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# The Estonian Straits

*Exceptions to the Strait Regime  
of Innocent or Transit Passage*

ALEXANDER LOTT

BRILL | NIJHOFF

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By

Alexander Lott



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### PART 3

## *The Significance of the Outer Limits of Maritime Zones for the Legal Regime of the Estonian Straits*

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## The Irbe Strait in the Gulf of Riga

### 1 The Characteristics of the Irbe Strait

The Irbe Strait (Estonian: *Kura kurk* or *Irbe väin*; Latvian: *Irbes jūras šaurums*) connects the Baltic Sea proper with the Gulf of Riga. It lies between the Estonian Sõrve Peninsula and the Latvian Courland Peninsula and stretches from the Ovisi lighthouse in the west to the Abruka meridian in the east.<sup>448</sup>

The shallow strait is in its western part generally 5 to 10 m deep due to the almost continuous belt of shallows extending from the Latvian coast to the tip of the Estonian Sõrve Peninsula.<sup>449</sup> However, its narrow shipping channel is 20–23 m deep.<sup>450</sup> Due to the relatively shallow depth and low salinity of the Gulf of Riga, the strait is often covered with ice; the Gulf of Riga freezes completely over in about a third of winters and the ice cover may last from January to April.<sup>451</sup> However, as the bays (e.g. Pärnu Bay) of the Gulf of Riga are never covered with ice for most of the year, this excludes the applicability of the special legal regime of ice-covered areas (Article 234 of the LOSC) to the Gulf of Riga.<sup>452</sup>

The international seaway of the Irbe Strait leads to the ports of *inter alia* Riga, Pärnu, Kuressaare, Roomassaare and Virtsu. The Irbe Strait has relatively heavy traffic, reaching over 10 000 ships a year in 2011 and 2012.<sup>453</sup> In 2013, the ship traffic crossings in the Irbe Strait amounted to 9,639.<sup>454</sup> In 2014, the 815

448 Eesti Entsüklopeedia. – Kura kurk. Accessible in Estonian at: [http://entsyklopeedia.ee/artikkel/kura\\_kurki](http://entsyklopeedia.ee/artikkel/kura_kurki) (30.11.2017).

449 The depths in the eastern end of the Irbe Strait reach up to 30 m. See e.g. British Admiralty Chart No. 2226, *op. cit.*

450 Tea Entsüklopeedia, vol. 11. – Kura kurk. Tallinn: Tea 2014, p. 145.

451 Eesti Entsüklopeedia, vol. 8, *op. cit.*, Riia laht, p. 128. Eesti Nõukogude Entsüklopeedia, vol. 3, *op. cit.*, p. 673.

452 For a discussion on Article 234 of the LOSC, see *supra* Section 2.2 of Part 1.

453 See the maps and figures in Baltic Marine Environment Protection Commission. Report on shipping accidents in the Baltic Sea area during 2011. Helsinki 2011, pp. 2–5. Baltic Marine Environment Protection Commission. Report on shipping accidents in the Baltic Sea area during 2012. Helsinki 2012, pp. 3–7. The figures do not include small craft. Accessible: <http://helcom.fi/action-areas/shipping/publications> (30.11.2017).

454 Baltic Marine Environment Protection Commission. Report on shipping accidents in the Baltic Sea area during 2013. Helsinki 2014, p. 3. Accessible: <http://helcom.fi/action-areas/shipping/publications> (30.11.2017).



year-old Riga Port alone accommodated 3,797 vessels.<sup>455</sup> At the same time, the Irbe Strait falls entirely under the European network of nature protection areas (Natura 2000) and includes the Estonian nature reserve of Vesitükimaa Islets (216,4 ha) which is located at the tip of the Sõrve Peninsula. It is an important nesting area for sea birds and also has a grey seals' habitat.<sup>456</sup>

At its narrowest section, the Irbe Strait is 14.5 nm wide. The Irbe Strait falls entirely within the territorial sea of its coastal States Estonia and Latvia. Thus, the Irbe Strait meets the geographic and functional criteria of an international strait as it is used for international shipping and its width is up to 24 nm.

## 2 Straits of the Gulf of Riga Linking Two Parts of an EEZ

The Irbe Strait and the Sea of Straits may potentially fall under the transit passage regime since they connect the Latvian/Swedish/Estonian/Finnish EEZs in the Baltic Sea proper with the Latvian EEZ in the south-eastern part of the Gulf of Riga.<sup>457</sup> In this case, the right of transit passage would apply also in maritime areas that lead to such international straits or from such international straits to the respective EEZ, such as the northern part of the Gulf of Riga.<sup>458</sup> This would be contrary to *inter alia* the security interests of the coastal States of the Gulf of Riga.

The Estonian foreign minister commented before the Parliament that during the maritime boundary delimitation in the Gulf of Riga, great emphasis was put on security concerns in view of finding a solution that would be favourable to the interests of Estonia.<sup>459</sup> He added that if the maritime boundary delimitation between Estonia and Latvia would not have been successful and both States would have referred the dispute for international arbitration, then in the end, Estonia and Latvia "would have been obliged to guarantee access to third

455 See About Port. – Freeport of Riga Authority, 2015. Accessible: <http://www.rop.lv/en> (30.11.2017).

456 See also M. Kuris. Vesitükimaa laidude, Vesitükimaa hoiuala ja Kura kurgu hoiuala kaitsekorralduskava 2016–2025. Tallinn: Environmental Board 2015, pp. 7–8.

457 On the legal regime of transit passage see *supra* Section 1.2 of Part 1.

458 See also A.R. Thomas, J.C. Duncan. Annotated Supplement to the Commander's Handbook on the Law of Naval Operations. – 73 International Law Studies 1999, p. 183. Schachte, Jr, Bernhardt, *op. cit.*, p. 536. R.I. Clove. Submarine Navigation in International Straits: A Legal Perspective. – 39 Naval Law Review 1990, p. 109. M.C. Stelakatos-Loverdos. The Contribution of Channels to the Definition of Straits Used for International Navigation. – 13 The International Journal of Marine and Coastal Law 1998(1), p. 85.

459 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*



States through the Irbe Strait and, besides, it would have been still necessary to delimit EEZ in international waters."<sup>460</sup> It thus appears that in the 1996 Maritime Boundary Treaty Estonia and Latvia aimed at setting aside Part 3 of the LOSC on the legal regime of straits. With respect to the foreign minister's comment on the EEZ it should be noted that Estonia and Latvia delimited the EEZ by leaving all of the overlapping EEZ on the Latvian side of the boundary.<sup>461</sup>

The head of the Parliament's foreign committee also hinted at the security interests associated with the applicability of transit passage in the Irbe Strait:

In discussing the question at the [Parliament's] foreign committee it was not understood that the Gulf of Riga would need to be a part of the sea with free entrance and I understand that principally we are all of the view that the Gulf of Riga should be closed and divided between the territorial sea of Estonia and Latvia. In this regard, any talk that it should still include an exclusive economic zone similarly to what we provided in the 1993 Maritime Boundaries Act is, indeed, outdated.<sup>462</sup>

Thus, it appears that during the maritime boundary negotiations, Estonia and Latvia strived to exclude the existence of an EEZ in the Gulf of Riga in order to avoid the potential applicability of the transit passage regime in the Gulf of Riga. However, they did not succeed in this attempt since the failure to agree on the status of the Gulf of Riga as a historical bay inevitably led to the existence of a Latvian EEZ in the Gulf of Riga which is beyond 12 nm from the baselines of both States.<sup>463</sup>

The reason why strait States are generally interested in avoiding the applicability of the transit passage regime to its strait(s) pertains to the magnitude of limits on the coastal State's sovereignty over its territory, as provided in the legal framework under Section 2 of Part 3 of the LOSC.<sup>464</sup> The domestic law of Estonia and Latvia on the passage rights of warships and other foreign vessels used for national non-commercial purposes does not follow the legal framework of transit passage and excludes the possibility of exercising transit passage in the relevant maritime area.

460 Ibid.

461 See *supra* Section 6 of Chapter 3 in Part 2.

462 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

463 See *supra* Section 6 of Chapter 3 in Part 2. See also *infra* Section 4.4 of Chapter 1 in Part 3.

464 The transit passage regime is almost always contrary to the interests of the strait States. Thus, the strait States generally strongly opposed the establishment of the concept of transit passage during the drafting of the LOSC. See e.g. Nandan, Rosenne, *op. cit.*, p. 284. See also Rothwell 2015, *op. cit.*, p. 122.



