJ recognised as customary international law, the right of innocent passage through straits used for international navigation:

> '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'.[1116]

This principle of customary international law was codified in the 1958 Convention on the Territorial Sea and the Contiguous Zone.[1117]

The 'non-suspendable' element of innocent passage in the straits under customary international law, as referred to in the *Corfu Channel Case*, is distinct from the power of the coastal State to act against non-innocent passage. As Guilfoyle explains, 'it is clearly arguable that under the non-suspendable innocent passage regime a coastal State retains its right to *prevent* non-innocent passage by individual foreign vessels'.[1118] Non-suspendable innocent passage instead refers to a prohibition on the non-discriminatory cordoning off of any part of the strait. In contrast, under standard innocent passage the coastal State has the right under UNCLOS to suspend the passage, in the form of a temporary restriction, 'if such suspension is essential for the protection of its security, including weapons exercises'.[1119]

1116 Merits, Judgment, I.C.J. Rep. 1949 (Apr. 9), p. 4, p. 28. In this case, Greece considered itself to be at war with Albania and considering this, the Court concluded that Albania was permitted to regulate the passage of warships through the strait but not to prevent the passage or impose an obligation of special authorisation (p. 29). See Section 5.5.

1117 Convention on the Territorial Sea and the Contiguous Zone 1958, Article 16(4).

1118 Douglas Guilfoyle, 'Iran and the Strait of Hormuz: Some Initial Thoughts' (EJIL: Talk! 2 February 2012), available at <www.ejiltalk.org/iran-and-the-strait-of-hormuz-some-initial-thoughts/> accessed 17 January 2018.

1119 UNCLOS, Article 25(3).

Consistent with innocent passage, the non-suspendable innocent passage for international straits under customary international law does not apply to aircraft.[1120] Despite this, if both the State of registration of the aircraft and the State whose national airspace the aircraft is operating within – i.e. whose territorial sea the strait is a part of – are parties to the Chicago Convention and the Transit Agreement,[1121] then both civil non-scheduled and scheduled flights, respectively, have the right to overfly the airspace, notwithstanding any other restrictions that might be imposed by the State. Recalling Section 2.4, State aircraft are excluded from the Chicago regime and so, without further arrangements between the relevant States, such flights would not be permitted to operate through international straits under the regime of non-suspendable innocent passage.[1122]

5.3.2 Shifting territorial sea boundaries: The heightened need for transit passage

The codification of a more generous right of passage through international straits under UNCLOS occurred simultaneously with the codification under this Convention of the right of a coastal State to claim a territorial sea of 12nm, as opposed to the 3nm which was previously recognised under customary international law.[1123] Most international straits are wider than 6nm and so had high seas running through them prior to this change,[1124] but the extension led to over 100 straits being encompassed by territorial sea,[1125]

1120 As indicated by the US in the context of transit passage in, United Nations Office for Ocean Affairs and the Law of the Sea, 'Law of the Sea - Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea' (1992) 33. This is also reflected – through absence of mention of aircraft – in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, adopted 12 June 1994 (International Review of the Red Cross, November-December 1995, no 309, pp 583-94) ('San Remo Manual'): 'In addition to the exercise of the rights of transit and archipelagic sea lanes passage, belligerent *warships* and auxiliary *vessels* may… exercise the right of *innocent passage* through neutral international straits …' (emphasis added) (para 31) and, 'Neutral *vessels* may likewise exercise the right of *innocent passage* through belligerent international straits …' (para 32).

1121 Recalling Section 2.3.3.1, this agreement, also known as the 'two freedoms agreement', provides for the exchange of the first two freedoms of the air i.e. overflight and stops for technical purposes.

1122 United Nations Office for Ocean Affairs and the Law of the Sea, 'Legislative History of Part III of UNCLOS' (n 1120) 30-31 (Spain) and 62 (US).

1123 See Section 2.2.3.1 for discussion of the extension of the territorial sea from 3nm to 12nm.

1124 Bernard Oxman, 'Transit of Straits and Archipelagic Waters by Military Aircraft' (2000) 4 S J Int & Comp L 377, 384. The Singapore and Sunda Straits are, however, narrower than 6nm.

1125 Karin M Burke and Deborah A DeLeo, 'Innocent Passage and Transit Passage in the United National Convention on the Law of the Sea' (1983) 9 Yale J World Pub Ord 389, 400, quoting Ronald P Cundick, 'International Straits: The Right of Access' (1975) 5 Ga J Int'l & Comp L 107.

including ones that are strategically important for maritime States such as Gibraltar, Hormuz (Figure 5.1), Bab el Mandeb, Dover and Malacca.[1126]

