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The Legal Regime of the Turkish Straits:  
Regulation of the Montreux Convention and its  
Importance on the International Relations after  
the Conflict of Ukraine

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## **1. The Importance of the Straits**

The Turkish Straits are incontrovertibly important due to their significant geographical location. In order to control them, many wars have been waged since Ancient times. After Tsarist Russia secured a foothold on the Black Sea shores in 1774, the Straits played a key role between the powers. Due to their geographical characteristics the Straits were considered “the key to her house” by Tsarist Russia, and were used by western powers as a barrier against Russian expansion into the warm waters. Further, the Straits became a balance element by the Ottoman between powers during its sovereignty over the Straits. Until the Montreux Convention, even after its conclusion, the Straits took their place as “the Straits question” in the international arena.

The Black Sea and the Turkish Straits have regained significance since the dissolution of Soviet Russia in 1991. Since then, they have become one of the most important and busiest energy corridors of the world. Due to the increased transportation of oil, natural gas and other products from the Caspian region through the Straits, the dense traffic and the regulation of this traffic in the Straits has become a core issue between Turkey and user states. Since 1936, the number of vessels passing through the Straits has increased approximately 9 times while their total tonnage has increased more than 25 times. Today, the number of ships passing through the Straits in one year is nearly 50,000; in 1938 this count was 4,500.

There are more than 260 straits in the world. The Turkish Straits are at the center of many problems because of their geographical features and the dense population of the city of Istanbul, which has almost 15 million inhabitants. Besides their economic importance, the Turkish Straits continue to have strategic and political importance as a result of their geopolitical position between energy sources and energy-demanding countries. When the Montreux Convention was adopted, the number of merchant vessels in the Straits was not sufficiently high to cause serious problems such as pollution, dangerous accidents or the collision of oil tankers. Moreover, the tonnage of individual ships was nearly 25-fold less than today and the size of ships was nearly 19-fold smaller. Especially after the 1990s, passages began to present an increasing potential problem to navigation, environment and safety in the Turkish Straits. Due to

some fatal accidents in the Straits, Turkey adopted a new set of rules for safety of navigation called “Maritime Traffic Regulations for the Turkish Straits and the Marmara Region” in 1994 and it renewed it in 1998. These regulations caused some disagreements over whether they were compatible with the Montreux Convention.

The Turkish Republic has operated the Straits with the Montreux Convention since 1936. The Convention laid down a reasonable regime of passage through the Turkish Straits under the circumstances of the time when it was adopted. It established very liberal rules for merchant vessels and guaranteed the principle “freedom of passage and navigation by sea in the Straits” as an unchanged principle for the Straits. On the other hand, it laid down complex provisions regarding the passage of warships. However, deficiencies in the agreement have emerged over the years, resulting in attempts to modify it in part or in whole.

The Convention involves more restrictive rules for warships of the non-riparian states of the Black Sea than for riparian states. The existence of the restrictive provisions regarding the passage of warships and the regulation of these provisions by the Turkish Government caused many debates, in particular during the Second World War. Therefore, after the Second World War the revision of the Convention was also discussed. Looking back at the last decade, the South Ossetia War in August 2008 was followed by the war in Syria in 2011, and the conflict in Ukraine – especially the Crimean issue – in 2014. During these incidents, the impact and regulation of the above-mentioned restrictive rules of the Convention drew international attention. Thus, the Turkish Straits took place on the global agenda, again attracting the attention of the great powers, especially the European Union (EU), the United States (US) and Russia; namely that NATO member states on one side and Russia on the other. As a result of these events, the Montreux Convention, which has regulated the passage regime of the Turkish Straits since 1936, was questioned again following Russia’s occupation of South Ossetia, the Crimea and the conflict in Ukraine. It was frequently voiced that the Montreux Convention prevented assistance to Georgia and Ukraine because of its restrictive rules regarding warships of non-Black Sea states.

The boundaries and the balance have been changing in the Black Sea region. Following the accession of Bulgaria and Romania to the EU, both countries are parties to the Montreux Convention, the EU has become littoral to the Black Sea. There is no

doubt that if Ukraine joins in the EU, the Black Sea will gain more importance for the EU and while it also becomes one of the biggest coastal powers of the Black Sea. Additional to this political aspect, the Black Sea has also become an energy corridor between resource countries and the European states, including Turkey. It seems that the Montreux Convention will stay on the agenda as long as the Black Sea secures its importance for the interests of both coastal and non-coastal states.

## **2. Major Research Question**

Despite all controversies above, the Montreux Convention is still in force because it keeps the sensitive political balance between the riparian states of the Black Sea and the non-riparian states. In this thesis it will be examined whether the Montreux Convention and its provisions are compatible with general international law, keeping in consideration the time it was adopted; and whether the Turkish maritime traffic regulations are compatible with the Montreux Convention. Other than this, the focus will be on the political balance established through the Montreux Convention in the Black Sea region, and in particular, whether the Montreux Convention has effects on the Ukraine conflict. However, to reach a judgment, first the historical background of the Turkish Straits will be presented, as well as the practice of the Montreux Convention in the Straits since 1936 and the development of the international law on straits after the Montreux Convention.

In this context, the first aim of this thesis is to explore whether the Montreux Convention is suitable for today's requirements. Then, it will be examined whether the current situation governing the Turkish Straits is the best for all sides or whether the Montreux Convention needs to be amended or abolished. If it needs revision, what role would the Ukraine Conflict play? If some modifications to the Montreux Convention are necessary, what kind of modifications would be appropriate on the grounds of international law and how might they affect the stability in the Black Sea region and the balance between the riparian and non-riparian states? What kind of advantages and disadvantages for the international community are to be expected if there is a revision of the Montreux Convention? The second aim is to examine whether the new regulations adopted by Turkey in 1998 solved the existing problems. If not, is it



possible to apply some other regulations to the Turkish Straits under international law without any revision of the Montreux Convention? If yes, what kind of suggestions might be appropriate? Additionally, in the next decade the Turkish government plans to build a canal between the Black Sea and the Sea of Marmara called “Canal Istanbul”. If the canal were built, how would the Montreux Convention be affected by this situation and might the canal solve the problems without any revision of the Montreux Convention?

### **3. Thesis Overview**

To examine the above-mentioned questions this thesis will be divided into two parts. Chapters 1-5 make up Part I and the rest, Chapters 6-8, will be in Part II.

The purpose of Part I is to look at both the geographical location of the Turkish Straits and the historical background of the Montreux Convention. In this part, since the Montreux Convention is not the unique treaty which was concluded for the passage regime of the Turkish Straits, the aim is to examine whether the Montreux regime was affected by the clauses of the old treaties signed before it and by political circumstances in the Black Sea region in earlier times. The second aim is to present the practice of the Montreux regime and points of discussion caused by its implementation.

In line with this aim, the first chapter provides a summary of the geographical character and the location of the Straits as it is necessary to know what geographical characteristics the Turkish Straits have. Then, for the purpose of understanding why the Montreux Convention was concluded, the historical evolution of the Turkish Straits will be examined in the second and the third chapters. The second chapter will focus on the period of closeness of the Straits – the ancient rule (of the Ottoman) – and bilateral treaties after Tsarist Russia became a coastal power of the Black Sea by the Treaty of Küçük Kaynarca of 1774. Afterwards, multilateral treaties will be reviewed, including the London Treaties of 1841 and of 1871, the Paris Treaty of 1856 and the Berlin Treaty of 1878. Chapter three focuses on the end of ancient rule, internationalization of the Straits and the Lausanne Convention of 1923. The fourth chapter will deal with the process of the Montreux Conference of 1936 and the provisions of this Convention. Then, in order to evaluate the Montreux passage regime, the fifth chapter focuses on the

practice of the Montreux regime and the attempts by Russia to revise it after the Second World War.

The purpose of Part II is to review the Montreux Convention in the scope of international law on the sea and to offer a solution to the modification of the Convention, based on the Ukrainian Crisis in the light of evolving international law.

In this framework, in the sixth chapter, the legal status of international straits in international law will be examined. In order to understand the Montreux regime's place in international law, the chapter will look at the evolution of international law on the sea up until the Montreux Convention and then will focus on other improvements in international law after the conclusion of the Convention. Thus, this chapter will provide opportunities for comparison between the Turkish Straits' passage regime and other international straits periodically. Further in this chapter, other international straits regulated by long standing treaties will be considered in order to investigate whether their coastal states have adopted rules and regulations beyond the scope of the original treaty, in line with generally accepted and up-to-date standards. Afterwards, in light of subsequent practices by other straits used for international navigation, the Turkish maritime regulations of 1994 and 1998 will be discussed, to explore whether these regulations are compatible with the Montreux Convention and other rules of the international law of the sea.

Before the modification scenarios of the Montreux Convention, the events that occurred in the last decade will be discussed in the seventh chapter, such as the Syrian, Georgian and Ukrainian conflicts and their effects on the revision or amendment possibilities of the Montreux Convention.

Finally, in chapter eight, the Montreux regime and the political balance it maintains between powers, as well as possible revision scenarios and effects of Canal Istanbul project on the Montreux regime will be examined. In order to find a solution the advantages and disadvantages the Montreux regime provides to powers will be reviewed. Then, the formal denunciation and modification mechanism of the Montreux Convention as well as possible consequences based on political and economic conditions in the Black Sea region will be discussed. Later in this chapter, in case the modification mechanism of the Convention is insufficient in offering a solution, an alternative way to revise the Montreux Convention will be considered; that is, the

methods to interpret a treaty as provided by the Vienna Convention on the Treaty Law of 1969 and functions of some of international institutes which were established after the signing of the Montreux Convention such as International Maritime Organization, International Law Commission and International Court of Justice.

## **PART I: Historical Background of the Turkish Straits and State Practice on the Passage Regime**

The Montreux Convention is not the only Convention that has concerned the Turkish Straits. Before the Montreux Convention several bilateral and multilateral treaties regulating the passage regime of the Turkish Straits were concluded by powers during the long history of the Straits. Treaties were signed by powers involved in conflict, bloody wars or political changes in the region. Each of those treaties oversaw changes to the passage regime of the Straits and established a new regime based in the political circumstances of that time. However, each treaty was affected by the provisions of the previous one. In other words, after each conflict, powers preferred to adopt some clauses in the new treaty which paid heed to previous experiences regulating the Strait, coupled with political considerations of the time. Thus, past experiences and state practices resulted in changing clauses of the passage regime and the adoption of new ones up until the Montreux Convention. In Part 1, this framework will be used to understand and interpret the provisions of the Montreux Convention, as well as examining the historical evolution of the passage regime of the Turkish Straits and their geographical character.