### 3 The Domestic Law of Estonia and Latvia on the Passage Rights of Warships and Other Foreign Vessels Used for National Non-commercial Purposes

Pursuant to Section 13(1) of the Estonian State Borders Act, innocent passage through the territorial sea of Estonia is permitted. Passage must be continuous and expeditious as, pursuant to Section 13(5) of the Act, a vessel may only stop in case of a marine casualty, due to *force majeure*, in order to save human lives or provide assistance to vessels or aircraft in danger or in distress. According to Section 13(7) of the Act, the deck armaments of a foreign vessel must be fixed in the position for transport and covered. Alex Oude Elferink has pointed out that such a specific requirement is not provided for in the LOSC as, according to Article 19(2)(b), it merely requires foreign ships in innocent passage to avoid “any exercise or practice with weapons of any kind.”<sup>465</sup> Additionally, fishing and other gear must be placed at the storage facilities upon passage through the Estonian territorial sea. The latter requirement is absent from and thus also complements the indicative list of activities in Article 19(2) of the LOSC that are considered to be prejudicial to the peace, good order or security of the coastal State if carried out in its territorial sea.<sup>466</sup>

However, by contrast to the Swedish, Finnish and Russian regulations,<sup>467</sup> Section 13(2) of the State Borders Act of Estonia still retains the requirement for foreign warships and other government-owned vessels used for non-commercial purposes to give a prior notification in order to enter the territorial sea of Estonia. Additionally, Section 43(1) of the National Defence Act<sup>468</sup>

465 A.G. Oude Elferink. Estonia: Rules of Navigation of Ships through the Territorial Sea and the Internal Waters of Estonia. – 8 International Journal of Marine & Coastal Law 1993, p. 424.

466 See *ibid.*

467 Ordinance concerning the admission to Swedish territory of foreign naval vessels and military aircraft (as amended 27.10.1994). Adopted 03.06.1966, e.i.f. 03.06.1966. See Hallituksen esitys Eduskunnalle Yhdistyneiden Kansakuntien merioikeusyleissopimuksen ja sen XI osan soveltamiseen liittyvän sopimuksen eräiden määräysten hyväksymisestä sekä laiksi aluksista aiheutuvan vesien pilaantumisen ehkäisemisestä annetun lain muuttamisesta (Explanatory Note to the Proposal of the Finnish Government) – 2.1. Alueneri. Helsinki 1996, HE 12/1996. Accessible in Finnish at: <http://www.finlex.fi/fi/esitykset/he/1996/19960012> (30.11.2017). See also Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation. Adopted 16.07.1998, e.i.f. 31.07.1998, Sections 2(4) and 10–13. Accessible: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm> (30.11.2017).

468 Riigikaitseeadus (National Defence Act). Adopted 11.02.2015, e.i.f. 01.01.2016 (RT I, 12.03.2015, 1). Accessible: <https://www.riigiteataja.ee/en/eli/ee/51712015001/consolide/current> (30.11.2017).



of Estonia stipulates that a permit for entry of a foreign military vessel into Estonian territorial waters or inland waters is issued by the minister of defence or a person authorised thereby.

Although according to the wording of the said provision, the permit is necessary “for entry /.../ in territorial waters,” it appears that unlike Section 13(2) of the State Borders Act, it does not regulate innocent or transit passage through the territorial sea or internal waters, but rather the entry and stay of foreign warships in the Estonian territorial sea and internal waters. This is clarified in Section 2(4) of the procedure for the issue of permits for entry of foreign military vessels in Estonian territorial waters or inland waters<sup>469</sup> (adopted as a Cabinet regulation under Section 43(2) of the National Defence Act) which stipulates that diplomatic clearances are not required for exercising the right of innocent passage in the Estonian territorial sea. Instead, foreign military ships need to comply with the prior notification requirement as stipulated in Section 13(2) of the State Borders Act.

The Estonian domestic law is silent on the application of transit passage in its maritime area. It is unclear whether foreign ships and aircraft have an obligation under the Estonian domestic law to get prior permission for the exercise of transit passage. Such an obligation would certainly be contrary to Article 38(1) of the LOSC. Yet Section 12(2) of the Estonian State Borders Act currently provides that an aircraft may cross the state border outside the established airway only with the permission of an agency authorised by the Estonian Government.

A similar regulation to the afore-mentioned 2016 Estonian Cabinet Decree is also in force in Latvia. Under Paragraph 3 of the Latvian regulation, a foreign warship is similarly required to apply for a permit from the Ministry of Foreign Affairs to enter the Latvian territorial sea.<sup>470</sup> The 34-paragraph long detailed

469 Välisriigi sõjalaevale territoriaal- või sisevetesse sisenemise loa ning välisriigi riiklikule õhusõidukile õhuruumi sisenemise loa andmise kord (Procedure for the Issue of Permits for Entry of Foreign Military Vessels in Estonian Territorial Waters or Inland Waters and Permits for Entry into Estonian Airspace of Foreign State Military Aircraft, for their Landing on Estonian Territory or for their Flying over the Territory). Adopted 28.01.2016, e.i.f. 05.02.2016 (RT I, 02.02.2016, 2). Accessible in Estonian with an English translation of the Application for Diplomatic Clearance of Military Ship at: <https://www.riigiteataja.ee/akt/102022016002> (30.11.2017).

470 Procedures, by which Foreign Warships shall Enter and Stay in the Territorial Sea, Inland Waters and Ports of the Republic of Latvia and Leave Them (Cabinet Regulation No. 759). Adopted 10.08.2010, e.i.f. (with amending regulations) 11.11.2011. Accessible: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK\\_Noteikumi/Cab\\_Reg\\_No\\_759\\_-\\_Foreign\\_Warships\\_shall\\_Enter\\_and\\_Stay\\_in\\_the\\_Territorial\\_Sea.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab_Reg_No_759_-_Foreign_Warships_shall_Enter_and_Stay_in_the_Territorial_Sea.doc) (30.11.2017).



regulation stipulates in Paragraph 5 *inter alia* that the embassy or the Ministry of Foreign Affairs shall, by diplomatic channels, request a permit for entering no later than 30 days prior to the planned entering in the territorial sea, inland waters and ports of Latvia by foreign warships if another procedure has not been specified in an international agreement. If the Head of State or a member of the government is on board a foreign warship as an official person, the warship needs to request a permit no later than 7 days prior to entering the Latvian territorial sea, pursuant to Paragraph 6 of the regulation. According to Paragraph 32 of the regulation, a foreign warship must notify the Latvian authorities if it is forced to enter and temporarily stay in the territorial sea due to an accident or natural disaster, need for medical assistance or other emergency reasons.

The Latvian Cabinet regulation of 2010 is adopted pursuant to Article 11(3) of the Law on the Border of the Republic of Latvia, which distinctly from the Estonian State Borders Act does not provide for a prior notification requirement for the foreign warships to exercise their right of innocent passage through the territorial sea. Section 10(9) of the Latvian Law on the Border stipulates that vessels of foreign States have the right to cross the State border and enter the territorial sea in conformity with the principle of innocent passage in accordance with the LOSC.

However, Section 11(3) of the same Act provides that the procedures by which foreign warships enter and stay in the territorial sea, inland waters and ports, as well as leave the territorial sea, inland waters and ports, shall be determined by the Cabinet. Molenaar has noted that it is unclear what this actually amounts to.<sup>471</sup> Section 11(3) of the Latvian Law on the Border is not subordinated to other Latvian laws that would clarify the nature of the innocent passage as provided in the domestic law. Thus, it is questionable whether Section 11(3) of the Latvian Law on the Border in combination with the 2010 Cabinet regulation respects the right of innocent passage of foreign warships through the Latvian territorial sea absent of a prior permit. In addition, the Latvian domestic law does not regulate the right of transit passage.