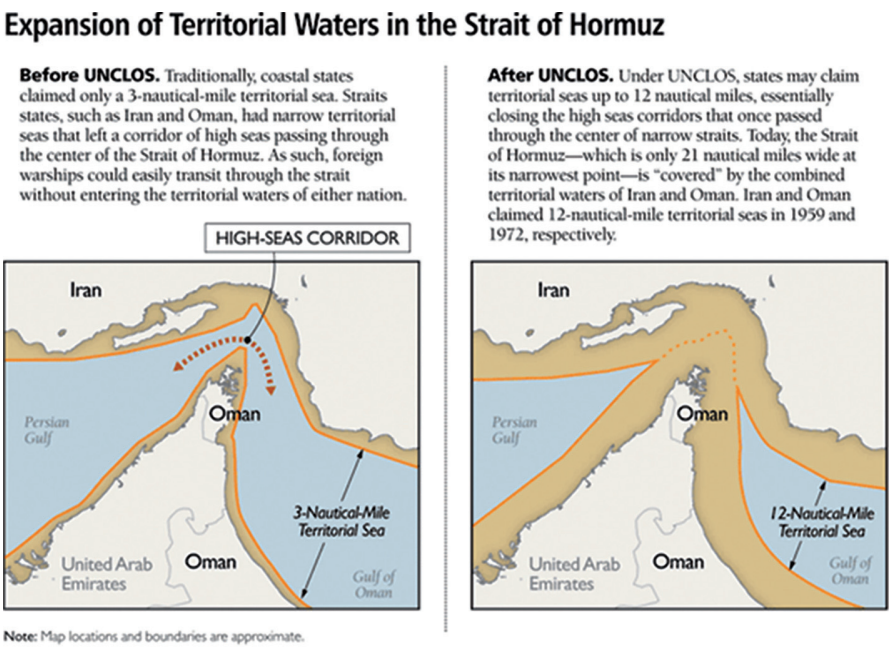

Figure 5.1: Strait of Hormuz, indicating the loss of the high seas corridor with the extension of the territorial sea

The coinciding adoption of these two elements – a comprehensive regime of transit passage and an increase in the breadth of the territorial sea – was aimed at ensuring that the extension of the territorial seas did not prohibit passage through certain straits that lost their high seas passage, particularly for military aircraft, which are regarded under Article 3 of the Chicago Convention as State aircraft. For those straits that are part of a State's EEZ or part of the high seas, the freedoms of the high seas – including freedom of overflight – apply as in any other part of the high seas and so are not relevant to the discussion on transit passage.[1127] Straits in this category are one of the four types of international straits excluded from the transit passage regime under UNCLOS, as will be addressed in the following section.

1126 Kay Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea' (1983) 77 Am J Int'l L 490, 493.

1127 Provided the high seas or EEZ route is of similar convenience to the routes through the territorial sea (see Section 5.3.3).

5.3.3 Exclusion of certain international straits from transit passage regime

Before considering the application of the transit passage regime and its implications for overflight, this section will briefly set out the extent of transit passage in terms of the geographical requirements of an international strait in which transit passage applies. In addition to the type of strait mentioned above, that is, straits through which there are high sea routes or EEZ routes that are of similar convenience,[1128] UNCLOS excludes three other types of international straits from the transit passage regime: straits through which passage is subject to existing conventions;[1129] straits formed by an island off the coast of the mainland of a State, where there is a passage of similar convenience through the high seas or EEZ on the seaward side of the island;[1130] and, straits providing access between the high seas or an EEZ and territorial sea of a foreign State.[1131] The second of these four categories – straits subject to existing conventions – was adopted to maintain ingrained pre-existing treaties at the time of the drafting of UNCLOS and is not in wide application today.[1132] Passage through straits in this category is determined according to the relevant conventions. For straits in the final two categories non-suspendable innocent passage applies, in the same manner as discussed above in relation to the *Corfu Channel Case*.[1133] In these two types of straits, as in other areas of the territorial sea where no passage is provided, overflight rights are obtained as for any other national airspace,

1128 UNCLOS, Article 36. This article applies in the case that an international strait is sufficiently wide so that at its narrowest point there is EEZ or high seas running through it. In this case, if those EEZ or high seas routes are 'of similar convenience' to the routes in the territorial sea portions of the international strait, the standard regimes of freedom of navigation and overflight in the EEZ/high seas and innocent passage in the territorial sea, will apply (Caminos and Cogliati-Bantz (n 1114) 42).

1129 UNCLOS, Article 35(c). For example, the Turkish Straits, Bosphorus and Dardanelles, which are governed by the Montreux Convention of 1936, giving Turkey control over the straits in return for free passage. The original signatory States to this Convention are (in addition to Turkey) Bulgaria, France, Greece, Japan, Romania, the USSR, the UK and Yugoslavia (Jon M Van Dyke, 'Transit Passage Through International Straits' in Aldo Chircop, Theodore McDorman and Susan Rolston (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M Johnston* (Martinus Nijhoff Publishers 2009) 204).

1130 UNCLOS, Article 38(1). Also known as the 'Messina exception', in recognition of its application to the strait between Sicily and mainland Italy.

1131 ibid Article 45(1)(b). For example, the Straits of Tiran, which connect the Red Sea and the Gulf of Aqaba, the latter of which is made up of the territorial seas of Egypt and Saudi Arabia.

1132 Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 Aust YBIL 93, 97. See above n 1129 for discussion of the Montreux Convention, as an example of a treaty of this kind currently in force.

1133 UNCLOS, Articles 45(1) and (2).

that is, prior authorisation from the coastal State is required.[1134] Passage through the first category however, is subject to the freedom of the high seas and applies as such to both ships and aircraft.[1135] As a result, aside from any conventions governing individual straits, such as the Montreux Convention of 1936, there are only two instances where overflight without prior permission exists through international straits: firstly, where there is transit passage and secondly, when there is a high seas or EEZ route through the strait.

5.3.4 The result of transit passage on overflight

UNCLOS expressly extends the regime of transit passage to aircraft: 'all ships and aircraft enjoy the right of transit passage'.[1136] Like non-suspendable innocent passage, and as mentioned in Section 5.2, the coastal State cannot suspend the right of transit passage. This is unequivocally provided under Article 44 UNCLOS – '[t]here shall be no suspension of transit passage' – and it means that States are not permitted to restrict or prohibit overflight in the airspace over straits in accordance with Article 9 of the Chicago Convention, as they are in other national airspace.[1137] Caminos and Cogliati-Bantz point out that the closure of the airspace in the Sunda Strait and the Lombok Strait by Indonesia in 1988 for 'the purpose of conducting air and sea tactical exercises' was consequently a violation of Article 44.[1138]