### **CHAPTER 1 General Observations on the Turkish Straits**

#### **1. Geographical Description**

The Bosphorus (the Strait of Istanbul),<sup>1</sup> the Sea of Marmara and the Dardanelles (the Strait of Çanakkale)<sup>2</sup> constitute the Turkish Straits. The total navigational distance of the Turkish Straits is nearly 300 kilometers and with an average speed of commercial vessels the passage through the Straits takes about 16-18 hours.<sup>3</sup> The primary importance of the Straits lay in their geographical position. The Turkish Straits are a narrow passage of water between Europe and Asia and connect two important seas in

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<sup>1</sup>It is also known as the Istanbul Strait. See *IMO Resolution A.827(19)*.

<sup>2</sup>It is also known as the Çanakkale Strait. See *IMO Resolution A.827(19)*.

<sup>3</sup>Istikbal, C. (12-14. May 2001). Regional Transport Demands and Safety of Navigation in Turkish Straits: A Balance at Risk. *Problems of Regional Seas 2001; Proceedings of the International Symposium on the Problems of Regional Seas*, S. 76-85.

the north-south direction. The Black Sea connects to the Aegean Sea (which is a part of the Mediterranean) via the Bosphorus and the Dardanelles, which are the only possible connection between them. The Turkish Straits are the most unique waterway among the straits of the world due to their complicated navigational conditions, as well as their hydrological, oceanographic, morphological, biological and physical characteristics.<sup>4</sup>

The Bosphorus is an approximately 31 kilometer<sup>5</sup> long waterway connecting the Black Sea and the Sea of Marmara, which is located between 40°58'.67N – 41°14'.90N and 28°57'.00E – 29°11'.00E<sup>6</sup>. The Strait of Istanbul lies in a north easterly direction and is defined on the Black Sea coast by a line between Türkeli Feneri on the European side and Anadolu Feneri on Asia Minor, and on the Sea of Marmara coast by a line between Ahırkapı Feneri on the European Side and Kadıköy İnciburnu/Mendirek Feneri on Asia Minor.<sup>7</sup> Just inside the southern entrance of the Istanbul Strait on the European side is the Golden Horn, and there is an inlet that forms the port of Haydar Pasha on the Asiatic shore. At the outlet to the Marmara Sea is Istanbul, the most populous city of Turkey. Its population had reached about 15 million in 2016<sup>8</sup> and it has been declared a “World Heritage City” by UNESCO<sup>9</sup>. This is a typical example of the double cities on both sides of the Strait.

The Bosphorus has a very narrow and curved structure compared to other straits used for international navigation. The width of the Strait is at the northern entrance about 3,600 meters and just inside the southern entrance between Anadolu Hisarı and

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<sup>4</sup> C. Istikbal, p.77. The hydrographical, oceanographic, morphological and biological character of the Turkish Straits will be examined in Chapter 6.

<sup>5</sup> The Strait of Istanbul is called Bogazici in Turkish. The average length measured from the center line is about 17 nautical miles (nearly 31 kilometers). The length in the coast is 19 nautical miles (nearly 35 kilometers) on the Asiatic side and due to the more curved structure 30 nautical miles (nearly 55 kilometers) on the European side. See: *Turkish Straits and seas, Turkish Naval Forces*, <[https://www.dzkk.tsk.tr/pages/denizwiki/konular.php?icerik\\_id=136&dil=1&wiki=1&catid=1](https://www.dzkk.tsk.tr/pages/denizwiki/konular.php?icerik_id=136&dil=1&wiki=1&catid=1)> (accessed May 3, 2017).

<sup>6</sup> *Nautical Charts and Publications Catalogue 2017, Office of Navigation, Hydrography and Oceanography of Turkey (SHOD)*, <[http://www.shodb.gov.tr/shodb\\_esas/orj/2017\\_KATALOG\\_ok.pdf](http://www.shodb.gov.tr/shodb_esas/orj/2017_KATALOG_ok.pdf)> (accessed May 3, 2017).

<sup>7</sup> Maritime Traffic Regulations for the Turkish Straits (1998, October 8), <<http://www.mevzuat.gov.tr/MevzuatMetin/2.5.9811860.pdf>> (accessed May 3, 2017).

<sup>8</sup> According to the Turkish Statistical Institute, Istanbul's population is 14,804,116 in 2016. See at <<http://www.tuik.gov.tr/UstMenu.do?metod=temelist>> (accessed May 3, 2017).

<sup>9</sup> C. Istikbal, p.78. See also: World Heritage List of UNESCO, <<https://whc.unesco.org/en/list/356>> (accessed Juli, 16, 2018).

Rumeli Hisarı 698 meters as the narrowest place.<sup>10</sup> The Strait is characterized by several sharp bends and has a current southward along which it may attain approximately five knots per hour at the narrowest point.<sup>11</sup> Due to this character, the Bosphorus resembles a river more than a maritime strait.<sup>12</sup> The two seas connected by the Straits, being of quite great depth difference, form a threshold and cause an undercurrent of water to occur. At the Bosphorus, this condition creates a surface current and due to the difference in salinity, water is exchanged as an undercurrent between the Black Sea and the Aegean Sea. There is a strong surface current from the Black Sea to the Aegean Sea and in the opposite direction the undercurrent moves to the Black Sea through the Istanbul Strait, and can reach about 5-8 knots per hour.<sup>13</sup>

The average depth in the main channel of the Strait is 35 meters and the maximum depth 110 meters.<sup>14</sup> However, there are many mooring buoys and many quays on both sides of the Strait. The Port of Istanbul is formed by a detached breakwater and it has quays with a depth of approximately 7 meters with buoys.<sup>15</sup> During navigation in the Straits it is observed that the physical characteristics of the Istanbul Strait such as sharp turns, narrow points and a rapid surface and undercurrents, present difficulties for ships. The ships are bound to alter course in this Strait at least 12 times and up to 80 degrees.<sup>16</sup> Navigation is particularly deceptive at the narrowest point of the Strait, as under adverse weather conditions the tankers and huge vessels approaching from opposite directions cannot see each other around the bends. This has caused numerous fatal and environmentally harmful accidents in the Bosphorus where the population is crowded.<sup>17</sup>

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<sup>10</sup> See *Turkish Straits and seas, Turkish Naval Forces*.

<sup>11</sup> 1knot= 1,15 miles per hour. See: *National Oceanic and Atmospheric Administration U.S. Department of Commerce*, <[http://oceanservice.noaa.gov/facts/nauticalmile\\_knot.html](http://oceanservice.noaa.gov/facts/nauticalmile_knot.html)> (accessed May 3, 2017).

<sup>12</sup> Váli, F. A. (1972). *The Turkish Straits and NATO*. Stanford, California: Hoover Institution Press Stanford University, p.6.

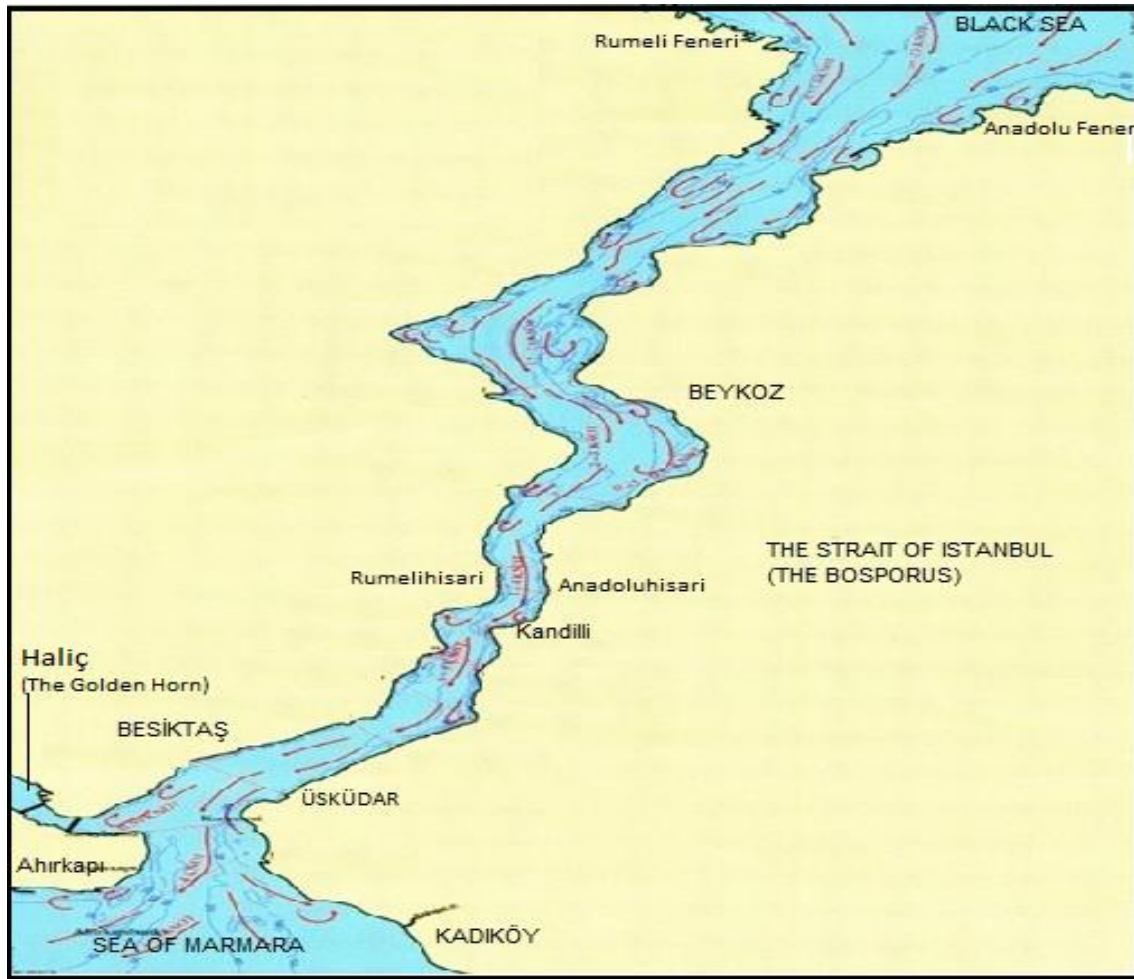
<sup>13</sup> Öztürk, B. (July 1995). The Istanbul Strait, a Closing Biological Corridor. *Turkish Straits, New Problems New Solutions*, pp. 145-154..