In its Government Decree on territorial surveillance, Finland has also set out detailed requirements for foreign government (incl. military) vessels for applying to enter Finnish territorial sea and internal waters.<sup>472</sup> However, similarly to Section 2(4) of the above-referred Estonian Cabinet Regulation, Finland has

471 Molenaar, *op. cit.*, pp. 239–240.

472 Valtioneuvoston asetus aluevalvonnasta (Government Decree on Territorial Surveillance). Adopted 16.11.2000, e.i.f. 01.01.2001. Accessible: <https://www.finlex.fi/fi/laki/kaannokset/2000/en20000971.pdf> (30.11.2017).



also unequivocally stated in Section 5(1) of its Territorial Surveillance Act that a prior permission is not required in cases of innocent passage.<sup>473</sup>

The duties to notify the Estonian government in advance of passage through its territorial sea, as stipulated in Section 13(2) and Section 14<sup>1</sup>(1) of the State Borders Act of Estonia, as well as to request a permit from the Latvian State authority, as seems to be provided in the Latvian regulation, are both in breach of the fundamental norm of the LOSC, namely Article 17, according to which all ships enjoy the right of innocent passage through the territorial sea.<sup>474</sup> Alex Oude Elferink has noted in connection with the Estonian requirement of prior notification that its application to foreign warships was generally quite frequent in State practice in 1994, whereas its extension to all vessels used for national non-commercial purposes at the time goes beyond the practice of most other States.<sup>475</sup>

Such a restrictive understanding of innocent passage was already adopted in Estonia under the Soviet rule by the Estonian scholar Abner Uustal.<sup>476</sup> Uustal was among the Soviet jurists that opposed to "bourgeois authors"<sup>477</sup> who "do not recognise the coastal States' right to prohibit the passage of ships and the overflight of aircraft."<sup>478</sup> Uustal was of the view that it is not possible to provide for innocent passage of foreign warships through territorial sea because "the foreign warships of capitalist States in the territorial sea of other States endanger the security of coastal States due to their weapons."<sup>479</sup> Uustal's approach to international law has been found to be wholly political and subsumed to the aims and interests of the politics of the Soviet Union.<sup>480</sup> Yet it is notable that after the 1989 joint declaration by the Soviet Union and the United States, even the Soviet Union abandoned the requirement of a prior notification or request for authorisation for a foreign ship to enjoy the right of innocent passage

473 Aluevalvontalaki (Territorial Surveillance Act). Adopted 18.08.2000, e.i.f. 01.01.2001. Accessible: [www.finlex.fi/en/laki/kaannokset/2000/en20000755.pdf](http://www.finlex.fi/en/laki/kaannokset/2000/en20000755.pdf) (30.11.2017).

474 See also LOSC: Declarations made upon signature, ratification, accession or succession or anytime thereafter, *op. cit.* – Germany, the United Kingdom, Italy, the Netherlands. See also e.g. K. Zou. Innocent Passage for Warships: The Chinese Doctrine and Practice. – 29 *Ocean Development & International Law* 1998(3), p. 211.

475 Oude Elferink 1993, *op. cit.*, p. 423.

476 Professor of International Law at the University of Tartu from 1966 to 1985. See L. Mälksoo. *Rahvusvaheline õigus Eestis: ajalugu ja poliitika*. Tallinn: Juura 2008, p. 111.

477 A. Uustal. *Rahvusvaheline õigus*. Tallinn: Eesti Raamat 1984, p. 259.

478 *Ibid*, p. 260.

479 Uustal 1977, *op. cit.*, p. 37.

480 See Mälksoo 2008, *op. cit.*, pp. 111, 119, 123.



through territorial sea.<sup>481</sup> Other Estonia's neighbouring countries Finland and Sweden did so some years later, as discussed below.<sup>482</sup>

By contrast to Abner Uustal, the pre-1940 Estonian scholar Ants Piip favoured innocent passage concordant with the doctrine of *mare liberum*. Piip insisted that "the coastal State cannot prohibit passage through its coastal waters, i.e. coastal seas, to foreign ships and therefore, foreign merchant vessels as well as warships have so-called right to passage (*ius passagii innocui*). Such a right is well founded, because the coastal sea is nothing more than a part of the high seas that the coastal State may be interested in the most, but in regard to which other States also have a certain necessity."<sup>483</sup> Likewise, in the Estonian draft reply of 24 November 1938 to a preliminary notion<sup>484</sup> made by the British Foreign Office in its letter from 21 November 1938 on the 1938 Estonian Neutrality Act,<sup>485</sup> it was stated that "[p]ursuant to the general norm of international law (XIII Hague Conv. Art. 10), the passage of warships through territorial waters is always permitted – it cannot be prohibited."<sup>486</sup> In the official reply by the Estonian Ministry of Foreign Affairs from 2 October 1939 to the memorandum<sup>487</sup> presented by the British Foreign Office to Estonia on 5 June 1939, it was specified:

The Estonian Government wish to point out that according to the general principles of international law, as well as according to the provisions of Paragraph 1, belligerent warships may enter Estonian ports and territorial waters provided they, in so doing, comply with the prescriptions in force.

481 Joint Statement by the United States of America and the Union of Soviet Socialist Republics: Uniform Interpretation of Rules of International Law Governing Innocent Passage. Jackson Hole 23.09.1989, p. 2. Accessible: [http://www.un.org/depts/los/doalos\\_publications/LOSBulletins/bulletinpdf/bulE14.pdf](http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf) (30.11.2017).

482 *Infra* Section 2.2 of Chapter 2 in Part 3.

483 A. Piip. *Rahvusvaheline mereõigus. Mereväehvitseridele peetud loengute kokkuvõte*. Tallinn: Merejõudude Staap 1926, pp. 10–11.

484 ERA.957.14.590, p. 2.

"In the first place, His Majesty's Government must make a general reservation regarding the prohibition of the stay of belligerent submarines in Estonian waters, and desire to point out that it has not hitherto been a practice in any war for neutrals to forbid entry altogether to any class of belligerent warship."

485 Erapooleetuse korraldamise seadus (Neutrality Act). Adopted 03.11.1938, e.i.f. 03.12.1938 (RT 1938, 99, 860).

486 ERA.957.14.590, p. 68.

487 An analogous memorandum was presented by the British Foreign Office to the governments of all the northern countries that had adopted the neutrality act in 1938, including Finland, Latvia and Lithuania. See ERA.957.14.563, pp. 5–6.



The Government of a neutral State is, however, entitled to prohibit, as the British Government themselves admit it, in exceptional cases the entry of belligerent warships into its territorial waters and ports.<sup>488</sup>

Also, in modern Estonian literature on the law of the sea, Heiki Lindpere has stated that legal acts that ignore the right of innocent passage or reservations to that effect made upon signing, ratifying or acceding to the LOSC are “indisputably void.”<sup>489</sup>

Nevertheless, Estonia, similarly to Bangladesh, Croatia, Denmark, Egypt, Guyana, India, Libya, Malta, Mauritius, Nigeria, Serbia, Montenegro and South Korea, still upholds the requirement of prior notification.<sup>490</sup> Latvia’s requirement of a prior permit for warships to enter its territorial sea also hinders the right of innocent passage. Algeria, Antigua and Barbuda, Bangladesh, Barbados, Brazil, Cambodia, Cape Verde, China, Congo, Denmark, Grenada, Iran, Maldives, Myanmar, Oman, Pakistan, the Philippines, Poland, Romania, St Vincent and the Grenadines, Somalia, Sri Lanka, Sudan, Syria, United Arab Emirates, Vietnam and Yemen required such a permit.<sup>491</sup> While acceding to the LOSC, Estonia and Latvia did not make a declaration on their restrictions to the right of innocent passage.<sup>492</sup>

It follows from the foregoing that the domestic law of Estonia and Latvia is in breach of the LOSC with regard to the legal framework applicable to innocent passage, as well as with the right of transit passage in case it should be applicable in the straits of the Gulf of Riga. In the case of applicability of transit passage regime to the Irbe Strait and/or the Sea of Straits, foreign (military) aircraft and (war)ships would essentially have the right to freely enter the Gulf of Riga through the Irbe Strait/Sea of Straits in their normal modes, navigate/fly around Ruhnu Island (through the Latvian EEZ) if they wish and leave the Gulf of Riga through the Irbe Strait and/or the Sea of Straits. This necessitates

488 *Ibid.*, p. 6.

489 Lindpere 2003, *op. cit.*, p. 55. See criticism on the current Estonian legal framework on innocent passage also in A. Lott. Rahumeelse läbisõidu õigus Eesti territoriaalmeres. – *Juridica* 2015(9), pp. 636, 641–644. See also I. Kaunis, H. Lindpere, A. Lott. Mereõiguse kodifitseerimise lähteülesanne. Tallinn: Ministry of Economic Affairs and Communications 2015, pp. 165–169.

490 Rothwell, Stephens 2016, *op. cit.*, p. 291.

491 *Ibid.* Rothwell and Stephens do not refer to Latvia in their list of countries requiring a prior permit.