Transit passage through an international strait does not change the status of the seas that make up the strait, that is, they retain their status as the internal waters and territorial seas of the bordering States. UNCLOS makes this clear in stating that the transit passage regime 'shall not in other respects affect the legal status of the waters forming such straits'.[1139] It also stipulates that the sovereignty or jurisdiction of the States bordering the straits over such waters – the airspace, bed and subsoil – shall not in other respects be affected, but that it is to be exercised subject to the applicable part of UNCLOS (Part III) and to other rules of international law.[1140]

Transit passage under UNCLOS reflects the codification of the EEZ and so, further to the rule in the *Corfu Channel Case* which applies only to straits connecting specifically high seas, transit passage applies in straits that are 'used for international navigation between one part of the high seas or an

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1134 For Israel, in relation to the passage of its vessels, the application of non-suspendable innocent passage to the Straits of Tiran (see above n 1131) was particularly important considering that it would otherwise likely not have had the right of access to its territory through this body of water (Caminos and Cogliati-Bantz (n 1114) 54-55).

1135 UNCLOS, Article 36.

1136 UNCLOS, Article 38(1).

1137 Caminos and Cogliati-Bantz (n 1114) 232.

1138 ibid.

1139 UNCLOS, Article 34(1).

1140 ibid Article 34(1) and (2).

exclusive economic zone and another part of the high seas or an exclusive economic zone'.[1141] Through these straits, in accordance with the regime of transit passage, aircraft and vessels enjoy 'freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait'.[1142] Despite the use of the term 'freedom' in this article, aircraft do not enjoy freedom of overflight in transit lanes. The obligations on aircraft to, for example, proceed without delay and refrain from engaging in activities that are not related to expeditious transit, as mentioned in Section 5.2, are indicative of this.

The regime finally adopted for transit passage in UNCLOS reflects a compromise between coastal States bordering international straits, who will have more control over the straits in order to protect their marine resources and security interests, and maritime States, who benefit from fewer restrictions in passing through the straits.[1143] The limitations on overflight that prevent transit passage from constituting freedom of overflight are one side of this compromise, in favour of States bordering international waterways such as Spain, Morocco, Malaysia and Indonesia, who contended during the drafting process that the regime of non-suspendable innocent passage should be maintained in international straits.[1144] These States were particularly concerned about the implications of providing access to foreign military aircraft. As Spain put forward,

> '…if a military aircraft overflew the waters of a narrow international strait at high altitude, it would be easy for it to carry out observations for military purposes of the territory and installations of the coastal States. The latter would be helpless to prevent such threats to their national security. In addition, of course, the territory of the coastal State would also be at serious risk in the case of an accident to such a military aircraft'.[1145]

The adoption of the transit passage regime and its equal application to aircraft, in spite of these concerns, demonstrates the compromise from the other side. The fact that the rights of transit passage and archipelagic sea lanes passage continue to apply during armed conflict (see Section 5.5),[1146] make these concerns particularly acute.

As will be seen in the following section, despite the ultimate adoption of an international codified transit passage regime, Iran has been reluctant to yield control in the Strait of Hormuz.

1141 ibid Article 37.
1142 ibid Article 38(2).
1143 Burke and DeLeo (n 1125) 401.
1144 United Nations Office for Ocean Affairs and the Law of the Sea, 'Legislative History of Part III of UNCLOS' (n 1120) 31-32, 94, 36 and 134, respectively. Consider, for example, the Strait of Gibraltar and the Straits of Malacca.
1145 ibid 32. For further discussion on this matter in the drafting history see, Van Dyke, 'Transit Passage Through International Straits' (n 1129).
1146 San Remo Manual, para 27.

5.3.5 The Strait of Hormuz

Some States, including the US and the UK, support the view that transit passage under UNCLOS has attained customary status,[1147] but this is by no means widely accepted.[1148] This situation poses a problem considering that some States are not party to UNCLOS and do not recognise the customary status of the transit passage regime.

Oman has ratified UNCLOS but Iran has not, and neither State is a party to the 1958 Convention on the Territorial Sea and the Contiguous Zone.[1149] As States bordering the Strait of Hormuz, they have also not concluded a specific treaty governing transit through the strait.

Both Iran and Oman dispute the applicability of the rule of non-suspendable innocent passage in the *Corfu Channel Case* to the Strait of Hormuz on the basis that it applies to straits connecting one part of the high seas to another part of the high seas, whereas the Persian Gulf does not contain high seas.[1150] Iran has also repeatedly voiced its opposition to the transit regime under UNCLOS having developed into customary international law.[1151]

Despite not being a State party, Iran is a signatory to UNCLOS and upon signing it, issued an interpretive declaration that it would grant the right of transit passage under Article 38 UNCLOS but only to those States that are parties to the said convention.[1152] Otherwise, Iran applies innocent passage to its area of territorial sea in the strait, as it applies in any other area of territorial sea.[1153] Notably, the US is not a party to UNCLOS. In June 2019, a US drone flying through the Strait of Hormuz was shot down by

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1147 Guilfoyle (n 1118).

1148 Van Dyke, 'Transit Passage Through International Straits' (n 1129) 186-87.

1149 Iran is a signatory to the convention though, as of 28 May 1958.

1150 Andrea Gioia, 'Persian Gulf' (Max Planck Encyclopedia of Public International Law 2007) 31. This is presumably on the basis that Iran has declared an EEZ, which encompasses what existed of the high seas in the Gulf. This does of course mean that the Persian Gulf contains international airspace. Being encompassed by national airspace though, this makes little difference to overflight rights in the absence of transit passage for aircraft through the strait.

1151 ibid.

1152 United Nations Treaty Collection, 'Chapter XXI: Law of the Sea, Declarations and Reservations', available at <treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> accessed 26 July 2019. This is despite the fact that Article 38(1) UNCLOS provides that 'all ships and aircraft enjoy the right of transit passage', not just State parties to the treaty. See also, Nilufer Oral, 'Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers' (ASIL Insight, 3 May 2012), available at <www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage> accessed 1 February 2020.