<sup>14</sup> Ibid; *Turkish Straits and seas, Turkish Naval Forces*.

<sup>15</sup> Rozakis, C. L. & Stagos, P. (1987). *The Turkish Straits*. Athens: Martinus Nijhoff Publisher.

<sup>16</sup> C. Istikbal, p.78; Oguzülgen, S. (1995, July). The Importance of Pilotage Services in the Turkish Straits for the Protection of Life, Property and the Environment. *Turkish Straits: New Problems, New Solutions*, pp. 105-126.

<sup>17</sup> S. Oguzülgen, p.110.



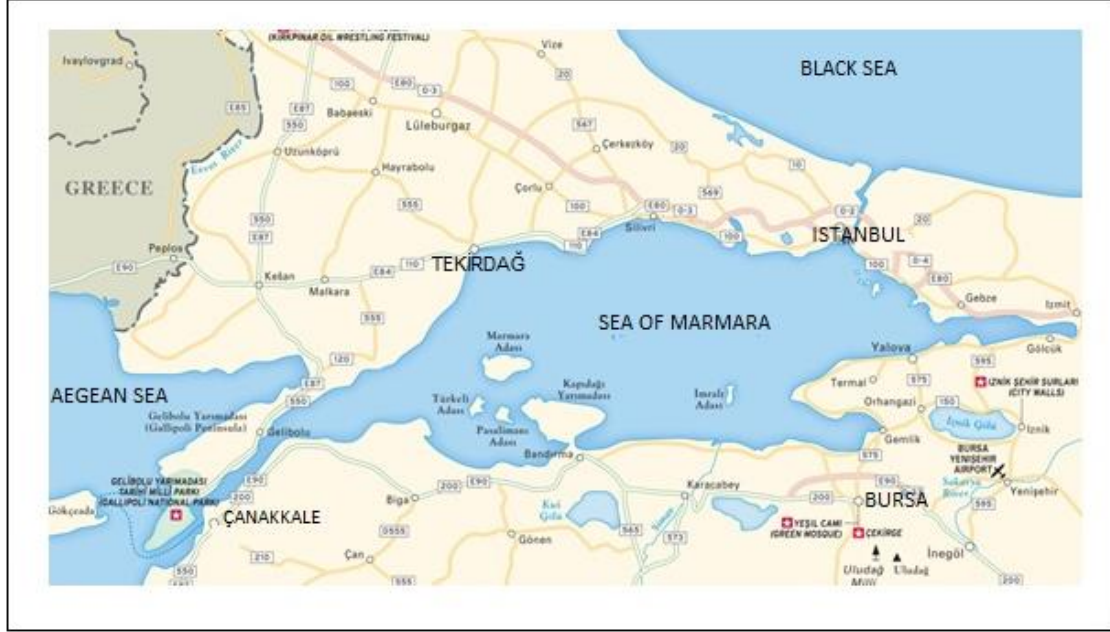
(The Bosphorus)

The Sea of Marmara, an oval-shaped inland sea, connects the Bosphorus with the Dardanelles. The length of the Sea of Marmara in the East-West direction is about 280 kilometers, its width at its widest part is about 80 kilometers and its surface area is about 11,350 square kilometers.<sup>18</sup> It is a relatively deep sea with a current flowing from east to west direction at rates varying about from 1,5 to 2 knots. The average depth is 493 meters and the maximum depth is 1225 meters.<sup>19</sup> Whilst the Sea of Marmara has no important harbors on its northern coastline, its southern coastline is considerably curved with harbors and gulfs such as the Gulf of Erdek, the Gulf of Mudanya, Bandirma Harbor and the Gulf of Izmit, in which the port of Izmit and a Turkish naval base and

<sup>18</sup> Okay, A. I., Mater, B., Artüz, B. O., Gürseler, G., Artüz, M. L., & Okay, N. (2007). *Bilimsel Acidan Marmara Denizi*. Ankara: Türkiye Barolar Birliği Yayinlari 119, Kültür serisi: 2, p.3.

<sup>19</sup> Ünlü, A. N. (2001). *The Montreux Convention and the Development of the Legal Regime of the Turkish Straits*. Faculty of Law University of Birmingham, p.23; C. L. Rozakis & P. Stagos, p.3.

dockyard of Gölcük are located.<sup>20</sup> In addition, the Marmara Sea shores contain industrial and agricultural centers with the most crowded populations in Turkey – about 25 million<sup>21</sup> - as well as the major international ports of Turkey.



(The Sea of Marmara)

The base of the Marmara Sea is still an active earthquake region and there are several islands in it. The largest is the Marmara Island and the famous Princess Islands which lie near the entrance of the Bosporus.<sup>22</sup> Navigation through the Sea of Marmara presents no great difficulty compared to the Dardanelles and Bosporus. Nevertheless, there are some detached shoals lying up to 2 kilometers off shore at the mouth of the Dardanelles, and a bank about 1,5 kilometers from the mouth of Bosporus at the Asiatic side, which can be dangerous for navigation in the Marmara Sea.

The Dardanelles connects the Sea of Marmara, an inland sea, and the Aegean Sea, which is an international sea. It is located between 39°51'.20N – 40°29'.80N and 26°07'.60E – 26°46'.00E.<sup>23</sup> The Strait is about 70 kilometers long and is defined at the entrance of the Sea of Marmara by the longitude passing through Zincirbozan Feneri

<sup>20</sup>Okay, Mater, Artüz, Gürseler, Artüz, & Okay, p.6.

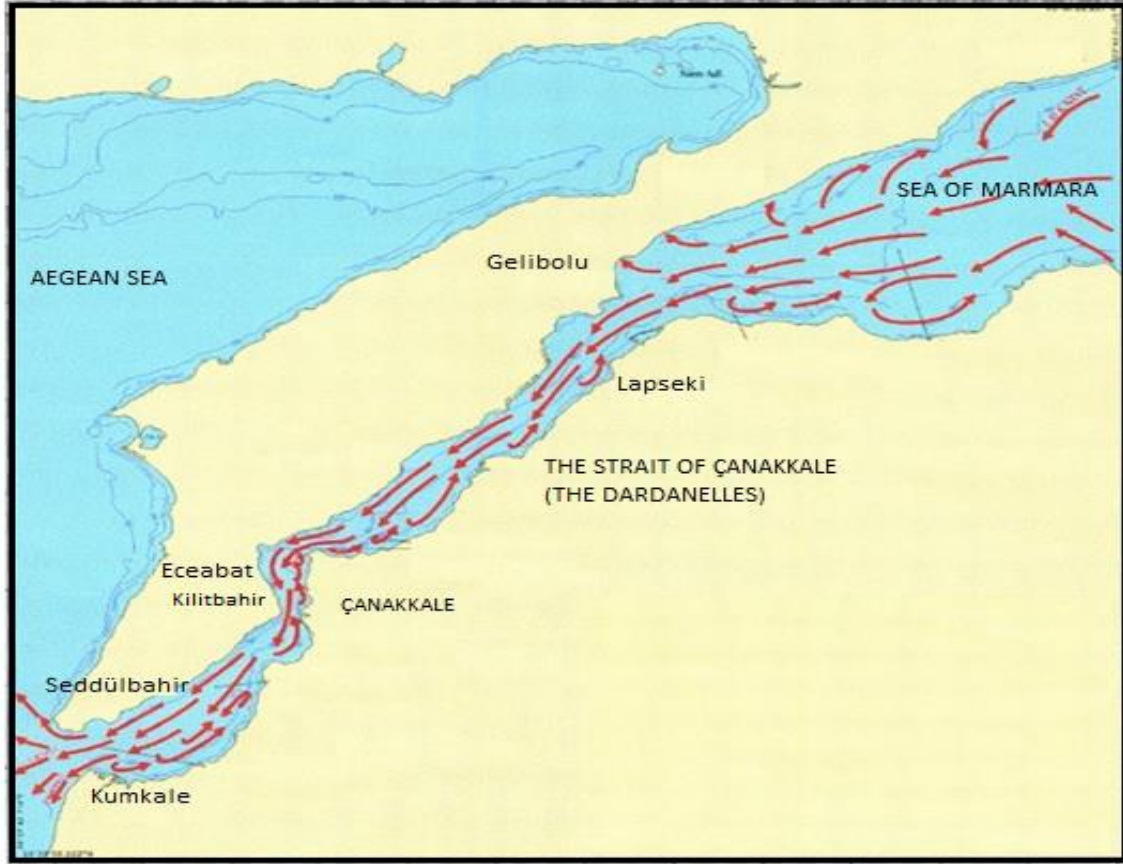
<sup>21</sup> See *The Statistics Summary of Cities According to the Census Years (2000-2017)*. Türkiye İstatistik Kurumu [Turkish Statistical Institute], <<http://www.tuik.gov.tr/UstMenu.do?metod=temelist>> (accessed May 8, 2017).

<sup>22</sup>Okay, Mater, Artüz, Gürseler, Artüz, & Okay, p.6.

<sup>23</sup> See: *Nautical Charts and Publications Catalogue 2017*, Office of Navigation, Hydrography and Oceanography of Turkey (SHOD),



and at the entrance of the Aegean Sea by a line between Kumkale Feneri on the Asia Minor and Mehmetcik Burnu Feneri on the European side.<sup>24</sup>



(The Dardanelles)

The width of the Dardanelles is more than 3 kilometers at its northern entrance and decreases to about 1,200 meters at its narrowest point between the province of Çanakkale on Asia Minor and Kilitbahir on the Gelibolu (Gallipoli) Peninsula. About 20 kilometers of the Strait have a general width ranging about from 1,5 to 2 kilometers.<sup>25</sup>

The Dardanelles has an average depth of 55 meters and the depth reaches a maximum of 91 meters at the northern entrance. However, the depth decreases to 27 meters at the offshore of Kilitbahir<sup>26</sup> which is the narrowest place of the Strait. The Dardanelles has a less narrow and curved structure compared to the Bosphorus, but, for

<sup>24</sup> Ibid.

<sup>25</sup> Okay, Mater, Artüz, Gürseler, Artüz, & Okay, p.20.