492 LOSC: Declarations made upon signature, ratification, accession or succession or anytime thereafter, *op. cit.* – Estonia; Latvia.



subsequent analysis on whether the transit passage regime is applicable to foreign ships and aircraft in the Irbe Strait.<sup>493</sup>

#### 4 The Legal Framework Applicable to the Irbe Strait

##### 4.1 *The Inapplicability of Non-suspendable Innocent Passage under Article 45(1)(b) of the LOSC to the Irbe Strait*

Artur Taska has noted that the pre-1940 legal status of the Irbe Strait as an international strait was beyond doubt,<sup>494</sup> although at that time, the 4-nm-wide territorial sea of the respective coastal States did not cover the strait entirely leaving areas of high seas. More recently, López Martín has categorised the Irbe Strait as an international strait that connects part of an EEZ with the territorial sea of a foreign State in terms of Article 45(1)(b) of the LOSC.<sup>495</sup> Likewise, Caminos and Cogliati-Bantz have referred to the Irbe Strait as Article 45(1)(b)-type of strait on the basis of López Martín's study.<sup>496</sup> In this case, the right of non-suspendable innocent passage would be applicable to the ships transiting the Irbe Strait pursuant to Article 45 of the LOSC.

Yet this categorisation can be questioned. First, as López Martín herself seems to admit,<sup>497</sup> Article 45(1)(b) of the LOSC applies to such international straits that connect to the territorial sea of a foreign State, i.e. not that of the strait State itself. Hence, geopolitically, Article 45(1)(b) may potentially be applicable to the Viro Strait (the strait States of which are Estonia and Finland) since it connects to the territorial sea of a foreign State – that of the Russian Federation. By contrast, the Irbe Strait does not meet this geo-political criterion since it leads only to the territorial sea of Estonia and Latvia. Both countries are the coastal States of the Irbe Strait and thus cannot be considered as *foreign* States in terms of the said provision. It follows that if the EEZ in the Gulf of Riga, hypothetically, did not exist, the Irbe Strait would not fall under any of

493 The passage regime in the Sea of Straits is examined *infra* in Part 5.

494 Taska 1974, *op. cit.*, p. 113.

495 López Martín, *op. cit.*, p. 100.

496 Caminos, Cogliati-Bantz, *op. cit.*, p. 58. The authors have not examined the characteristics of the Irbe Strait (Kurk Strait, as the authors incorrectly refer to it) since if the authors had actually applied their conclusions on the criteria of Article 45(1)(b) of the LOSC to their classification of the Irbe Strait, then it would clearly not have been possible to place it in the Article 45(1)(b)-category of strait. This is due to Caminos' and Cogliati-Bantz's false presumption that the Irbe Strait is only bordered by Estonia (thus leading to the territorial sea of a foreign State – Latvia).

497 López Martín, *op. cit.*, p. 99.



the categories of straits under Part 3 and consequently the ordinary regime of innocent passage applicable to the territorial sea would apply (Article 17).

According to López Martín, despite the inclusion of the term “foreign State,” Article 45(1)(b) of the LOSC may still be applied to all so-called dead-end straits, i.e. international straits which connect the territorial sea of a random State, and thus also to the Irbe Strait.<sup>498</sup> She argued that:

[I]f we carry out an extensive rather than a strict interpretation of this rule, we could also consider that the straits located between the high sea or an exclusive economic zone and the territorial sea of a State, even if it is a coastal State of the strait are also included. This interpretation would be founded on two considerations. On the one hand, the stipulations in article 35 a) concerning internal waters which we have analysed; on the other hand, the types of straits we refer to are clearly “dead-end” straits, a category which is unanimously considered to be the objective of article 45.1 b), as was stated above. In addition, this same interpretation would also be supported by the opinion of some States. As regards this point, on presenting the proposal of the United Kingdom to the Second Committee, which is the proposal of article 45, the British delegate referred to these types of straits as “linking a part of the high seas with the territorial sea of a State”.<sup>499</sup>

However, such interpretation would go against not only the ordinary meaning of the terms of the said provision, but arguably also against its purpose. Article 45(1)(b) of the LOSC aims to ensure primarily that a State which does not have any control over the strait that connects its territorial sea with either the high seas or an EEZ would be vested with a lasting (non-suspendable) right of innocent passage in the strait. Likewise, Nandan and Anderson maintain in this context that “‘foreign’ means the same as in Article 16(4) of the CTSCZ [Convention on the Territorial Sea and the Contiguous Zone – A.L.], i.e. a State situated beyond the coastal State(s) bordering the strait.”<sup>500</sup> Also, the Virginia Commentaries state that an international strait falling under Article 45(1)(b) of the LOSC needs to connect the territorial sea of “a foreign State,” not that of “a State.”<sup>501</sup>

Second, during the time of writing the *International Straits: Concept, Classification and Rules of Passage* (published in English in 2010, in Spanish in 2008),

498 Ibid, p. 100.

499 Ibid.

500 Nandan, Anderson, *op. cit.*, p. 197.

501 Nandan, Rosenne, *op. cit.*, p. 396. This matter is further analysed in Caminos, Cogliati-Bantz, *op. cit.*, pp. 57–58.



López Martín was not able to take into account the maps that Latvia deposited with the Secretary-General of the United Nations in June 2011 which show the baselines and the outer limits of Latvia's territorial sea, including the limits of Latvia's EEZ in the Gulf of Riga.

#### 4.2 *Transit Passage in the Irbe Strait*

The establishment of the Latvian EEZ in the south-eastern part of the Gulf of Riga means that Article 37 applies to the Irbe Strait as a strait used for international navigation between one part of an EEZ in the Baltic Sea proper and another part of an EEZ in the Gulf of Riga.<sup>502</sup> Article 37 of the LOSC provides that the regime of transit passage applies to straits which are *used* for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ. However, ships that sail through the Irbe Strait do not necessarily cross the Latvian EEZ in the south-eastern part of the Gulf of Riga. Foreign ships using the sealane leading to the Estonian ports such as Pärnu, Kuressaare, Roomassaare, or Virtsu, only navigate in the territorial sea and internal waters of Estonia, since the northern part of the Gulf of Riga does not include an EEZ. Similarly, although foreign ships using the sealane from the Irbe Strait to the port of Riga often cross the Latvian EEZ south of Ruhnu Island,<sup>503</sup> in some cases they may navigate solely in the Latvian territorial sea east of the Courland Peninsula for reaching Riga.

The wording of Article 37 of the LOSC thus raises the question whether application of Article 37 requires that the strait has to be actually used by a ship (or aircraft) for reaching another part of an EEZ. In this case, foreign ships and aircraft would be subject to the right of transit passage only if they notified the strait State that they will navigate through the EEZ. The strait States would be able to monitor vessel and air traffic, in this case, in the Gulf of Riga in view of ascertaining whether a foreign ship or aircraft that claimed the right of transit passage actually complies with its requirements (*prima facie* the continuous and expeditious transit via the Latvian EEZ) as stipulated in Section 2 of Part 3 of the LOSC.

The application of the right of transit passage in the Irbe Strait, as well as in the maritime areas leading to the Latvian EEZ in the Gulf of Riga (comprising the Estonian as well as Latvian maritime areas and thus essentially most parts of the Gulf of Riga),<sup>504</sup> could be considered as a juridical fact.

<sup>502</sup> See *supra* Section 1.2 of Part 1.

<sup>503</sup> See Marine Traffic. – Gulf of Riga. Accessible: <http://www.marinetraffic.com> (30.11.2017). Compare with map 6 in Annex 1.

<sup>504</sup> The right of transit passage does not apply in the Latvian EEZ (Article 35(b) of the LOSC) where foreign ships and aircraft enjoy the freedoms of navigation and overflight.



The juridical fact – the application of the transit passage to foreign ships and aircraft in the Irbe Stait – is due to the existence of the Latvian EEZ (previously high seas) in the Gulf of Riga.

In practice, Estonia and Latvia could argue that as the EEZ in the Gulf of Riga is wholly surrounded by their territorial sea the transit passage regime does not apply. Yet the text of the LOSC does not provide a legal basis for such interpretation. Should the ships and aircraft of a third State exercise transit passage in this maritime area despite possible warnings from Estonia and Latvia, it would potentially stir up conflict and escalate tensions between the user State and the strait States.