1153 Geir Ulfstein, 'How International Law Restricts the Use of Military Force in Hormuz' (EJIL:Talk! 27 August 2019), available at <www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz/> accessed 3 November 2019.

Iranian forces.[1154] The US declared that they were in international airspace at the time.[1155] As is so often the case with these highly politicised incidents, the facts are vague, and this event is just one of many arising out of ongoing tensions between the US and Iran, and one that goes beyond the interpretation of the law of the sea. It does, however, serve to illustrate that despite a widely accepted international legal framework for transit passage, which is generally uncontroversial, the application of the relevant law in certain straits and with regard to certain maritime States is complex, with potentially significant consequences for overflight.

Finally, although the above is presented as a problem in part arising from Iran not having ratified UNCLOS, doing so does not necessarily result in a harmonised approach considering that ratification of a treaty does not necessarily mean that a State adheres to all aspects of that treaty. Regarding transit passage under UNCLOS, Spain declared upon ratification that it did not adhere to the transit passage regime and that it would continue to apply its national laws in international straits.[1156] In addition, Greece, a State party to UNCLOS issued a declaration that in practice provides that it has the responsibility to designate routes throughout its islands off its coast, in effect writing into the convention additional or varied rules for transit passage by, as Turkey stated in its reply, allowing it to 'retain the power to exclude some of the straits which link the Aegean Sea to the Mediterranean from the regime of transit passage'.[1157]

The transit passage regime under UNCLOS has resulted in substantial uniformity for the passage of aircraft through international straits without the need for prior permission. Some coastal States, however, such as Iran, Spain and Greece, that border international straits falling within the scope of the UNCLOS transit passage regime, do not apply this regime to the strait. This has implications for both navigation of vessels and overflight of aircraft through the strait. Whilst uniformity in the rules is preferable for the safety and efficiency of both navigation and overflight, it is the conflict between the coastal State, in applying a different regime, and the State of nationality of the aircraft or vessel operating through the strait, in failing to accept, and therefore adhere to, the different regime, that potentially results in detrimental consequences. The incident above between the US and Iran provides an example of the implications for overflight.

1154 'Strait of Hormuz: US Confirms Drone Shot Down by Iran' (BBC, 20 June 2019), available at <www.bbc.com/news/world-middle-east-48700965> accessed 3 November 2019.
1155 ibid.
1156 United Nations Treaty Collection, 'Declarations and Reservations' (n 1152).
1157 ibid.

5.4 Archipelagic waters

5.4.1 What is an archipelagic State?

UNCLOS defines an archipelagic State simply as 'a State constituted wholly by one or more archipelagos', where an archipelago is 'a group of islands, interconnecting waters and other natural features which are so closely interrelated [that they]… form an intrinsic entity'.[1158] Although this definition might suggest that there are a large number of archipelagic States, further conditions go some way in explaining why there are only nine States that have deposited charts or lists or geographical coordinates with the Secretary-General of the UN, as required under UNCLOS for an archipelagic State.[1159] These conditions apply to the drawing of the baselines of an archipelagic State and include, for example, that the water to land ratio inside the archipelagic baseline must be between 1 to 1 and 9 to 1, and that the length of baselines may not exceed 100nm.[1160] Furthermore, as is clear from the definition of 'archipelagic State', it excludes States that comprise an archipelago in addition to land connected to a continent: the State must be *wholly* constituted by an archipelago or archipelagos.

5.4.2 Coastal State sovereignty over archipelagic waters and sea lanes

Returning to the definition of an archipelagic State, surrounding this 'intrinsic entity' is the territorial sea baseline, seaward of which the territorial sea begins.[1161] Prior to UNCLOS, an archipelagic State was required to delimit its territorial sea on the basis of each of its individual islands in accordance with the law applying to islands in general.[1162] As a result of the archipelagic sea regime under UNCLOS, States have, in addition to their territorial sea and their internal waters, sovereignty over their archipelagic waters,[1163] from the bed and subsoil up to and including the airspace.[1164]

1158 UNCLOS, Articles 46(a) and (b).

1159 ibid Article 47(9). These States are: Bahamas, Fiji, Indonesia, Jamaica, Papua New Guinea, the Philippines, Sao Tome and Principe, Seychelles, and Trinidad and Tobago. Despite this, other States have made archipelagic claims, including: Antigua and Barbuda, Cape Verde, Comoros, Kiribati, Maldives, the Marshall Islands, St Vincent and the Grenadines, Solomon Islands, Tonga, Tuvalu and Vanuatu. On these points, see, Carlos Jiménez Piernas, 'Archipelagic Waters' (Max Planck Encyclopedia of Public International Law 2009) 20 and 21, respectively.

1160 UNCLOS, Articles 47(1) and (2).

1161 UNCLOS, Article 48.

1162 Convention on the Territorial Sea and the Contiguous Zone 1958, Article 10. Indonesia has not ratified this convention though, and in 1957 declared its archipelago part of its internal waters subject to innocent passage (P de Vries Lentsch, 'The Right of Overflight Over Strait States and Archipelagic States: Developments and Prospects' (1983) 14 Netherlands Yearbook of International Law 165, 180).

1163 UNCLOS, Article 49(1).

1164 ibid Article 49(2).

As with the territorial seas forming international straits under the transit passage regime, archipelagic waters are considered part of the territory of a State under Article 2 of the Chicago Convention, with the airspace above being national airspace.