<sup>26</sup> Karamahmut, A. (2006). *Montrö Sözleşmesi, Türk Boğazları ve Karadeniz [The Montreux Convention, the Turkish Straits and the Black Sea]*. İstanbul: TÜDAV Yayınları, no:26.

the same reason as the Bosphorus, there are two major currents in the Dardanelles: the more saline undercurrent, which flows from the Aegean Sea towards the Black Sea, and a strong surface current, which flows in the opposite direction, in narrow parts reaching about 4 knots and in general about 2 knots.<sup>27</sup> At the narrowest point of the Strait, where it is pressed in between steep banks, the surface current acquires speed. The current speed and northeasterly or northerly winds can cause serious difficulty for navigation in the Strait.<sup>28</sup> Additionally, navigation is also difficult for tankers and large ships on account of the presence of submerged rocks.

Besides complicated navigation conditions, with a very narrow and winding formation, the Turkish Straits are one of the most difficult waterways for navigation in the world.

## **2. Navigation in the Straits**

Today, waterways have an even greater critical importance than in the past for the transportation of commercial products such as raw materials, petroleum, foods, and so on throughout the world. This is partly due to the fact that seas enable more efficient transport. At the present time, 75% of commercial goods are carried by ships in the world.<sup>29</sup> As such, canals and straits connecting seas and oceans still retain their incontestable importance.

The Turkish Straits are located on an arterial road linking the Black Sea with the rest of world via the Aegean Sea. They constitute an important and unique sea route for the Black Sea region states Romania, Bulgaria, Ukraine and Georgia, which use the Straits as a route for the majority of their international trade. But the Straits also have great importance for Russia. Although in the north it has direct access to the oceans to reach other parts of the world, the Turkish Straits are an indispensable waterway for

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<sup>27</sup> F. A. Váli, p.6; C. L. Rozakis & P. Stagos, p.1.

<sup>28</sup> S. Oguzülgen, p. 105-110; Brüel, E. (1947). *International Straits, Vol. II*. Copenhagen: NYT Nordisk Forlag Arnold Busck and Sweet & Maxwell Ltd. & Chancery Lane London, p.254.

<sup>29</sup> See: *Deniz Ticareti Analizleri [Sea Trade Analysis]*, Ministry of Transport, Maritime Affairs and Communications of Turkey/ Directorate General of Merchant Marine (August 2012) <[http://www.kugm.gov.tr/BLSM\\_WIYS/DTGM/tr/Analizler/20121019\\_111113\\_64032\\_1\\_64351.pdf](http://www.kugm.gov.tr/BLSM_WIYS/DTGM/tr/Analizler/20121019_111113_64032_1_64351.pdf)> (accessed June 22, 2017).

Russia because the Black Sea ports are free of ice throughout the year, unlike other seaports of Russia.<sup>30</sup>

In recent decades vessel traffic in the Turkish Straits has increased tremendously. This traffic mainly stems from non-call passage of ships of international companies carrying products for international trade between the Black Sea region states and the rest of the world, besides those vessels calling on Turkish northern ports in the Black Sea.

The Black Sea is linked through the connection of the rivers Danube and Rhein-Main with the West European countries, and on the other hand, through the network of natural and artificial waterways in the territory of the former Soviet Union, the Black Sea is linked with the Baltic Sea. From the riparian states of those rivers start additional small-vessels traffic to the Black Sea and, as a result of this connection, the number of vessels passing through the Turkish Straits has increased.<sup>31</sup> Furthermore, after the dissolution of the former Soviet Union, the Straits began to be used increasingly as a main trade route from Caspian Sea region states and central Asian markets of Armenia, Azerbaijan, Kazakhstan, Turkmenistan and Uzbekistan for their products – especially petroleum, Liquefied Petroleum Gas (LPG) and Natural Gas (LNG).<sup>32</sup>

To meet energy demands made by the growing population of the world, since the 1990s the Caspian Sea region has emerged as an important energy supplier for western countries in particular. In addition, in parallel with the development of ship building technology the size of vessels has grown and the number of the vessels passing through the Turkish Straits has increased dramatically. On account of all reasons mentioned above, much more hazardous and dangerous cargoes have been carrying by large vessels through the narrow Turkish Straits, where Istanbul is located as a historical heritage city of the world, in the last years.<sup>33</sup>

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<sup>30</sup> Dyoulgerov, M. (1999). Navigating the Bosphorus and the Dardanelles: A Test for the International Community. *The International Journal of Marine and Coastal Law*, Vol 14, No1, pp. 57-100.

<sup>31</sup> Caminos, H. (2014). *The Legal regime of International Straits: Contemporary Challenges and Solutions*. United Kingdom: Cambridge Press, p.78; S. Oğuzülgen, p.107.

<sup>32</sup> M. Dyoulgerov, p. 65; H. Caminos, p.78.

<sup>33</sup> Aybay, G., & Oral, N. (June-August 1998). Turkey's Authority to Regulate Passage of Vessels through the Turkish Straits. *Perceptions*, S. 84-108; Ustaoglu, B. S., & Poyraz, Ö. (16-17. November 2002). VTS and its Applications What Type of VTS for Turkish Straits. *The Proceeding of the Symposium on the Straits used for International Navigation*, pp. 116-125.

Furthermore, due to the greatly increasing population, local vessel traffic constitutes another problem, particularly in the Bosphorus. Between the Asian and European parts of Istanbul, boats and inter-city ferries cross the Straits diagonally about 2,000 times daily and transport more than one million people.<sup>34</sup> In summer there are a number of tourist cruises and during the fishing seasons fishing boats and leisure sailing crafts that have to be factored in to calculating the dense traffic of both Straits.

In comparison with earlier times, it is obvious how traffic has increased in the Straits. In 1934 approximately 4,500 ships navigated annually in the Straits. In 1995 the number of ships reached 46,914. This marks a ten-fold rise in just over 60 years.<sup>35</sup>

According to the data of the Directorate General of Coastal Safety of Turkey, details of which are presented in tables below, a total of 42,553 vessels and 8,703 tankers with a total capacity of 565,282,287 gross tons<sup>36</sup> passed through the Strait of Istanbul in 2016.<sup>37</sup> Local vessels such as boats, inter-city ferries or fishing boats are not included in this calculation. Table 1 shows that approximately 116 vessels pass through the Strait daily and about 24 of them are tankers carrying hazardous cargo such as oil, LNG, LPG and petrochemical products.

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<sup>34</sup> S. Oguzülgen, p.106; M. Dyoulgerov, p.63.

<sup>35</sup> G. Aybay & N. Oral (1998), p.104.

<sup>36</sup> "Gross tonnage is a measurement of total capacity expressed in volumetric tons of 100 cubic feet; it is calculated by adding the underdeck tonnage and the internal volume of tween-decks and deck space used for cargo. The measurement is used in assessing harbour dues and canal transit dues for merchant ships." See Britannica at <<https://www.britannica.com/technology/tonnage#ref265290>> (accessed, 22 June 2017).

<sup>37</sup> See: *The Statistics Summary of Vessels passed through the Turkish Straits in 2016* [General Directorate of Maritime Trade of Turkey],

<[https://view.officeapps.live.com/op/view.aspx?src=https://atlantis.udhb.gov.tr/istatistik/files/DIGER\\_I\\_STATISTIKLER/TURK\\_BOGAZLARI\\_GEMI\\_GECIS\\_ISTATISTIKLERI/Yillara\\_Gore\\_Karsilastirma\\_Tablosu.xlsx](https://view.officeapps.live.com/op/view.aspx?src=https://atlantis.udhb.gov.tr/istatistik/files/DIGER_I_STATISTIKLER/TURK_BOGAZLARI_GEMI_GECIS_ISTATISTIKLERI/Yillara_Gore_Karsilastirma_Tablosu.xlsx)> (accessed December 21, 2017).

<i>The Statistics Summary Of Vessels Passed Istanbul Strait (2016)</i>											
Months	Number Of Vessels	Total Gross Tonnage	With Pilot	Sp1 Given	Non Call In Vessels	LOA Longer Than 200 M	Lower Than 500 GT	Total Tankers			Towaged
								TTA	LPG/LN G	TCH	
January	<b>3.103</b>	41.342.718	1.681	3.077	1.807	284	41	492	89	143	4
February	<b>3.146</b>	41.688.172	1.703	3.111	1.880	283	43	460	104	115	4
March	<b>3.786</b>	51.423.593	2.031	3.744	2.289	352	44	551	102	149	6
April	<b>3.612</b>	45.378.529	1.808	3.580	2.182	300	46	468	90	142	7
May	<b>3.754</b>	45.786.750	1.960	3.718	2.192	283	57	498	92	143	6
June	<b>3.463</b>	44.379.390	1.783	3.425	2.024	300	52	506	99	141	5
July	<b>3.504</b>	47.929.178	1.816	3.458	2.242	338	48	497	74	125	5
August	<b>3.714</b>	50.140.136	1.995	3.684	2.330	339	36	454	80	124	10
September	<b>3.619</b>	48.219.584	1.838	3.595	2.283	330	37	500	68	129	12
October	<b>3.738</b>	51.755.564	1.913	3.702	2.388	377	39	527	75	156	3
November	<b>3.610</b>	48.218.615	1.872	3.567	2.251	339	50	524	56	150	6
December	<b>3.504</b>	49.020.058	1.956	3.471	2.182	348	29	556	60	164	5
<b>Total</b>	<b>42.553</b>	<b>565.282.287</b>	<b>22.356</b>	<b>42.132</b>	<b>26.050</b>	<b>3.873</b>	<b>522</b>	<b>6.033</b>	<b>989</b>	<b>1.681</b>	<b>73</b>

Table 1: The statistics of vessels that passed through the Strait of Istanbul in 2016.<sup>38</sup>

Similarly, in 2016, a total of 44,035 vessels with a total capacity of 772,922,682 gross tons passed through the Dardanelles, excluding boats, inter-city ferries or fishing boats.