Furthermore, in case the rules of transit passage are breached by a foreign State's aircraft, then most likely the North Atlantic Treaty Organization's (hereinafter *NATO*) air defence Quick Reaction Alert's fighter jets in the Ämari air base near Tallinn would be deployed. However, some *NATO* member States that contribute to the air-policing mission in the Baltic States may not consider breaches of the transit passage regime by a foreign ship or aircraft as amounting to an unauthorised transit passage against which measures may be taken by the strait State. For example, Oxman has argued that

[E]ven a first-year law student could construct the syllogism that any vessel or aircraft that does not comply with any obligation no longer comes within the definition of the transit right, and the coastal state is free to deal with its unauthorized presence in the same way as with any other unauthorized presence in its waters. A similar game could be played in reverse with the sovereignty of the coastal states, which 'is exercised subject to this Convention' or parts thereof. This is not a reasonable interpretation of the transit passage and archipelagic sea lanes passage regimes in context. Unilateral enforcement by the coastal state of the conditions for transit or its own interpretation thereof was simply not contemplated or authorized except where expressly permitted.<sup>505</sup>

In general, Oxman argues for a very limited strait State's jurisdiction over aircraft and ships acting in breach of the transit passage regime. This interpretation follows the aim of the legal regime of transit passage. It is clear that due to the freedom of navigation and overflight, the coastal State's jurisdiction over ships and aircraft in transit passage is restricted under Articles 38(1), 42(2) and 44 of the LOSC and the discretionary right in regard to breaches of the right of transit passage or measures aimed at preventing it is reduced to the minimum.

<sup>505</sup> Oxman, *op. cit.*, p. 409.



However, by interpreting the LOSC systematically, it is also possible to arrive at a different conclusion of the strait State's powers against unlawful transit passage. Klein argues that

[I]f a warship is not adhering to the requirements of transit passage (it has stopped, is hovering, or is otherwise engaged in non-expeditious passage without reason of force majeure or distress), the lawful response of the coastal state would be similar to that in response to non-innocent passage. Namely – although not stated specifically – the coastal state would be entitled to require the warship to leave the strait immediately.<sup>506</sup>

Molenaar finds that the breach of obligations only under Article 39(1)(a-c) of the LOSC ends transit passage and further explains that in this case:

[I]t seems that ships engaging in activities which are not exercises of the right of transit passage, will lose this right. Such ships are to be considered in non-transit passage, and through Article 38(3), will automatically fall under the general regime of innocent passage. /.../ [T]his will usually imply loss of innocence as well, and bring the powers under Article 25(2) into view. It is submitted that the obligation under Article 44 for strait States not to suspend transit passage does not prevent a strait State from suspending a particular case of transit passage for want of innocence, but rather prohibits the general suspension for security or any other reason similar to Article 25(3).<sup>507</sup>

Similarly, Jia comes to the conclusion that the strait States may interrupt transit passage in case the conditions for exercising this right are violated.<sup>508</sup> This view is also shared by de Yturriaga as well as Churchill and Lowe.<sup>509</sup> Nonetheless, as appears from above, State practice and the opinions expressed in the legal literature are not uniform on the question of strait State's powers in respect of foreign aircraft and ships that do not comply with the regime of transit passage.

506 Klein, *op. cit.*, p. 36.

507 Molenaar, *op. cit.*, p. 289.

508 Jia 1998, *op. cit.*, p. 148.

509 J.A. de Yturriaga. *Straits Used for International Navigation: A Spanish Perspective*. Dordrecht/Boston/London: Martinus Nijhoff 1991, p. 222. Churchill, Lowe, *op. cit.*, p. 107.



#### 4.3 *Foreign Military Activities in the Latvian EEZ*

In addition, State practice and the views of legal scholars differ on the legality of foreign military activities<sup>510</sup> in the coastal State's EEZ. In terms of law, this question does not directly relate to the regime of transit passage. Yet in practice it is closely intertwined with the legal framework applicable to navigation in the sea and air in or above the Gulf of Riga. In the Latvian EEZ in the Gulf of Riga, the right of foreign military activities implies foreign States' right to send their warships and military aircraft under the regime of transit passage to these enclaved international waters, which might then be used possibly as *inter alia* a military practicing field by foreign States. This would be against the security interests of Estonia and Latvia as the coastal States of the Gulf of Riga. On the same grounds, China and many other States oppose a wide discretion of flag States to carry out military activities in another coastal State's EEZ.<sup>511</sup> Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, and Uruguay have declared under Article 310 of the LOSC that foreign military activities in their EEZ are not allowed.<sup>512</sup>

Nevertheless, the majority of States, *prima facie* Western States, do not oppose military activities in the EEZ of another coastal State. Raul Pedrozo notes that intelligence collection and other military activities are permitted under the LOSC in the EEZ of another coastal State.<sup>513</sup> Likewise, Said Mahmoudi comes to the conclusion on the basis of the Swedish domestic law and State practice that "foreign military activities, strictly under the conditions prescribed in the convention [LOSC – A.L.], may be permitted, and in case of non-resource-related residual rights, flag states may expect a conciliatory attitude from Sweden."<sup>514</sup> Barbara Kwiatkowska also finds that peaceful military activities (e.g. naval manouvres, weapons practice, the emplacement of sensor arrays, aerial reconnaissance, intelligence gathering) in an EEZ are lawful and

510 This term is undefined in the LOSC. Mahmoudi has suggested on the basis of the drafting history of Article 298(1)(b) of the LOSC that "military activities are activities which are undertaken either by warships or military aircraft or by government vessels and aircraft engaged in noncommercial services, and the purpose of which is to increase the readiness of a state for war." S. Mahmoudi. *Foreign Military Activities in the Swedish Economic Zone.* – 11 *The International Journal of Marine and Coastal Law* 1996(3), p. 375.

511 R. Pedrozo. *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone.* – 9 *Chinese Journal of International Law* 2010, p. 27.

512 Klein, *op. cit.*, p. 48.

513 Pedrozo, *op. cit.*, p. 12.

514 Mahmoudi 1996, *op. cit.*, p. 386.



related to the high seas freedoms in an EEZ.<sup>515</sup> Klein, on the other hand, argues for “the moderate position of allowing reasonable naval activities without the use of weapons.”<sup>516</sup>

Pedrozo observes that the United States activities in the EEZ of other coastal States have been wide-ranging and include military exercises and manoeuvres, weapons firing and testing as well as surveys and surveillance.<sup>517</sup> The United States has been also assertive in accepting such right of other flag States in the Baltic Sea. For example, the Department of State explicitly recognised in 1996 the right of the Russian Federation to carry out military activities in the Lithuanian EEZ.<sup>518</sup>

Furthermore, according to the United States’ position, hydrographic surveying is to be distinguished from marine scientific research, for which coastal State’s prior permission is required pursuant to Articles 56(1)(b)(ii) and 246(2) of the LOSC.<sup>519</sup> Thus, while it is prohibited under Article 40 of the LOSC to carry out any research or survey activities during transit passage in the Irbe Strait and in the Gulf of Riga without the prior authorisation of the strait States Estonia and Latvia, it might be lawful to conduct the same surveys with military vessels without Latvia’s permission in its EEZ in the Gulf of Riga. In this regard, Pedrozo distinguishes military marine data collection and hydrographic surveys which fall under the high seas freedoms from marine scientific research.<sup>520</sup>

Therefore, military activities in the Latvian EEZ (but not in other parts of the Gulf of Riga, incl. the Irbe Strait) in the Gulf of Riga might be lawful as long as they are consistent with the United Nations Charter in terms of Articles 88 and 301 of the LOSC.<sup>521</sup> In particular, such activities may not constitute any threat or use of force against the territorial integrity or political independence of Latvia and Estonia.

Subsequently, the option for Latvia and Estonia to exclude the applicability of the transit passage regime will be examined in the context of so-called historic waters under international law, and in particular the LOSC. Article 35(a) of the LOSC stipulates that nothing in the legal framework on international

515 B. Kwiatkowska. *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*. Dordrecht/Boston/London: Martinus Nijhoff 1989, p. 203.

516 Klein, *op. cit.*, p. 51.

517 Pedrozo, *op. cit.*, pp. 12–13.

518 See further J. Kraska, R. Pedrozo. *International Maritime Security Law*. Leiden, Boston: Martinus Nijhoff 2013, pp. 237–238.

519 Pedrozo, *op. cit.*, p. 14.

520 *Ibid*, pp. 21–23.

521 See Kwiatkowska 1989, *op. cit.*, p. 203. See also Mahmoudi 1996, *op. cit.*, p. 374.



straits, as provided in Part 3 of the LOSC, affects any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in Article 7, has the effect of enclosing as internal waters areas which had not previously been considered as such. If a particular maritime area is formed by historic waters and is generally recognised as such, then clearly it meets the criteria of Article 35(a) for the inapplicability of the Part 3 regime on straits. The applicability of the exception stipulated in Article 35(a) of the LOSC to the Gulf of Riga, including the Irbe Strait, may only be founded on the concept of historic bay as recognised under the international law of the sea.