ICAO has described the archipelagic State framework under UNCLOS as representing 'a profound innovation and progressive development of international law',[1165] not least in that it has led to the concept of 'territory' under Article 2 encompassing a far greater geographic expanse than was intended at the time of the drafting of the Chicago Convention. Despite this, upon the adoption of UNCLOS, ICAO did not consider an amendment to Article 2 to be necessary in light of the archipelagic waters regime. ICAO concluded that the archipelagic waters regime under UNCLOS instead resulted in an implicit shift in the interpretation of the term 'territory' under the Chicago Convention:

> 'Vast areas of the sea which were part of the high seas will become 'archipelagic waters' over which the archipelagic States will have sovereignty extending also to the airspace thereabove. Without any need for a textual amendment of the Chicago Convention, its Article 2 will have to be read as meaning that the territory of a State shall be the land areas, territorial sea adjacent thereto and its archipelagic waters'.[1166]

Recalling Section 2.2.2.1, Article 2 stipulates that 'territory of a State shall be deemed to be *the land areas* and *territorial waters*… under the sovereignty of such State'. It is proposed here that the term 'territorial waters', which is not used in UNCLOS and was also not used in the 1958 Convention on the Territorial Sea and the Contiguous Zone, necessarily refers more broadly to the maritime areas under the sovereignty of the State, rather than being synonymous with the more specific term of 'territorial sea', as used in UNCLOS and the 1958 Convention. This is the logical conclusion considering that internal waters, which are neither land areas nor territorial sea, have never been controversial in their inclusion within Article 2 of the Chicago Convention. Following this interpretation, 'territorial waters' under Article 2 of the Chicago Convention are those maritime areas referred to in Article 2(1) UNCLOS, setting out the extent of sovereignty of a coastal state beyond its land territory:

> 'The sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea'.

1165 ICAO *Secretariat Study on Agenda Item 5* (n 1105) 253.
1166 ibid 254.

This issue is still occasionally raised at the level of ICAO. In 2008, Indonesia brought the matter before the Legal Committee, arguing for a need to amend Article 2 of the Chicago Convention, but no further action on this has been recorded.[1167]

5.4.3 Archipelagic sea lanes

The right of innocent passage is enjoyed by ships through archipelagic waters outside sea lanes[1168] but, consistent with innocent passage in territorial seas,[1169] the right does not extend to aircraft. Archipelagic sea lanes provide aircraft (and vessels) with a right of passage through the archipelagic waters without affecting the archipelagic State's sovereignty over the lanes.[1170]

Archipelagic sea lanes passage is defined in Article 53(3) UNCLOS as,

> 'the exercise… of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone'.

Importantly for overflight, the above definition necessarily means that aircraft also have the right to archipelagic sea lanes passage in the territorial sea surrounding a State's archipelagic waters, as further expressly provided in Articles 53(1) and (4).[1171] If this were not the case, the right to exercise archipelagic sea lanes passage for aircraft would be subject to the

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1167 ICAO WP/8-2, *Draft Report on the Work of the Legal Committee During its 33rd Session* (1 May 2008) 4.5-4.14.

1168 UNCLOS, Article 52(1). Although ships have the right to innocent passage through archipelagic waters, the designation of archipelagic seas lane passage is significant as there are a number of distinctions between the two, which make sea lanes more favourable. For example, the right of innocent passage can be suspended by the coastal State (Article 25(3)) but the right of archipelagic sea lanes passage cannot, although lanes can be substituted; and, when exercising their right to innocent passage, submarines and other underwater vehicles must surface and show their flag (Article 20) whereas in in archipelagic seas lanes this is not required. In addition, prior notification and sometimes authorisation is required by some States for the innocent passage of warships, but this does not apply to the use of archipelagic sea lanes. For a discussion on these distinctions see, Hasjim Djalal, 'The Law of the Sea Convention and Navigational Freedoms' in Donald R Rothwell and Samuel Grono Bateman (eds), *Navigational Rights and Freedoms, and the New Law of the Sea* (Martinus Nijhoff Publishers 2000) 9.

1169 See Section 2.2.3.2.

1170 UNCLOS, Article 49(4).

1171 'An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters *and the adjacent territorial sea*' (emphasis added) (Article 53(1)); and, 'Such sea lanes and air routes shall traverse the archipelagic waters *and the adjacent territorial sea*…' (emphasis added) (Article 53(4)). See also, ICAO *Secretariat Study on Agenda Item 5* (n 1105) 253.

negotiation of access to the airspace in the territorial sea, as with access to national airspace in general. This is clear from Figure 5.2, which depicts the archipelagic State of the Philippines surrounded by its band of territorial sea. Having said this, the Philippines made a declaration upon signing UNCLOS that it considers archipelagic waters as similar to internal waters and thus, that there is no passage through its territorial waters providing access to its archipelagic waters.[1172] The declaration was met with opposition by a number of States, including Russia and Australia.

Figure 5.2: The archipelago of the Philippines surrounded by the Philippines' territorial sea[1173]

1172 United Nations Treaty Collection, 'Declarations and Reservations' (n 1152).

1173 Source: Roel Balingit (username: Namayan), available at <commons.wikimedia.org/wiki/File:Ph_Territorial_Map.png> accessed 12 February 2020.

As with transit passage, some States – such as the US – claim that archipelagic sea lanes passage is customary international law, but the variation in State practice in applying the regime suggests that this is unlikely to be the case.[1174] All States noted above in Section 5.4.1[1175] that have met the formal requirements of an archipelagic States, or that have registered but not met the formal requirements, are parties to UNCLOS, and therefore bound by its provisions. Like the Philippines though, Cape Verde and Sao Tome and Principe registered declarations to the archipelagic regime, in their case indicating a tacit rejection of archipelagic sea lanes passage.[1176] Indonesia's administration of its archipelagic sea lanes provides another example of what some States view as a variation from what is provided under UNCLOS, a matter that will be further discussed in Section 5.4.4.3.