<i>The Statistics Summary Of Vessels Passed Canakkale Strait (2016)</i>											
Months	Number Of Vessels	Total Gross Tonnage	With Pilot	Sp1 Given	Non Call In Vessels	LOA Longer Than 200 M	Lower Than 500 GT	Total Tankers			Towaged
								TTA	LPG/LN G	TCH	
January	3.162	57.030.096	1.418	3.133	1.763	414	33	456	89	205	6
February	3.356	58.927.424	1.474	3.323	1.979	432	38	503	101	164	10
March	3.701	67.075.167	1.651	3.667	2.202	485	23	523	89	210	7
April	3.749	63.427.204	1.589	3.715	2.198	440	51	507	76	195	17
May	3.779	63.497.429	1.596	3.743	2.182	436	48	495	75	217	12
June	3.679	61.801.905	1.618	3.616	2.047	446	97	502	69	230	12
July	3.720	66.838.550	1.619	3.670	2.248	500	65	504	73	215	10
August	3.831	67.353.403	1.641	3.782	2.326	495	63	465	74	193	14
September	3.720	64.558.861	1.548	3.684	2.295	487	69	484	59	199	13
October	3.920	69.597.756	1.666	3.870	2.364	528	69	523	62	251	11
November	3.734	65.062.504	1.554	3.689	2.263	485	54	518	57	236	14
December	3.684	67.752.383	1.633	3.651	2.204	517	51	561	57	244	13
<b>Total</b>	<b>44.035</b>	<b>772.922.682</b>	<b>19.007</b>	<b>43.543</b>	<b>26.071</b>	<b>5.665</b>	<b>661</b>	<b>6.041</b>	<b>881</b>	<b>2.559</b>	<b>139</b>

Table 2: The statistics of vessels that passed through the Strait of Çanakkale in 2016.<sup>39</sup>

Table 2 shows that in 2016 approximately 120 vessels passed the Strait daily and about 25 of them were huge tankers carrying hazardous cargo. It can be seen from the above-mentioned number of passages and crowded vessels traffic that the Turkish Straits are one of the busiest waterways, despite their narrow character.

<sup>38</sup> See: *The Statistics Summary of Vessels passed through the Turkish Straits in 2016* [General Directorate of Maritime Trade of Turkey].

<sup>39</sup> Ibid.

### 3. The Straits in Antiquity

Since Ancient Times the Bosphorus and the Dardanelles have impressed users and other powers with their unique geographical and strategic formation. In the history of the Straits, it was always seen that controlling the Turkish Straits meant to controlling rivals and the trade corridor between the Black Sea and the Mediterranean as well as between the Middle East via Asia Minor and Europe.

The early history of the Dardanelles has sunk into the fog of Greek mythology. The Dardanelles, also known in classical Antiquity as the Hellespont,<sup>40</sup> was only later called by its familiar name “Dardanelles” from the old town Dardanos in the time of Troy. Mastery over the navigational hazards of the Straits and the difficulties they offered were symbolized by the story of the Symplegades or Clashing Rocks. In mythology, this pair of rocks at the Bosphorus that clashed together when a ship went through. Jason sailed in the Argo to the Black Sea searching for the Golden Fleece and succeeded with the help of the Symplegades. Remarkably, these legends motivated the historical ancient Greeks to reach the Black Sea region. For trade and colonization, the straits supplied the route to navigate into the Black Sea region in ancient times.<sup>41</sup> Many settlements and ports along the Straits and also in the Sea of Marmara such as Gelibolu (Heliopolis), Lapseki (Lampsakos), Erdek (Cyzicus) or Kadiköy (Chalcedon) were evidence of the importance of the trade among the Black Sea regions in ancient Greek. The Trojan War in about 1200 B.C. was the first struggle for the freedom to trade from the Aegean Sea to the Black Sea, that is, for the control of the Dardanelles.<sup>42</sup>

The Bosphorus and the Dardanelles were used first as a military transport route between Asia and Europe in the years of 513 and 512 B.C. As a function of its geographic location, the Straits have been a valuable connection route between the two continents in all ages. The Persian King Darius I undertook a campaign against the Scythians, who had colonized the northern Black Sea regions between the Danube and the Don rivers. For this purpose, he crossed the Bosphorus with his army on a bridge,

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<sup>40</sup> Herrmann, G. (1936). *Die Dardanellen*. Leipzig: Wilhelm Goldmann Verlag, p.11.

<sup>41</sup> Erkin, F. C. (1968). *Türk Sovyet İlişkileri ve Boğazlar Meselesi [Turkish Soviet Relations and the Straits Issue]*. Ankara: Beşnur Matbaası, p.14.

<sup>42</sup> F. A. Váli, p.14.

which was stretched over the sea from the Asian side to the European side. His son, and at the same time his successor, Xerxes, followed a similar route in 480 B.C. For his campaign against the Greeks he crossed the Dardanelles with his army on bridges formed by ships.<sup>43</sup>

The Straits were of decisive importance in the Peloponnesian War, too. Sparta and Athens fought for the control of the Dardanelles, which was of remarkable importance to Athens. Athens supplied grain and other products to its people from the Black Sea region via the Straits. The Spartan fleet also succeeded at a sea blockade and the two navies fought by one year in the Dardanelles in 405 B.C. After one year the war ended; Athens capitulated and Sparta became the new Greek hegemon.<sup>44</sup>

For his campaign Alexander the Great crossed the Dardanelles with his army against the Persians in 334 B.C on bridges formed by ships, as Xerxes had done 156 years earlier. Later in Greek and Roman history, the Dardanelles played only a subordinate role because the focus of their historical business lay in other areas of the Mediterranean.<sup>45</sup>

The Romans appreciated the function of the Straits as a bridge and used them as a link for their armies between the European and Asian provinces. From the time of the conquest of Anatolia<sup>46</sup> by the Romans in 138 B.C. when they reached the southern side of the Straits, they were controlled by the Romans for about 15 centuries, and then by the East Rome Empire until the Ottomans. As a trade and supply route the Straits had no significance for the Romans, which they still had for the Greeks. Probably Rome did not depend on the transport of corn to North Africa from the northern shores of the Black Sea, which it received via the Straits. The rather secondary importance of the Straits in the Roman world changed when in 330 B.C the old Byzantium became the new capital of the Roman Empire was named Constantinople after Constantin I. Constantinople soon developed as a trading center between East and West.<sup>47</sup>

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<sup>43</sup> Tugin, C. (1947). *Boğazlar Meselesi*. Istanbul: Pan Yayıncılık, p.19; F. C. Erkin p.15; F. A. Váli, p.15.

<sup>44</sup> F. C. Erkin, p.15; F. A. Váli, p.15.

<sup>45</sup> G. Herrmann, p.12; C. Tugin, p.19

<sup>46</sup> Anatolia, also called Anadolu in Turkish, is defined the Asian portion of Turkey.

<sup>47</sup> G. Herrmann, p.12; C. Tugin, p.19; E. Brüel, Vol. II (1947), p.262.

With the growing political and economic importance of Constantinople, the Straits increased with the significance of the city. Additionally, with the expansion of Christianity in the Roman Empire, Constantinople became the center of Eastern Christianity.<sup>48</sup> The Straits formed a natural moat, protecting Constantinople against attacks from Asia Minor, in the same way that the Golden Horn provided a safe refuge for the fleet and army<sup>49</sup>. In the next centuries, the city repeatedly succeeded in warding off attacks. With the advantages of the Straits, Constantinople resisted the attack of the Huns (Avari) and the Persians in 626, as well as the attacks by Arabs in 717 and 718. It must be noted that at the same time Arabs almost crossed the Strait of Gibraltar. Although the Arabs had succeeded in entering the Sea of Marmara through the Dardanelles, they could not conquer Constantinople. In the years 907 and 941, the city was able to withstand the attacks of the Normans of Novgorod who had penetrated the Bosphorus from the Black Sea.

Gradually, the internal political improvements of the Byzantine Empire created possibilities for other countries to exercise an influence on its administration. From the 11<sup>th</sup> century, the weakness of the Byzantine Empire had become clear and it no longer had a sufficient fighting fleet, although it was a significant coastal state in its time. It was forced to defend itself from other powers, notably Northern countries, and had to seek assistance from the Italian city states especially Venice, Genoa and Pisa, which followed their trade interests in the Levant<sup>50</sup> and the Orient. Venice and Genoa were in sharp competition with each other, which occasionally resulted in armed conflicts. The Byzantine Empire attempted to assume the most favorable position in this situation by changing its allies. For the first time commercial privileges were granted to Venice in 992. Because Venice agreed to defend Constantinople against a new Norman attack in 1082, it became the first Italian city state to be granted its own quarter with complete autonomy in Constantinople in 1085.<sup>51</sup> This was the earliest origin of the so-called capitulations which continued until the Lausanne Treaty of 1923.<sup>52</sup>

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<sup>48</sup> Birkner, S. (2002). *Die Durchfahrtsrechte von Handels- und Kriegsschiffen durch die türkischen Meerengen*. Berlin: Duncker&Humbolt GmbH p. 20.

<sup>49</sup> E. Brüel, Vol. II (1947), p. 262.

<sup>50</sup> The Levant is an approximate historical geographical term referring to a large area in the Eastern Mediterranean.

<sup>51</sup> F. C. Erkin, p.18; E. Brüel, Vol. II (1947), p.263; S. Birkner, p.21.

<sup>52</sup> E. Brüel, Vol. II (1947), see Footnote 1, p. 264.



In the following years, Venice and Genoa were given certain privileges through trade treaties as allies of the Byzantine. They always tried to extend their trade to the east but the Byzantine made this difficult and emphasized its rights over the Straits. Consequently the capital city of the Byzantine, namely Constantinople, was conquered in 1204 by the Venetians and it stayed under Latin protectorates about 60 years.<sup>53</sup> In fact, the creation of a vassal state resulted in a kind of internationalization problem of the Straits in favor of Western Europe, especially the Venetian trade.<sup>54</sup> In 1264 with the help of the Genovese the Venetians' hegemony on the Byzantine collapsed and thereafter the Byzantine did not create difficulties for the ships of Venice and Geneva passing through the Straits. The Italian city states henceforward had control over many ports in the Black Sea and Islands in the Mediterranean and in the Aegean. Thus, at the time, their hegemony was applicable on the sea trade and on the Straits.<sup>55</sup>

## **CHAPTER 2 A Historical Overview of the Legal Regime of the Turkish Straits**

### **1. Historical Evolution of the Straits in the Ottoman Era**

Over the centuries the Byzantine Empire weakened, the Genovese, the Venetians and other Mediterranean powers turned their ambitions for wealth towards the Straits and the Black Sea region to reach valuable goods, especially corn in the Russian steppes and Asia.<sup>56</sup> Meanwhile Seljuk Turks had defeated the Byzantine army in 1071 at Malazgirt (Manzikert) in east Anatolia and thereafter the Byzantine had lost nearly all of Anatolia. After the collapse of the Seljuk State, a number of small nomadic Turkish province states named Beys were established in Anatolia. One of them was the Ottoman, led by Osman in 1299 in Söğüt and Domaniç in northeastern Anatolia, very close to the Marmara Sea at the Byzantine border. Ottoman's founder Osman and his successors approached the West, particularly to Constantinople and around the Straits, because, from the beginning of the establishment of the Ottomans, they had already remarked the economic and strategic importance of the Straits besides their critical

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<sup>53</sup> C. Tugin, p.22; G. Herrmann, p.12.