#### 4.4 *The Irbe Strait and the Gulf of Riga in Light of the Concepts of Historic Strait and Historic Bay*

Subsequent to signing the LOSC on 10 December 1982, the Soviet Union declared under a 1985 decree the Gulf of Riga a historic bay (as it had done previously under a 1947 decree) and closed the Irbe Strait by drawing a straight baseline from the Cape Loode on the Sörve Peninsula to the Ovisi lighthouse on the Courland Peninsula.<sup>522</sup> Pursuant to the position of the Soviet Union, the Gulf of Riga was in the immediate vicinity of its coast and thus fell under its complete sovereignty, which extended back to the era of imperial Russia – this, in addition to the lack of specific protests by other States,<sup>523</sup> enabled the Soviet Union to declare the Gulf of Riga a historic bay.<sup>524</sup> Nevertheless, the protests of numerous States against the illegal annexation of Estonia and Latvia could potentially be interpreted as the non-recognition of the historic bay status of the Gulf of Riga.<sup>525</sup>

The LOSC does not provide for a legal definition of a historic bay. However, pursuant to a general agreement, a historic bay may be recognised if the coastal State has made a corresponding declaration and States have generally

522 See Franckx 2002. Report No. 10–15, *op. cit.*, p. 2999. Decree no. 4450 of the Council of Ministers of the Soviet Union, *op. cit.*

523 R. Lapidoth-Eschelbacher. *The Red Sea and the Gulf of Aden*. The Hague: Martinus Nijhoff 1982, p. 112. See also Franckx 2002. Report No. 10–15, *op. cit.*, p. 2999.

524 Franckx 2002. Report No. 10–15, *op. cit.*, pp. 2999–3000. See also Uustal 1977, *op. cit.*, p. 42. Uustal 1984, *op. cit.*, p. 265.

525 On world community response to the annexation, see W.J.H. Hough, III. *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*. – 6 *New York Law School Journal of International and Comparative Law* 1985(2), pp. 391–446.



accepted this or do not oppose it.<sup>526</sup> Additionally, the coastal State needs to have effectively, openly and continuously exercised authority over the relevant maritime area consistently and over a long period of time.<sup>527</sup> The United States Supreme Court has found that in order to establish that a body of water is a historic bay, a coastal nation must have “traditionally asserted and maintained dominion with the acquiescence of foreign nations” and “that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority.”<sup>528</sup> Churchill and Lowe note that the primary prerequisite for the recognition of a historic bay is the acceptance by other States.<sup>529</sup> Also, Caminos and Cogliati-Bantz refer to the need for a long and consistent assertion of dominion over the bay which has included the coastal State’s right to exclude foreign vessels, except on permission, as well as the element of acquiescence by third States.<sup>530</sup>

Prior to the independence of Estonia, Finland and Latvia in 1918, the Russian Empire considered both the Gulf of Finland as well as the Gulf of Riga as its historic bays<sup>531</sup> based on the view put forth by Friedrich von Martens in 1886, that bays with coasts belonging to a single State comprise its territorial sea.<sup>532</sup> Martens found that in Europe, such bays include the Gulf of Finland and the Gulf of Riga (Russian Empire), Zuiderzee (the Netherlands), Solent (British Empire) and, as a historical example, the Gulf of Bothnia (during the period when Finland was part of the Swedish Empire).<sup>533</sup> Similarly, Latvia considered in the beginning of 1920s that the Gulf of Riga is a historic bay (*closed*

526 United Nations Secretariat. Judicial Régime of Historic waters including historic bays. – Yearbook of the International Law Commission 1962, vol. 11, pp. 8–10, 25.

527 Ibid, p. 25. On the ICJ’s recognition of the historic bay status of the Gulf of Fonseca, see Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p. 251, para 394. See also Tunisia v. Libyan Arab Jamahiriya, *op. cit.*, para 100.

528 US Supreme Court. United States v. Alaska, 23.06.1975, No. 73–1888, Part 2. The United States has taken the position that the exercise of authority over the body of water in question needs to be open, notorious and effective. See United States Department of State. China: Maritime Claims in the South China Sea. – Limits in the Seas, No. 143. Washington DC: US Department of State 2014, p. 10.

529 Churchill, Lowe, *op. cit.*, p. 44.

530 Caminos, Cogliati-Bantz, *op. cit.*, pp. 60–61.

531 Taska 1974, *op. cit.*, p. 86. Piip 1936, *op. cit.*, p. 183.

532 F.F. von Martens. Völkerrecht: das internationale Recht der civilisirten Nationen, vol. 1. Berlin: Weidmann Buchhandlung 1886, p. 382.

533 Ibid, p. 383.



sea), whereas Estonia rejected this proposition in the Estonian-Latvian Border Commission in 1922.<sup>534</sup>

Since the restoration of independence of Estonia and Latvia in 1991, the coasts of the Gulf of Riga belong to two States. Thus, the Gulf no longer meets the terms of Article 10 of the LOSC on bays. Yet in the first half of the 1990s Latvia regarded the Gulf of Riga as a historic bay.<sup>535</sup> Latvia's interpretation of the Gulf of Riga as a historic bay was apparently founded on the ICJ's judgment in the Gulf of Fonseca case, in which a Chamber of the Court found in the context of the concepts of joint sovereignty and historic bay that:

A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States.<sup>536</sup>

On the basis of the *uti possidetis juris* principle,<sup>537</sup> as recognised by the Court in 1986,<sup>538</sup> the ICJ decided that the waters of the Gulf of Fonseca are held in a joint sovereignty of its three coastal States ("threefold joint sovereignty"), excluding the 3-nm-wide belt of internal waters of the coastal States, over which each coastal State exercised its exclusive sovereignty.<sup>539</sup>

Analogously, it follows that the principle of State succession as applied in the *Gulf of Fonseca* case could have entitled Estonia and Latvia to declare the Gulf of Riga a historic bay upon their restoration of independence. On the other hand, the classification of the Gulf of Riga as a historic bay on the basis of the Soviet Union's prior practice and legal framework would have been in contravention with the doctrine of State continuity as adopted by Estonia and

534 Eesti-Läti piirikomisjoni tegewuse tagajärjed. Postimees, 01.04.1922.

535 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.* See also Franckx 2002. Report No. 10–15, *op. cit.*, p. 3000.

536 El Salvador v. Honduras, *op. cit.*, para 399. See also Lapidoth-Eschelbacher, *op. cit.*, p. 113. A similar conclusion had been reached in the study on historic bays as published by the United Nations Secretariat in 1962. See the United Nations Secretariat 1962, *op. cit.*, p. 21.

537 See generally Opinion no. 2, The Arbitration Commission of the Conference on Yugoslavia, 11.01.1992 (referred: A. Pellet. The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples. – European Journal of International Law 1992(3), p. 184). See also J. Mayall. Nationalism, Self-determination, and the Doctrine of Territorial Unity. – M. Weller, B. Metzger (eds). Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice. Leiden, Boston: Martinus Nijhoff 2008, pp. 9–10.

538 Burkina Faso v. Republic of Mali, *op. cit.*, para 20.

539 El Salvador v. Honduras, *op. cit.*, para 418.



Latvia. Estonia had declared on 8 October 1991 that it did not consider itself as a successor State to the Soviet Union.<sup>540</sup> By recognising the Gulf of Riga as a historic bay, Estonia and Latvia could have indirectly declared themselves as successor States to the Soviet Union – not as continuators of the pre-1940 Estonian and Latvian republics.<sup>541</sup> While Estonia, in principle, had not been against the legal concept of historic bay (and had even recognised it during the 1930 Hague Codification Conference)<sup>542</sup> it rejected Latvia's proposal to declare the Gulf of Riga a historic bay primarily on the grounds of State continuity with pre-1940 independent Estonia.<sup>543</sup>

At the same time, Estonia also acknowledged the negative effect that joint sovereignty over the Gulf of Riga would have on its fishing industry.<sup>544</sup> Prior to the interruption of Estonia's and Latvia's independence in 1940, the Gulf of Riga fell primarily under the regime of the high seas and, during Soviet rule, under the regime of the internal waters of the Soviet Union. Estonian and Latvian fishermen were able thus to catch fish in the entire maritime area of the Gulf of Riga. This favoured Latvian fishermen who carried out approximately two-thirds of the combined fishing effort in the Gulf of Riga prior to the restoration of Estonia's and Latvia's independence.<sup>545</sup>

The Estonian foreign minister explained in Parliament that upon the establishment of a regime of joint sovereignty over the Gulf of Riga, Latvian fishing vessels would catch fish under their domestic legal framework that provides lesser protection for the fish stocks in maritime areas that reach even close to the Abruksa archipelago.<sup>546</sup> This, he remarked, could have caused irreversible damage to *inter alia* the spawning grounds around Ruhnu Island.<sup>547</sup>

It is also unclear whether the Gulf of Riga is situated wholly in the immediate vicinity of Estonian and Latvian coasts, which is a prerequisite for the application of the joint sovereignty of its coastal States. Distinct from the Gulf of Fonseca, which was recognised by the ICJ as a historic bay, the Gulf of Riga also includes extensive maritime areas that reach further than 12 nm to the sea

540 Oude Elferink. Estonia: Law on the Boundaries of the Maritime Tract, *op. cit.*, p. 238.

541 See on the *uti possidetis* principle in the context of the restitution of independence of the Baltic States in Mälksoo 2003, *op. cit.*, p. 249.