5.4.4 Ambiguities in the application of archipelagic sea lanes passage to overflight

5.4.4.1 Designation of air routes

The archipelagic sea lanes passage regime under UNCLOS has, in practice, resulted in little conflict regarding its application to overflight. This may be in part because the number of archipelagic States is only small, and that just one of those States, Indonesia, has designated sea lanes through its archipelagic waters. As will be seen below, the UNCLOS provisions relating to designation are not entirely unambiguous insofar as they relate to overflight. More significantly though, like in international straits, international civil aviation generally operates through archipelagic waters on the basis of prior permission as it does through other national airspace,[1177] and the application of archipelagic sea lanes passage to overflight is predominantly intended for the purpose of providing State aircraft access through the seas.

Under UNLCOS, an archipelagic State has the right to designate sea lanes and air routes through the archipelago and once established, all ships and aircraft enjoy the right of passage in such sea lanes and air routes.[1178] Aircraft are required to adhere to the air routes, with deviations of up to 25nm permitted either side of the route.[1179] In its designation of air routes, an archipelagic State must include 'all normal passage routes used as routes

1174 Caminos and Cogliati-Bantz (n 1114) 472.
1175 See n 1159.
1176 United Nations Treaty Collection, 'Declarations and Reservations' (n 1152).
1177 Pursuant to Articles 3, 5, 6 and 8 of the Chicago Convention, as addressed in Chapter 2.
1178 UNCLOS, Articles 53(1) and (2). Article 41 UNCLOS governs the designation of sea lanes within international straits. Unlike its equivalent for archipelagic seas lanes, it does not provide States with the right to designate air routes over international straits. Greece and Morocco objected to this omission prior to the conclusion of UNCLOS, calling for coastal States to have the right to impose corridors for overflight in international straits, but their opposition on this point failed to impact the final outcome (Caminos (n 1115) Note 386).
1179 UNCLOS, Article 53(5).

for international navigation or overflight'.[1180] If the State 'does not designate sea lanes or air routes', aircraft have the right to exercise passage 'through the routes normally used for international navigation', in accordance with Article 53(12).

The wording in Article 53(12) requires attention in terms of its implications for overflight in that it provides only for the ongoing use of routes normally used for international *navigation*, which is specifically used in UNCLOS in respect to ships, whereas the term 'overflight' is used for aircraft. This is despite the fact that the first part of the article establishes that it applies in the case that either sea lanes or air routes have not been designated. Commentators have thus questioned whether this means that air routes are tied to sea lanes.[1181] The apparent coexistence is heightened by the wording of Article 53(1): 'an archipelagic State may designate sea lanes and air routes *thereabove*…' (emphasis added).

ICAO has not commented on Article 53(1), but on Article 53(12) it stated, soon after the adoption of UNCLOS, merely that the provision 'preserves the factual status quo', meaning that 'the existing air routes will continue' in the case that the archipelagic State takes no action to expressly designate air routes. This suggests that ICAO either takes as a given that air routes follow the routes of navigation, or that the phrase 'routes for… navigation' as it is used in Article 53(12) refers also to air routes. The latter is unlikely given that UNCLOS throughout is clear in its distinction between routes for navigation and air routes, and navigation and overflight.

De Vries Lentsch has considered the ambiguity, pointing out that in practice air routes and sea routes are established in accordance with the considerations of each mode of transport – air routes cover land, for example – and requiring them to be aligned has no practical benefit.[1182]

However, Kwiatkowska and Agoes provide logic to the literal interpretation of the text:

> 'The requirement that air routes must be above archipelagic sea lanes was dictated… by the necessity to provide maneuvering possibilities for military aircraft while the naval forces of a particular fleet are passing through the sea lanes'.[1183]

Thus, the symbiotic relationship between the sea lanes and air routes is intentional, but not relevant to international *civil* aviation. Quoting Kwiatkowska and Agoes once again:

1180 ibid 53(4).

1181 Barbara Kwiatkowska and Etty R Agoes, 'Archipelagic Waters: An Assessment of National Legislation' in Rüdiger Wolfrum, Ursula E Heinz and Denise A Bizzarro (eds), *Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime - Proceedings of an Interdisciplinary Symposium of the Kiel Institute of International Law, 10-14 July 1990* (Duncker & Humblot 1991) 144; de Vries Lentsch (n 1162) 211.

1182 ibid.

1183 Kwiatkowska and Agoes (n 1181) 144.

> 'Civil aircraft could clearly not fulfill the condition of zigzagging above the archipelagic sea lanes and of overflying archipelagic waters without passing above archipelagic land (island) territory'.[1184]

Whilst international civil aircraft have a right to operate through air routes designated as archipelagic sea lanes pursuant to UNCLOS, in practice, these routes are not designed with their navigation in mind and their flight paths will instead be dictated outside the scope of UNCLOS as for the operation of foreign aircraft in any other national airspace.

5.4.4.2 ICAO's role in approving air routes

Under Article 53(9), an archipelagic State is required to refer its proposals of designated sea lanes to 'the competent international organization', in this case the IMO,[1185] for adoption before the State designates them. The article refers only to sea lanes though, rather than also air routes, an omission ICAO addressed shortly after the adoption of UNCLOS. Whilst it must be considered intentional, ICAO concluded, it noted that there is no record of the purpose of the omission and therefore,

> 'the prima facie interpretation must be that the archipelagic States would have no conventional duty to refer proposals on the designation of air routes over the archipelagic waters to ICAO for adoption'.[1186]

For practical reasons though, ICAO indicated that archipelagic States should submit their air route proposals to their Regional Air Navigation Conference 'for eventual approval by the ICAO Council'.[1187] This also makes sense from a safety perspective given ICAO's role in approving regional air navigation plans and the fact that air routes are the foundation for the coordination of the provision of air navigation services as set out in those plans.[1188] The IMO has since formally recognised ICAO as a relevant party in considering archipelagic sea lanes proposals.[1189] Noting ICAO's consideration that there is no recorded intention for the omission, the reason

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1184 ibid.