<sup>54</sup> G. Herrmann, p.13.

<sup>55</sup> C. Tugin, p.22; G. Herrmann, p.13.

<sup>56</sup> C. L. Rozakis & P. Stagos, p.15.

importance in point of world politics.<sup>57</sup> With the capture of Bursa on the Coast of the Sea of Marmara and thereafter the south side of Izmit Gulf in 1326, the Ottomans expanded their border for the first time around the Sea of Marmara towards the Bosphorus and the Black Sea.<sup>58</sup>

Meanwhile, since the beginning of the 14th century, fights for the throne had been occurring in the Byzantine. These internal battles and the instability of the Byzantine tempted the Ottomans to establish themselves on the European shore of the Straits too. As a reward for their support to the Byzantine emperor Kantakouzenos for his throne, Çimpe (Tzympe) castle, which was on the Gelibolu (Gallipoli) Peninsula, was given to the Ottomans in 1356.<sup>59</sup> After possessing Tzympe the Ottomans initially crossed the Dardanelles to the Gallipoli Peninsula from where Xerxes and Alexander the Great had crossed in the past.<sup>60</sup> Although the Ottomans now had both sides of the Dardanelles, they did not try first to close the Dardanelles as they did not want to repeat Xerxes' mistake, who had lost the Dardanelles to the Greeks. The Ottomans also established their dockyard in the Sea of Marmara after conquering the south coasts of Izmit, but its fleet was too weak and powerless compared to the Genovese and the Venetians, who had interests and desires on the Straits, namely their trade route between the Black Sea and the Mediterranean. The Ottomans did not wish to have new rivals in the Straits until they gained enough power at sea.<sup>61</sup>

Within the following years, the Ottomans conquered all the Gallipoli Peninsula and then Adrianople (Edirne) in 1363<sup>62</sup> and moved their capital to Adrianople. Thus Constantinople was encircled by the Ottomans from the European side, too. In the following years the victories of the Ottomans over the Balkans, especially the capture of Kosovo in 1389, brought the Balkans into Turkish hands, and it cut off the connection

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<sup>57</sup> C. Tükin, p.26; E. Brüel, Vol. II (1947), p.264.

<sup>58</sup> Uzunçarşılı, İ. H. (1988). *Osmanlı Tarihi I. Cilt [The History of the Ottoman, Vol. I]*. Ankara: Türk Tarih Kurumu Yayınları, p. 112.

<sup>59</sup> See footnote 191, İ. H. Uzunçarşılı, p. 143. According to many of Turkish resources the Cimpe was took in 1353. Basar, F. (1-5. November 2006). Osmanlı Akinci Ailelerinin Balkan Tarihindeki Yeri. *Balkanlarda İslam Medeniyeti , Uluslararası Üçüncü Sempozyum Tebliğleri*, p. 215-231.

<sup>60</sup> Linn, W. (1930). *Die Internationalisierung der Meerengen von Kostantionpel*. Ansbach: Ansbach Buchdruckerei Michael Schraut.

<sup>61</sup> C. Tükin, p.26.

<sup>62</sup> İ. H. Uzunçarşılı, p.148.

between the Byzantine and Western countries.<sup>63</sup> The Ottomans had become a visible force around the Straits especially in the Balkans and they were thus in a position to threaten the Byzantine from the east and the north too. Against the new external danger posed by the Ottomans, the three powers of the Straits, namely the Byzantine, Genoa and Venice came to a mutual agreement among themselves in 1381.<sup>64</sup> They agreed to close the Dardanelles for warships in time of peace, a rule which would be referred back in the future of the Straits. These implementations would form an outline for the next centuries in terms of the Customary Law of the Sea. Brüel defines it as follows:

“In their agreements with Byzantium, Venice and Genoa, whose mutual intrigues were continued, we find the earliest trace of so-called “Ottoman rule” which was partially revived by Montreux Convention of 1936, viz. the rule that no warship may pass the Dardanelles; and in the peace treaty between Genoa and Venice in 1381 we find quite a modern clause to effect that the island of Tenedos (Bozcaada) at the entrance to the Dardanelles was to be demilitarized, as we should say today, the treaty providing that the fortifications established on the island were to be demolished and the island to remain a no-man’s land, an early precursor of the provision in the Lausanne Convention of 1923 for the demilitarization of the shores of the Straits and the adjoining islands, including specifically Tenedos.”<sup>65</sup>

In this period, the Sea of Azov and its region, Crimea and the northern shore of the Black Sea, were under the control of the Genovese. Although there was controversy between Venice and Genoa, they were dominant on the Straits and sometimes they prohibited ships of other countries from passing through the Straits.<sup>66</sup> The Ottomans were unable to prevent navigation in the Straits although they held both sides of the Dardanelles and most of the coast of the Marmara Sea. The commercial ships of Italian City States could navigate on the shores of the cities of the Ottomans, because the Ottomans in the time of Murad I (1326-1383) tried to maintain a moderate policy with Venice and Genoa against the Byzantine for the purpose of possessing Constantinople.<sup>67</sup> The Conquest of Constantinople was motivation for all the Sultans of the Ottomans and for this purpose Bayezid I surrounded Constantinople twice and even built Anadolu Hisarı (Castle) on the Asia Minor coast of the Bosphorus, the nearest place to

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<sup>63</sup> G. Herrmann, p.14.

<sup>64</sup> E. Brüel, Vol. II (1947), p.265.

<sup>65</sup> Ibid

<sup>66</sup> C. Tükin, p.28.

<sup>67</sup> I. H. Uzunçarşılı, p. 149.

Constantinople, though he did not succeed in possessing it.<sup>68</sup>

The balance among the states on the Straits was changing rapidly and, in parallel to these changes, the states were keeping their interests in the foreground and were making new agreements among themselves. During the Battle of Varna in 1444 the Ottomans wanted to send a support force from Anatolia to their European territory via the Dardanelles but the Strait was closed by the ships of Venice and their other Western ally countries so that the Ottoman army was blocked from crossing between their two territories on the Dardanelles shore.<sup>69</sup> Although the Ottomans controlled all of the surrounding area of Constantinople and both sides of the Dardanelles, they were feeling insecure in the Straits. Further, in the 15<sup>th</sup> century, the Ottoman territory had been extended along the shore of the Adriatic and the Mediterranean. In light of this situation the Ottomans realized that they must develop their fleet and that they had to increase their maritime strength.

The Sultan Mehmed II believed that Constantinople had to be captured for the future of the Ottomans. When he came to power at the age of 21 in 1451 he was already sure about capturing Constantinople and that all supply routes of the Byzantine had to be cut. The Ottomans were suspicious about the security of their coasts on the Mediterranean and Adriatic. Mehmed II wanted to gain full dominance on the Straits to ensure connection between their fleets in both the Sea of Marmara and the Mediterranean. To begin with, he fortified relations with Geneva and Venice and concluded peace with Hungary, thus guaranteeing the safety of the Ottomans against the western powers. At the same time, he increased the capacity of the naval forces and developed the quality of advanced war weapons such as long-range cannons, which had great destructive power. Aside from these developments, he built Rumeli Hisarı (the Rumelian Castle) in 1452 on the coast of the European side of Bosphorus, where the narrowest point of Bosphorus in front of the Anadolu Hisarı was located, and thus navigation on the supply route between Constantinople and the Black Sea region was cut<sup>70</sup>. After controlling the navigation of the Bosphorus the Ottomans began to collect dues, under specific conditions, from all ships passing through the Straits and the Black

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<sup>68</sup> I. H. Uzunçarşılı, p.251, C. Tükin, p.27.

<sup>69</sup> C. Tükin, p.28; I. H. Uzunçarşılı, p.199.

<sup>70</sup> G. Herrmann, p.14; F. A. Váli, p.17; E. Brüel, Vol. II (1947), p.265; C. Tükin, p.28-29.

Sea.<sup>71</sup> The next strategic step was to build the Çanakkale and Kilitbahir Castles on the nearest point of the coast of the Dardanelles; thereby gaining precise control of Dardanelles and cutting the supply route for the western powers via the Aegean Sea.<sup>72</sup> On 26 April 1453 the Ottoman army, led by the Sultan Mehmed II, besieged Constantinople. This siege was different from previous ones because the Ottoman fleet was also involved. On 29 May 1453 the Ottomans began their final attack on Constantinople and with this attack the city fell, and the Greek Roman Byzantine Empire ended forever.

Now the Ottomans were an Empire and Constantinople, which was starting to be called Stambul (Istanbul)<sup>73</sup>, became the heart and brain of another universal Empire. When the city fell in 1453, the Ottomans completed their territorial connection in the east-west direction and the increased the integrity of their fleets in the Mediterranean and in the Sea of Marmara. From then on, the Straits and the Sea of Marmara were located in the territory of the Ottoman government, known later as the Sublime Porte.<sup>74</sup> This meant that it would be able to govern the passage through the Straits north-southwards as well as in the opposite direction.

## **2. The Ottoman Sovereign Period on the Turkish Straits**

### **2.1 The Ancient Rule of the Ottoman Empire**

Having control of the Straits showed that the Ottomans had become a great power in world politics, however, even more important than this was the reality that they now had many more rivals and enemies who threatened their future. It was strongly believed by the Sultans that for protecting their own land from the Adriatic to eastern Anatolia, the fleets had to be strengthened and that they also had to dominate the seas around their Empire. The Ottomans did not have enough trade ships. In the subsequent years the Ottomans tried to enlarge their fleet in the Mediterranean region and allowed in Italian traders, who continued to protect their trade interests in the Black Sea region and had great maritime strength. On the other hand, for over a century Italian ships had already

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<sup>71</sup> E. Brüel, Vol. II (1947), p.265.

<sup>72</sup> C. Tükin, p.29.

<sup>73</sup> G. Herrmann, p.14.