542 Taska 1977, *op. cit.*, p. 97.

543 See also Lindpere 2003, *op. cit.*, p. 40.

544 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

545 Franckx 2002. Report No. 10–15, *op. cit.*, p. 3002.

546 Stenographic record of the First Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

547 *Ibid.*



as measured from the baselines.<sup>548</sup> On the other hand, there are also examples of historic bays which cover more extensive maritime areas than the Gulf of Riga (e.g. Hudson Bay).

In its 1994 Maritime Code,<sup>549</sup> Latvia declared the Gulf of Riga as enclosed joint internal waters of Estonia and Latvia in which their ships enjoy free navigation.<sup>550</sup> Estonia did not approve this and sought to divide the maritime area of the Gulf of Riga between the two coastal States. Estonia had established its straight baselines in the Gulf of Riga under the 1993 Maritime Boundaries Act. Estonia thus vetoed Latvia's endeavours, since the preservation of the legal status of a historic bay necessitates that in the case of the disintegration of the bay's coastal State (in this case the Soviet Union), each of the new coastal States needs to recognise the continuous historical status of the bay.<sup>551</sup>

In light of Estonia's rejection of the concept of the Gulf of Riga as a historic bay and the delimitation of the maritime boundary in the Gulf of Riga,

548 See *supra* Section 6 of Chapter 3 in Part 2.

549 Cabinet of Ministers Regulations no. 168 on Latvian Maritime Regulations (Maritime Code). Adopted 16.08.1994, e.i.f. 11.09.1994. Accessible in Latvian at: <https://www.vestnesis.lv/ta/id/57653> (30.11.2017). The Maritime Code was adopted under Article 81 of the Latvian Constitution, according to which between the Parliament's sessions, the Cabinet of Ministers has the right, if urgently needed, to issue regulations that have the force and effect of law. Article 83(7) of the Saeima Rules of Procedure stipulated that if the Parliament decides to task its committees with examining regulations issued by the Cabinet of Ministers in line with Article 81 of the Latvian Constitution, then these regulations should be considered as draft laws and adopted in the first reading as of the moment the Parliament decides to task its committees with examining them. See Saeima Rules of Procedure. Adopted 28.07.1994, e.i.f. 01.09.1994. Accessible: <http://www.saeima.lv/en/legislation/rules-of-procedure> (30.11.2017). The Cabinet of Ministers submitted the Maritime Code to the Parliament on 22 September 1994. On 13 October 1994, the Code was forwarded to committees and was thus adopted in the first reading. The Draft Law on the Maritime Code was adopted in the first reading on 13 October 1994. Based on these regulations, it was not necessary to adopt the Maritime Code in the final reading of the Parliament. Information kindly obtained from Ms Ieva Šķendere, the Latvian Parliament on 27.11.2017. Reportedly, the Maritime Code was Latvia's lengthiest legal act (consisted of 482 Articles) and its drafters included representatives of the International Maritime Organization's Maritime Law Institute, Latvian Shipping Company and Latvia's Ministry of Transport. See the minutes of the first reading of the draft Maritime Code in the Latvian Parliament. The stenographic record of the V Saeima, 13.10.1994. Accessible in Latvian at: [http://www.saeima.lv/steno/st\\_94/st1310.html](http://www.saeima.lv/steno/st_94/st1310.html) (30.11.2017).

550 Stenographic record of the Second Reading of the 1996 Maritime Boundary Treaty in the Estonian Parliament, *op. cit.*

551 *El Salvador v. Honduras*, *op. cit.*, para 394. See also United Nations Secretariat 1962, *op. cit.*, p. 21.



it is highly unlikely that its coastal States would ever again consider the Gulf of Riga as falling under the so-called historic waters exception as provided in Article 35(a) of the LOSC. Yet such a legal line of argument might have provided the only means for the exclusion of the transit passage regime in the Irbe Strait (under Article 35(a) of the LOSC).<sup>552</sup>

Nonetheless, in light of the apparent lack of legal grounds in international law for claiming the Irbe Strait a historic strait, it is also doubtful that third States would accept such a classification, not least because of the general implications that such an introduction of essentially a new category of straits might have on the stability and coherence of the catalogue of straits as provided in Part 3 of the LOSC.<sup>553</sup> Thus, currently the Gulf of Riga is freely accessible<sup>554</sup> for foreign aircraft and ships from the Irbe Strait similarly to the pre-1940 situation.

## 5 The Legal Framework Applicable to the Irbe Strait *de lege ferenda*

As examined previously, the transit passage regime in the Irbe Strait and in the Gulf of Riga hinders the security of Estonia and Latvia.<sup>555</sup> It also raises concerns for the safety of international navigation due to, for example, the flights of military aircraft with unactivated or absent transponders, or the unchecked navigation of foreign submarines (including in the shallow Irbe Strait). There appears to be only two possibilities for limiting the adverse effects of the transit passage regime for the strait States in the Irbe Strait. The first would be the adoption of compulsory routeing measures in this maritime area in accordance with Article 41 of LOSC. However, such measures would provide lesser safeguards for the coastal States in comparison with the establishment of an EEZ corridor that would exclude the transit passage while also limiting the outer limits of the Estonian and Latvian territorial sea.

As a general rule, ships and aircraft transiting the strait continuously and expeditiously are not obliged to follow any prescribed trajectory. Pursuant to

552 The Irbe Strait is bordered by two coastal States which therefore (unlike the Soviet Union in 1985) cannot close the strait by a straight baseline. Thus, it cannot be a strait which comprises waters which were also internal waters prior to the drawing of the straight baselines in terms of Article 35(a) of the LOSC.

553 See *supra* Section 2.1 of Part 1.

554 The depths of the Irbe Strait and the Gulf of Riga are not sufficient for e.g. nuclear submarines to exercise such operations submerged. However, the Gulf of Riga should be freely accessible for submerged smaller submarines.

555 On the strait State's security concerns see Klein, *op. cit.*, p. 25.



Article 41(1) of the LOSC, strait States may designate sea lanes and prescribe traffic separation schemes for transit passage where necessary to promote the safe passage of ships, with which transiting ships must comply.<sup>556</sup> However, such sea lanes and traffic separation schemes must have been previously referred to and adopted by the International Maritime Organization in accordance with Article 41(4) of the LOSC. Thus, this constitutes an exception from the general rule stipulated in Article 22(3)(a) of the LOSC for innocent passage in the territorial sea, according to which the coastal State only has to take into account the recommendations of the International Maritime Organization in the designation of sea lanes and the prescription of traffic separation schemes.<sup>557</sup>

In case compulsory routeing measures would be adopted by the International Maritime Organization for the Gulf of Riga, such sea lanes and a traffic separation scheme might not address sufficiently the security interests of Estonia and Latvia.<sup>558</sup> According to the United States position, sea lanes and traffic separation schemes are not applicable to *inter alia* warships in transit passage, albeit in practice it is still considered advisable to follow them.<sup>559</sup> The voluntary use of sea lanes and traffic separation schemes by sovereign immune vessels in transit passage is also consistent with the International Maritime Organization's General Provisions on Ships' Routeing which stipulates that routeing systems (incl. traffic separation schemes) are only *recommended* for use by *all ships*.<sup>560</sup>

In addition, although non-State-owned foreign ships would be required under Articles 39(2)(a) and 41(7) of the LOSC in the course of transit passage to follow the traffic separation scheme, this would not apply to foreign aircraft and thus would not limit them in undertaking transit passage in the Gulf of Riga (Article 39(3) of the LOSC).<sup>561</sup> Likewise, in case of ships in transit passage that do not comply with the compulsory routeing measures in violation of Article 41 of the LOSC, the coastal State's ability to take countermeasures

556 Article 41(7) of the LOSC.

557 See also Nandan, Anderson, *op. cit.*, p. 189.

558 See *mutatis mutandis* the conclusions reached in respect of the Gulf of Finland *infra* Section 4 of Chapter 2 in Part 3.