1185 Caminos (n 1115) 166.

1186 ICAO *Secretariat Study on Agenda Item 5* (n 1105) 254.

1187 ibid.

1188 'Safety of Navigation: Designation of Certain Sea Lanes and Air Routes Thereabove Through Indonesian Archipelagic Waters – Note by Indonesia' (MSC 67/7/2 30 August 1996), in Barbara Kwiatkowska, Eric Molenaar, Alex Oude Elferink and Alfred Soons (eds), *International Organizations and the Law of the Sea – Documentary Yearbook 1996, Vol 12* (Martinus Nijhoff Publishers 1996) 727.

1189 IMO Resolution A.572(14), as amended, 'Amendments to the General Provisions on Ship's Routeing' (19 May 1998), Annex 2, 3.3: 'Upon receipt of a proposal for designating archipelagic sea lanes and before consideration for adoption, the IMO shall ensure that the proposal is disseminated to all Governments and ICAO so as to provide them with sufficient opportunity to comment on the proposal'.

may lie with the explanation above regarding the designation of air routes in archipelagic sea lanes being for the purpose of a military aircraft: given that State aircraft are outside the competence of ICAO, its involvement was not considered relevant.[1190]

5.4.4.3 Partial designation

The rules for designation involving routes normally used for navigation and overflight, are designed to help ensure archipelagic States maintain traditional routes through their archipelagos. It is in an archipelagic State's interest to minimise the designation of sea lanes through their archipelago though, as it retains greater control over non-sea lane designated waters.[1191] On the other hand, there are the interests of the States whose aircraft and ships benefit from a greater network of sea lanes to support both their commercial and military interests.[1192]

This tension has led to disagreements regarding Indonesia's designation of sea lanes. Indonesia designated north-south sea lanes through its archipelagic waters in 2002 but has not designated east-west lanes.[1193] The US and Australia object to the designation on the basis that they claim the east-west sea lanes to be routes normally used for navigation under Article 53(4) UNCLOS.[1194] Recalling Article 53(12), a State can use the routes normally used for navigation in the case that the archipelagic State has not designated routes, but this is the only permitted circumstance for the use of undesignated routes. In the case of Indonesia however, the IMO has classified its designation of sea lanes as a 'partial designation' on the basis that it does not include the east-west lanes[1195] and, as a consequence, States are still permitted to use the east-west designation on the basis of Article 53(12).[1196] Indonesia has acknowledged that its designation is partial and accepts

1190 Kwiatkowska and Agoes (n 1181) 144. Having said this, ICAO plays a role in the coordination of civil and military traffic and its involvement today in the designation process alongside the IMO is in this sense consistent with serving the interests of safety.

1191 Chris Forward, 'Archipelagic Sea-Lanes in Indonesia – Their Legality in International Law' (2009) 23 Aust & NZ Mar LJ 143, 150-51.

1192 Carlos Jiménez Piernas, 'Archipelagic Waters' (Max Planck Encyclopedia of Public International Law 2009) 25.

1193 Caminos and Cogliati-Bantz (n 1114) 199-200.

1194 Tara Davenport, 'The Archipelagic Regime' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 151.

1195 Arif Havas Oegroseno, 'Archipelagic States: From Concept to Law' in David J Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: Volume 1 - The Law of the Sea* (OUP 2014) 135.

1196 Caminos and Cogliati-Bantz (n 1114) 201. See also, Sam Bateman, 'Australia and Indonesia at odds at sea' (East Asia Forum, 26 June 2015), available at <www.eastasiaforum.org/2015/06/26/australia-and-indonesia-at-odds-at-sea/> accessed 20 May 2018; Carlos Jiménez Piernas, 'Archipelagic Waters' (Max Planck Encyclopedia of Public International Law 2009) 27.

the right of vessels and aircraft to operate though 'routes normally used for navigation', but this public position is contrary to its domestic legislation.[1197] As acknowledged in Section 5.4.4.1, there is no evidence that this situation has resulted in concern for the operation of international civil aviation, however it has impacted on foreign military operations, particularly those of the US who have operated in the east-west lanes, asserting what the US claims as its right to do so.[1198] In October 2016 the US reiterated its objection to the lack of designation by way of a diplomatic note to Indonesia.[1199] As of May 2020, this author is not aware of further steps having been taken towards a resolution of this matter between the two States.

5.5 Overflight through transit and archipelagic sea lanes during armed conflict

Sections 5.1 and 5.3.4 indicated that transit passage and archipelagic sea lanes passage continue to apply during a time of armed conflict. This is with the exception that a belligerent coastal State has no obligation to provide passage during an armed conflict for a vessel or aircraft of an enemy State.[1200]

Insofar as the passage of aircraft of neutral States[1201] is concerned, as a result of Article 44 UNCLOS, any provisions under air law that may lead to the suspension of the right of overflight during war, such as Article 89 of the Chicago Convention and Article I, Section 1 of the Transit Agreement, do not permit the coastal State to close an international strait[1202] and this applies equally to archipelagic sea lanes.[1203] In the case of suspension under these circumstances, transit and archipelagic sea lanes passage would continue to serve the operation of international civil aviation where

1197 'Indonesian Archipelagic Sea Lanes' (Semaphore – Newsletter of the Sea Power Centre Australia, April 2005), available at <www.navy.gov.au/sites/default/files/documents/Semaphore_2005_6.pdf> accessed 25 June 2016.