<sup>74</sup> F. A. Váli, p. 16. The term "Sublime Porte" was used to signify the government of the Ottoman Empire.

had privileges to pass through the Straits.<sup>75</sup> For many years after the conquest of Istanbul the Ottomans did not attempt any major change in the status of the Straits.<sup>76</sup> However, although the Ottomans did not have enough commercial ships of their own, they considered the vast expanse from the Black Sea to Dardanelles as their own sphere of influence to which no foreign power should have free access. There was no question of the Straits as an international problem yet.<sup>77</sup>

After the fall of Constantinople, the Turks gave priority to the Black Sea region and only a few years later, in 1461, Sinope and Trapezund were also captured. Shortly after that, in 1475, the Ottomans took the Genoese colony of Kaffa on the Crimea Peninsula and Amasra under their control, additionally, in the same year, the Tatar Khan of the Crimea pledged allegiance to the Ottomans.<sup>78</sup> The Turks did not turn their face to the Black Sea until possessing the Bosphorus. However, some twenty years after the fall of Bosphorus, with the conquest of the important port cities Kilija and Akkerman<sup>79</sup> in 1484, the Black Sea coast came under their control and in the west, Ottoman power extended onward to the mouth of the Danube. Thus the Black Sea became a Turkish inland sea. This entailed that the Dardanelles, the Sea of Marmara, the Bosphorus and the Black Sea were part of the Ottoman territory and all coasts of this body of water were surrounded by only one state. In other words, the Sea of Marmara, the Black Sea and the Turkish Straits, which are the single waterway connecting the Black Sea with other seas, were completely under the exclusive control of the Ottomans and the Black Sea was then a closed sea, also “mare clausum”.<sup>80</sup> This geographical and political change did not show its effect immediately in terms of customary law until the Ottomans built a sufficient number of commercial ships. As soon as they acquired the mercantile fleet of their own they closed the Bosphorus under their full sovereignty to navigation of all ships of other nations. This implementation became a rule named, “the ancient rule of the

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<sup>75</sup> Kurt, N. (1937). *Der Bosphorus und die Dardanellen unter Völkerrechtlichen und Politischen Gesichtspunkten*. Göttingen: Handelsdruckerei, p.7.

<sup>76</sup> F. C. Erkin, p.20; C. Tugin, p.29; S. Birkner, p.24,

<sup>77</sup> G. Herrmann, p.14, Worbst, P. G. (1941). *Die Dardanellen frage bis zum Lösungsversuch des Abkommens von Montreux*. Leipzig: Felix Meiner Verlag, p. 5; N. Kurt, p.7.

<sup>78</sup> F. A. Váli, p.18; F. C. Erkin, p.30.

<sup>79</sup> Kilija and Akkerman are located in present day in Ukraine.

<sup>80</sup> W. Linn, p.10; N. Kurt, p.6; Kumrow, C. (1913). *Die Bosphorus und die Dardanellen*. Warschau: Buchdruckerei Guido Zeidler, p.15; Oral, N. (2006). *The Legal Regime of the Black Sea: An Historical Overview*. *Turkish Review of Eurasian Studies*, Vol. 6, S. 217-254. See also Chapter 6.

Ottoman”, or “the ancient rule”. It stated that no non-Turkish ship may pass the Bosphorus.<sup>81</sup> For more than three centuries – up until 1774 – all goods from and to the Black Sea had to be reshipped respectively into or from Turkish commercial ships. In other words, of all ships carrying goods only those with Turkish flags were carried into or from the Black Sea. With regard to warships, the rule forbade the passage of all foreign war vessels through the Turkish Straits. This rule was maintained in principle up to Lausanne Convention in 1923 and later it was partially restored in the Montreux Convention of 1936.<sup>82</sup>

The Ottomans were in a position to maintain their monopoly around the Black Sea for so long because the Mediterranean in the 16<sup>th</sup> century was a time of change, much of it economically and politically in favor of the Ottomans. In addition, of course, their legal position was strong after the Black Sea had been made an internal Turkish Sea; all its shores and both sides of the Straits were entirely in Turkish territory. That is why the Ottomans did not want to allow foreign vessels into their inland water area. Such areas were much later recognized by international law schools and by authors in theory and practice, as falling under the exclusive territorial sovereignty of the coastal state.<sup>83</sup> Today it is generally agreed that admission to a part of the territory of a coastal state could be granted or refused at the desire of that state. Regarding the Straits and the Black Sea as an inland sea the implementation of the Ottomans is interpreted by Hurewitz as follows:

“As long as the Black Sea was an Ottoman lake, and the only approaches to it from open waters or from rivers flowed through the Sultan`s territory or tributary principalities, he could-and did- decide freely what ships might visit what parts of his realm and under what condition.”<sup>84</sup>

In addition Kurt summed up this right of the Ottomans as:

“... , daß der Uferstaat, damals die Türkei, das recht hatte, Durchfahrt und Außenfahrt

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<sup>81</sup> Inan, Y. (1995). *Türk Bogazlarının Siyasal ve Hukuksal Rejimi*. Ankara: Turhan Kitabevi, p.7; Wobst, P. G. (1941). *Die Dardanellen Frage bis zum Lösungsversuch des Abkommens von Montreux*. Leibzig: Felix Meiner Verlag, p.5; G. Herrmann, p.14; C. Tugin, p.30; E. Brüel, Vol. II (1947), p.266; F. C. Erkin, p.20.

<sup>82</sup> F. C. Erkin, p.20; E. Brüel, Vol. II (1947), p.266

<sup>83</sup> E. Brüel, Vol. II (1947), p.266; N. Kurt, p.7.

<sup>84</sup> J. C. (July 1962). Russia and the Turkish Straits: A Revaluation of the Origins of the Problem. *World Politics, Vol.14. No.4*, S. 605-632.

fremder Schiffe in Bezug auf betreffenden Wassergebiete frei zu regeln, zu erlauben, zu beschränken oder zu verbieten.”<sup>85</sup>

The Straits were closed by the Ottomans after conquering Kaffa in 1478. However, in actual fact we often meet the implementation in the intergovernmental treaties under the designation “the ancient rule” forming a fundamental principle of Turkish politics. In other words, although the Straits were closed for foreign ships, there were exceptions. As a matter of fact, immediately after having conquered Constantinople, the Ottomans and Venice signed a treaty about trade liberty in 1454. According to this treaty they could trade freely and mutually on land and at sea. Further along in 1479, when Kaffa was taken from the Genovese, Venice obtained the right to pass through the Straits with its commercial ships, paying a fee towards the Kaffa region in the north part of the Black Sea.<sup>86</sup> The treaty was renewed in 1782, 1513 and 1521 but the treaties did not have *eo ipso* character, that is, they were always renewed by the Ottoman Empire under special stipulations. However, the treaty of 1540 no longer contained any special stipulations because the Turks had created a sufficiently large fleet and wished to engage in trade themselves in the Black Sea.<sup>87</sup>

In the 16th and subsequent centuries, some western states signed maritime treaties with the Ottoman Empire and they obtained privileges of navigation for their commercial ships in the Ottomans’ territorial waters. In this context, France concluded a treaty with the Ottoman Empire in 1535 and the French obtained the same trade rights as Venice and Genoa. However, free shipping in Ottoman waters was then only permitted to the French and Venetians so that ships of other foreign powers who wanted to trade there had to sail under one of those two flags.<sup>88</sup> It should be noted that these treaties, called “capitulations”, contained no provision for foreign navigation and foreign trade in the Black Sea, but in practice commercial vessels of other nations were only ever authorized by the Ottomans to sail to the port of Istanbul and could not pass through the Bosphorus.<sup>89</sup> That meant French or Venetian traders had to reload their goods on ships under the Ottoman flag at the Port of Istanbul and then they could carry

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<sup>85</sup> N. Kurt, p.7.

<sup>86</sup> C. Kumrow, p.17; C. Tugin, p. 32; N. Kurt, p.7.

<sup>87</sup> C. Kumrow, p.18.

<sup>88</sup> P. G. Wobst, p.5; C. Tugin, p.33; N. Kurt, p.8.

<sup>89</sup> F. A. Váli, p.18; P. G. Wobst, p.5; C. Kumrow, p.18.



them to their destinations in the Black Sea. In the following years, all the attempts by foreign powers to open the Turkish Straits for their merchant vessels failed due to the steadfast principle of the passage to the Black Sea, and remained unsuccessful until the 18th century.<sup>90</sup>

Trade circulation in the Black Sea weakened, particularly during the 17<sup>th</sup> and 18<sup>th</sup> centuries, due to the increasing importance of the new trade routes to America and India used by Great Britain and Netherlands. After the collapse of Venice in 1797, a new competition emerged between the French, Great Britain and Netherlands in the Levant trade route, where the French had a dominant position. The two nations, Great Britain and Netherlands, aimed at equitable equality with France in terms of sea trade. Early in the 17<sup>th</sup> century France was shaken by internal political turmoil and then a trade crisis broke out. The ambassador of England in Istanbul took advantage of this opportunity and secured privileges for English traders in 1601, who were then able to navigate with their commercial ships to the ports of the Ottoman Empire and in the Black Sea on Turkish flagged ships.<sup>91</sup> Similarly, the ambassador of the Netherlands in Istanbul obtained the same legal position through the treaty of 1612 with the Sublime Porte, which was extended and confirmed again in 1680. However this great concession to England and Netherlands did not break the old rule of the Ottoman Empire.

In the following years other western powers tried to gain similar privileges from the Ottoman Empire and the problem of the Straits started to become visible in world politics. The Straits problem gained international significance. After the capitulations, and with their political importance, the Straits gained a European character because Venice, France, Great Britain, and the Netherlands pursued purely trade-policy aims, and increasingly the Sublime Porte met their demands.<sup>92</sup> The basic principle of closing the Straits was more and more interrupted by the capitulation system. Thus, these exceptional permissions given by the capitulation system were established as an

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<sup>90</sup> F. C. Erkin, p.32.

<sup>91</sup> C. Tugin, p.34. According to Kumrow the date of signing of the treaty is unclear. He argues that the date could be 1604 or 1609. See: C. Kumrow, p.19.

<sup>92</sup> At the beginning capitulations were given to France by Sulltan Suleyman, which contained concessions as a favor in terms of commercial, economic and political field. But later other western countries obtained the same privileges from the Ottomans, and while the Ottomans were weakening these countries used this as a step toward making other demands. They also used these concessions for their interests on the Ottomans' territory. As a result the capitulations accelerated the collapse of the Ottoman Empire. See; F. C. Erkin, p.20.

example for future permissions for other western powers' commercial ships. Nevertheless, the Straits remained in any case closed to all foreign warships.

## 2.2 Tsarist Russia and the Straits

The relations of western powers with the Turkish Straits were mainly in the commercial field in 15<sup>th</sup> and 16<sup>th</sup> centuries, but for the Tsarist Russia, they always meant more than this. Even though economic reasons played a weighty role, the core of the Russian efforts in the Orient were mostly politically orientated. The desire of Russia for the Turkish Straits and Istanbul had other deep historical roots: the Straits were the unique waterway to the warm water (the Mediterranean) for Russia, the ports of which stood mostly in ice except in the Black Sea. In other words, the Strait meant “the key to the door”<sup>93</sup> to Russia with their strategic importance in terms of security and freedom of its commercial and naval vessels. The political developments in the subsequent centuries have confirmed this reality.