559 See Thomas, Duncan, *op. cit.*, p. 184. On the other hand, Nandan and Anderson consider that a strait State may apply its domestic law on sea lanes or traffic regulation in respect of "all foreign ships exercising the right of transit passage". Nandan, Anderson, *op. cit.*, p. 191.

560 Section 8.2 of the IMO Resolution A.572(14), as amended. General Provisions on Ships' Routeing. London 20.11.1985, e.i.f. (as amended) 01.01.1997.

561 See further *infra* Section 4 of Chapter 2 in Part 3.



would be restricted as the ship would still have the right to continue its transit passage.<sup>562</sup>

In the course of its decision-making on compulsory routeing measures under Article 41(4) of the LOSC, the International Maritime Organization is concerned not only with ensuring the safe navigation of ships, but also other general navigational interests, including the freedom of the seas. In this connection, Hugo Caminos and Vincent Cogliati-Bantz have concluded on the basis of the applicable legal framework that “the extent of a mandatory routeing system should be limited to what is *essential* in the interest of safety of navigation and the protection of the marine environment. The International Maritime Organization will not adopt a proposed routeing system until it is satisfied that the proposed system will not impose *unnecessary* constraints on shipping and that the system is completely in accordance with the requirements of SOLAS.”<sup>563</sup> In particular, this follows from Section 6(8) of the International Maritime Organization’s General Provisions on Ships’ Routeing which stipulates that the extent of a traffic separation scheme should be limited to what is essential in the interests of safe navigation. It may be reasonable to expect that in the shallow Irbe Strait such compulsory routeing measures would be necessary or essential where the currents change direction and where the shipping corridor is at times only approximately one nm wide.<sup>564</sup> Shipping accidents have occurred relatively frequently in the Irbe Strait.<sup>565</sup>

The legality of implementing compulsory routeing measures in the wide maritime area of the Gulf of Riga proper needs to be further assessed in light of the criteria of Article 42(2) of the LOSC. In particular, the application of such compulsory routeing measures may not have the practical effect of denying, hampering or impairing the right of transit passage in the Gulf of Riga.

562 Thomas, Duncan, *op. cit.*, p. 184. See also *infra* Section 4 of Chapter 2 in Part 3. On the other hand, Nandan and Anderson refer in this context only to foreign warships. See Nandan, Anderson, *op. cit.*, p. 192.

563 Caminos, Cogliati-Bantz, *op. cit.*, p. 241. SOLAS stands for the International Convention for the Safety of Life at Sea.

564 See Maritime Administration of Latvia, *op. cit.*, pp. C – 20.1–2.

565 E.g. a German cruise ship crossing the Irbe Strait ran aground in 2008. See The Bahama’s Maritime Authority. Report of the investigation into the grounding of M/V Mona Lisa at the Irbe Strait, Latvia on 04th May 2008. London 2009. Accessible: <https://www.bahamasmaritime.com/wp-content/uploads/2015/08/MONA-LISA-Report-May-2008.pdf> (30.11.2017). Most recently, the Danish tanker and Panama’s dry bulk carrier collided in the Irbe Strait in January 2015. See Associated Press. Stranded cruise ship evacuated off Latvia. NBC News, 05.05.2008. See also Cargo Ships Collide off Latvia. World Maritime News, 20.01.2015.



Steven Kempton argues that the terms "hampering" or "impairing" as used in that provision imply "an action that has the effect of physically obstructing passage to the extent that a ship would be required to significantly deviate from its originally intended course, and where the alternate route would result in unacceptable delays and increased costs."<sup>566</sup> It appears that none of the conceivable compulsory sealanes' trajectories in the Gulf of Riga proper could force ships to significantly deviate from the shortest trajectory and in any case should not cause unacceptable delays or additional costs.

*De lege ferenda* there is an additional option for the coastal States to more thoroughly safeguard their security interests in the Gulf of Riga. If necessary, it is possible to consider establishing an EEZ corridor in the Irbe Strait, similar to the one agreed upon between Estonia and Finland in the Viro Strait in order to exclude the applicability of the regime of transit passage in the Gulf of Riga. This follows from Article 36 of the LOSC which provides the only other possibility aside from the afore-mentioned Article 35 for the inapplicability of the LOSC legal framework on international straits (Part 3).

Pursuant to Article 36 of the LOSC, its Part 3 does not apply to an international strait if it includes a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. Although the freedoms of navigation and overflight would apply in such prospective corridor analogously with the transit passage, it would limit the use of these freedoms to the confines of a narrow EEZ corridor leading from the Irbe Strait straight to the Latvian EEZ south of Ruhnu Island.

By contrast to the regime of transit passage, foreign ships and aircraft would not be entitled to the freedoms of navigation and overflight in most of the maritime area of the Gulf of Riga. Their use would be restrictively limited to the corridor as established under Article 36 of the LOSC. As a result of the establishment of the EEZ corridor in the western part of the Gulf of Riga, foreign ships and aircraft would enjoy the freedoms of navigation and overflight only for reaching the EEZ close to the Riga Port. It would abolish the currently freely usable roundabout in the Gulf of Riga, which encompasses the maritime area of Latvia together with the internal waters and territorial sea of Estonia.

Lewis Alexander has noted that in order to fulfil the condition stipulated in Article 36 of the LOSC, according to which the EEZ corridor must be of "similar convenience" to an ordinary route through the high seas or an EEZ,

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<sup>566</sup> S.B. Kempton. Ship Routing Measures in International Straits. – 14 *Ocean Yearbook* 2000, p. 240.



the corridor should be at least 2 or 3 nm wide at its narrowest point.<sup>567</sup> For the same reason, the corridor could not be established by means of limiting the outer limits of both the Estonian and Latvian territorial sea at least 1.5 nm from the equidistant boundary line in the western part of the Gulf of Riga, since it would then not overlap with the shipping channel in the southern part of the strait but would instead cross the shallow waters in the western part of the Irbe Strait (unless expensive dredging would be carried out). This is due to the fact that the boundary line in this maritime area lies much further to the north as compared with the shipping channel. A potential EEZ corridor along such maritime boundary would also be significantly lengthier than the normal navigational route used for reaching Riga and would have to follow a relatively sharp angle in the turning points number 11 and 12 of the maritime boundary, which would not correspond to the main shipping route between the Irbe Strait and the Riga Port.

If the Irbe Strait's shipping channel was to be included in the potential EEZ corridor, then the EEZ corridor west of the Kolka Cape (*Kolkasrags*) would be located in the Latvian maritime area.<sup>568</sup> The potential establishment of the EEZ corridor in the Latvian maritime area in the western part of the Gulf of Riga could be compensated on an equitable basis by the exclusion of the EEZ corridor from the Latvian maritime zone east of the Kolka Cape. There the corridor could be established within the limits of the Estonian maritime area west and south of Ruhnu Island. It would run southwards until it reaches the Latvian EEZ south of Ruhnu Island.<sup>569</sup> Thus, by slightly limiting the outer limits of their respective territorial seas, Estonia and Latvia could better address their potential security concerns in respect of their internal waters and territorial sea in the Gulf of Riga. Estonia and Finland have established such an EEZ corridor in the Gulf of Finland in the same manner, as examined next.

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567 Alexander 1991, *op. cit.*, p. 100. L.M. Alexander. Exceptions to the Transit Passage Regime: Straits with Routes of "Similar Convenience". – 18 *Ocean Development and International Law* 1987(4), p. 483. At the same time, Clove argues that it is not possible to agree on the minimum width that could trigger the applicability of Article 36 of the LOSC. He argues that the determinants of a convenient corridor are not constant and depend on the particular circumstances of each case: the width, the density of shipping in the area, the depth and contour of the bottom, and whether the vessel transiting is a single submarine or a battle group steaming in formation. See Clove, *op. cit.*, p. 111.

568 See map 6 in Annex 1.

569 See also map 6 in Annex 1.