1198 Davenport, 'The Archipelagic Regime' (n 1194) 151; Caminos and Cogliati-Bantz (n 1114) 200-1. A US military aircraft was met by Indonesia military aircraft whilst operating through the east-west sea lane.

1199 Robert Beckman, 'The Legal Regime Governing Passage on Routes used for International Navigation through Indonesian Waters' (Presentation delivered at the 42nd Annual Conference of the Centre for Oceans and Policy Cooperation and Engagement in the Asia Pacific Region, Beijing, 24-26 May 2018).

1200 Caminos and Cogliati-Bantz (n 1114) 21. As with many other aspects regulating the law of war, this is determined as a result of State practice. Note also, '[b]elligerents in transit or archipelagic sea lanes passage may not… conduct offensive operations against enemy forces' (San Remo Manual, para 30).

1201 That is, States that are not party to the conflict (San Remo Manual, para 13(d)).

1202 Caminos (n 1115), 161.

1203 UNCLOS, Article 54. This article provides that Article 44, *inter alia*, applies *mutatis mutandis* to archipelagic sea lanes passage.

overflight through other parts of the territory of the bordering States or archipelagic State would not be permitted.

The ICJ in the *Corfu Channel Case* made clear though that during a state of war, a belligerent State bordering a strait has the right to regulate – but not prohibit – the passage of warships through the strait,[1204] referring to neutral warships, and this is understood to extend also to merchant ships.[1205] Likewise, for neutral aircraft today, State practice suggests that a belligerent coastal State, whilst it may not prevent passage, has the right to impose regulations on overflight through transit lanes and archipelagic sea lanes during armed conflict, such as subjecting aircraft to visit and search.[1206]

Notwithstanding the above, Caminos and Cogliati-Bantz argue that in extreme circumstances the State may be able to justify the closure of transit lanes or archipelagic sea lanes, with the legality of doing so determined on the basis of the rules on State responsibility, specifically circumstances precluding wrongfulness.[1207]

5.6 Conclusion to chapter

As a result of the regimes established under UNCLOS, the airspace over international straits and in archipelagic sea lanes is an anomaly in that it is part of sovereign airspace but the rules applying to overflight are closer to those in international airspace. Like in the EEZ and the high seas, the Rules of the Air under Annex 2 of the Chicago Convention apply without exception and the coastal State cannot impose its national civil aviation regulations in the airspace. Furthermore, the coastal State may not hamper or suspend passage, even in the case of war, although State practice indicates that there is no obligation to permit the aircraft of an enemy State to pass through the lanes, and, possibly, in the case of exceptional circumstances, the coastal State also has the right to close the lanes to the aircraft of other States on the basis of the action being justifiable as a circumstance precluding wrongfulness.[1208]

Aircraft passing through an international strait or archipelagic sea lane do not require prior authorisation to pass through the airspace but neither do they have the right to freedom of overflight: unlike in the EEZ or over the high seas, they must proceed without delay and, in doing so, they are forbidden from activities that are external to expeditious transit. Whilst transit passage and archipelagic sea lanes passage apply to both

1204 *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Rep. 1949 (Apr. 9), p. 4, p. 29.
1205 Caminos and Cogliati-Bantz (n 1114) 26.
1206 San Remo Manual, paras 115 and 125.
1207 Caminos and Cogliati-Bantz (n 1114) 30.
1208 YILC (2001) Vol. II, Part 2.

civil aircraft and State aircraft, the regimes are, in practice, to the benefit of State – usually military – aircraft and as a result, the issues addressed in this chapter have consequences for these aircraft where they have little or no impact on international civil aviation. As discussed in Section 2.4.4, overflight of national airspace for State aircraft is largely negotiated on an ad hoc basis. Transit passage and archipelagic sea lanes passage enable such aircraft to operate freely between areas of international airspace without either the need for authorisation from the coastal States whose national airspace includes the international straits or archipelagic sea lanes they pass through or, the impractical detours that would be required if they were forced to avoid the airspace.

The regime under UNCLOS brings substantial uniformity to the legal framework applying to navigation in the airspace over international straits and archipelagic sea lanes. However, as demonstrated in this chapter, the application of the laws is not without conflict. In the case of transit passage, some coastal States have not accepted the application of the regime to their national airspace in the international strait. Where this is the case, the potential for conflict exists – as displayed in the Strait of Hormuz between the US and Iran – where the State of registry of the aircraft does not recognise the purported right of the coastal State to regulate the operation of the aircraft. In the case of archipelagic sea lanes passage, the designation of air routes has resulted in conflicting views between the coastal State, in this case Indonesia, and the States whose military aircraft operate in the airspace. As the case of Indonesia demonstrates, there is some ambiguity in the archipelagic sea lanes passage regime resulting from the failure to establish a contingency for the situation arising out of an archipelagic State designating some sea lanes but not including all normal passage routes. The concept of 'partial designation' has been accepted by the IMO to address this and to allow maritime States to operate in normal passage routes. In doing so, the IMO has arguably gone beyond the intention of UNCLOS[1209] and, although Indonesia has publicly accepted it, both its domestic legislation and actions in response to military aircraft operating in the east-west sea lanes indicate otherwise.

The tension between the conflicting rights asserted by the coastal State and the State of registry of aircraft navigating through international airspace, as has been addressed in the preceding chapters of this study, extends also to the context of archipelagic sea lanes and international straits which, despite constituting national airspace, involve rights that more closely resemble that of freedom of overflight. The consequences of this are negligible for international civil aviation but it remains to be seen whether and to what extent, these legal issues result in greater conflict between States in future regarding the navigation of State, particularly military, aircraft.

1209 Davenport, 'The Archipelagic Regime' (n 1194) 151.