As early as in the 9<sup>th</sup> and 10<sup>th</sup> centuries there were dynamic relations between Russia and the Byzantine. In 988 Vladimir the Great secured the relationship to Constantinople with his marriage to Princess Anna of the Byzantine and by accepting Christianity and supporting the Greek Emperor in the suppression of internal turmoil.<sup>94</sup> This situation was greatly advantageous for Russia's future because it now had continuous contact with Constantinople, which was not only a rich and international city, but also a religious and cultural metropolis.

Ever since Constantinople was conquered by the Turks in 1453, relations between Russia and the Byzantine entered a new era. Shortly after the conquest of Constantinople, all control of navigation in the Black Sea entered into Ottoman administration and in Azov, Russia had to start paying dues for its merchant ships, a situation which Tsar Ivan III complained about.<sup>95</sup> On the other hand, at the instigation

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<sup>93</sup> Tsar Alexander I referred to Constantinople as “the key to his house”. Deluca, A. R. (1981). *Great Power Rivalry at the Turkish Straits: The Montreux Conference and Convention of 1936*. New York: Columbia University Press, p.2.

<sup>94</sup> C. Kumrow, p.20.

<sup>95</sup> Ibid, p.21.

of the Pope, Ivan III aimed to return to the Greek Orthodox and Latin Church. He had married Zoe in 1469, the niece of the last Byzantine Emperor in Constantinople. The marriage to Zoe, who changed her name to Sofia, led to the Tsar's claim to be the rightful successor of the Greek Emperors as the "third Rome". He defended the idea that the Tsar was the champion of the Orthodox Church, located in Constantinople, and its believers. He assumed the title of Tsar and added the twin-headed eagle of the Eastern Empire for his own symbol.<sup>96</sup> He defined his foreign policy program, "Russia's historic mission", as the conquest of Constantinople and the Straits. He wanted to make Constantinople the religious capital of his country and gain access to "the warm water".<sup>97</sup>

Russia did not feel strong enough to attempt an attack on the Ottomans until the time of Peter I, who was called Peter the Great. In the time of Peter the Great started powerful expansion efforts by Russia towards the Black Sea, a series of Turkish-Russian wars that would continue for many centuries also began. He attempted to obtain free access to the seas to open a further link to Europe and to facilitate sea trade, which was important for the economic development of his country. In this direction he aimed to reach either the Baltic Sea or the Black Sea. As in the north, where it was about opening up to the "cold" waters, he turned his attention to the Black Sea to reach the warm waters, just as Ivan III had tried. Additionally, the treaties with Austria and Poland of his predecessor Sophie led him towards the Black Sea.<sup>98</sup> After an initial failure due to inadequate armor, the next year, in 1696 he succeeded in capturing the Azov castle. Thus Russia reached the Sea of Azov and constructed shipbuilding yards there which gave them the possibility to strengthen the Russian navy over a short period of time.<sup>99</sup> After this victory, Russia attempted to find access in the Black Sea so that it could navigate its ships in the Black Sea, but it did not succeed at first. Nevertheless,

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<sup>96</sup> C. L. Rozakis & P. Stagos, p.17; C. Tukin, p.39

<sup>97</sup> E. Brüel, Vol. II (1947), p.268; F. C. Erkin, p.21. According to Rozakis & Stagos: "Designs for the Russian reoccupation not only Constantinople with the Straits but also of the Ottoman territory in Europe thereafter inspired all the Russian Tsars." See: C. L. Rozakis & P. Stagos, p.17. Zechlin describes the Russian politics so: "Wenn man von einer traditionellen Außenpolitik Russlands sprechen wolle, müsse Tradition in einem sehr weiten Sinn verstanden werden. Dennoch lässt sich wohl in der geographischen Konstante, mit der jede russische Regierung zu rechnen hatte, ein außenpolitisches Agens erkennen, das berechtigt, von mehr als nur einer vagen historischen Kontinuität des russischen Strebens nach den Meerengen zu sprechen." See: Zechlin, E. (1966). Die Türkische Meerengen ein Brennpunkt der Weltgeschichte. *Geschichte in Wissenschaft und Unterricht, Vol.17, Issue 1*, S. 1-31.

<sup>98</sup> W. Linn, p.11; C. Kumrow, p.22; C. Tukin, p.42; S. Birkner, p.26.

<sup>99</sup> C. Tukin, p. 42; C. Kumrow, p.22.

Peter I waited until he could get free navigation right for Russian ships in the Black Sea; insomuch that Russia did not attend the negotiations of the Karlowitz Treaty in 1699 although the Ottomans were defeated. Russia hoped that it would be acceptable for Russian fleets to navigate in the Black Sea if only bilateral negotiations between Russia and the Ottomans were held. In the same year, for negotiations, Peter I sent his ambassador to Istanbul on a Russian warship named “Kriepost”, which had 36 cannons; the ship reached the Sublime Porte and docked in Istanbul despite objections from the Ottomans. That was the first warship to cross the Black Sea and enter the port of Istanbul through the Bosphorus, on which for about three centuries no warships other than Turkish ones had sailed.<sup>100</sup> Thus, the question of the Turkish Straits gained international significance when for the first time Russia advanced towards the Black Sea and strived for unimpeded access to the Mediterranean. The above-mentioned Russian act showed the danger not only to the Ottomans trade but also that of the western powers, which a Russian fleet in the Black Sea might constitute.

The Kriepost stayed a few days in the Bosphorus and during negotiations the Russian ambassador demanded freedom of navigation for the young Russian fleet from the Sea of Azov in the Black Sea. The Ottomans refused to give up their principle and argued that the Black Sea was an inland Sea.<sup>101</sup> The Sublime Porte described the Black Sea as follows:

“... das Schwarze Meer sei eine reine, unbefleckte Jungfrau, und das Reich der Osmanen werde niemandem jemals gestatten, diese Meere zu befahren. Eher würde der Sultan jemanden in seine inneren Gemächer lassen, als von diesem Grundsatz abgehen. Wenn es fremden Schiffen freistehen würde, das Schwarze Meer zu befahren, dann würde das Osmanische Reich zugrunde gehen und von unterst zu oberst gekehrt werden.”<sup>102</sup>

England and the Netherlands supported the Ottomans’ trade interests in the territory of the Sublime Porte, especially in the Black Sea, also referring to the Black Sea as an inland sea of the Ottoman. This first attempt by Russia to achieve the right to sail on the

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<sup>100</sup> G. Herrmann, p.16; C. Tukin, p.46; E. Brüel, Vol. II (1947), p. 269; Esmer, A. S. (January 1947). The Straits: Crux of World Politics. *Foreign Affairs*, Vol.25, No.2, S. 290-302.

<sup>101</sup> C. Tukin, p.47; E. Brüel, Vol. II (1947), p.69; F. C. Erkin, p.22.

<sup>102</sup> G. Herrmann, p.16.

Black Sea remained unsuccessful.<sup>103</sup> Russia's demand was left in abeyance when peace between the Ottomans and Russia was concluded in 1700. The Peace of 1700 gave Russia the possession of Azov, freed it from the Tatars' tribute and imposed the obligation on Turks not to build a fortress at the Dniester.<sup>104</sup> The negotiations resulted in that Russia accepting the "ancient rule" of the Ottomans. In other words, the Black Sea was an inland sea of the Ottomans.<sup>105</sup> However, as observed above, due to the importance of the Black Sea in terms of their security interests, the Ottomans were striving to keep the Black Sea an inland Sea. For this reason they preferred to reach an agreement with Russia regarding the issue of the Sea of Azov. The Black Sea thus remained as an inland Sea of the Ottoman:

"... Russia had penetrated the Sea of Azov, the entrance to which, the Kertch Straits, was dominated on both sides by Sultan. This legal reason, which contemporary opinion on international law could not reject, was supported by arguments of purely political nature, which the secretary of the Port defined by pointing out that if foreign ships were allowed to navigate freely in the Black Sea it would mean the end of Turkey."<sup>106</sup>

The question of free navigation by Russian ships in the Black Sea was dropped this time. In spite of the fact that the freedom of navigation of Russian vessels was of vital necessity to the growing Russian state, western powers, especially England and the Netherlands, coveted the continuation of the closed status of the Black Sea and the subjection of Russian trade to all Turkish supervision and restriction. However, the Ottomans were still anxious about Russia and in 1711 an armed conflict erupted between the two states. The war was unpropitious for Russia and after the conflict the Treaty of Pruth of 1711 was signed. The Russians lost the right to entertain an ambassador in Istanbul<sup>107</sup> and Azov was given back to the Ottomans.<sup>108</sup> Thus, Russia again lost the only base of the Russian navy in the Black Sea region and the Russian's political Black Sea aspirations had failed for the time being.<sup>109</sup>

In the following years, Russian Black Sea politics gained momentum again in the

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<sup>103</sup> F. C. Erkin, p.22; Brüel, *International Straits*, Vol.II, p.69; C. Tugin, p.51.

<sup>104</sup> C. Kumrow, p.23,

<sup>105</sup> C. Tugin, p.51; C. Kumrow, p.23.

<sup>106</sup> Brüel, *International Straits*, Vol.II, p.270.

<sup>107</sup> C. Kumrow, p.24; S. Birkner, p.29.

<sup>108</sup> P. G. Wobst, p.6; W. Linn, p.11; C. Tugin, p.62.

<sup>109</sup> Brüel, *International Straits*, Vol.II, p.270.

time of Empress Anna. After a renewed war between the Ottoman Empire and Russia under the Empress Anna, the Ottomans succeeded in winning Azov back again at the Peace of Belgrade in 1739. The neutralization of Azov was accepted by Russia.<sup>110</sup> The Russians demanded the freedom of navigation for Russian ships on the Black Sea and in the Straits, but this was not included in the 1739 Treaty of Belgrade.

In spite of the fact that this case was a military defeat for the Ottomans, they won a diplomatic victory. They owed this diplomatic success to the jealousy of the European powers France, England and Austria-Hungary. They had vital interests in trade, resources and security in the Mediterranean and in the Black Sea via the Turkish Straits. In order to serve these interests, they established a balance in the region and in fact Russia, as a growing rival power, did not receive any “partner” power for itself in the Black Sea. At the Peace of Belgrade in 1739 France advised the Sultan to surrender Azov to Russia and to close the Kertch Straits because closing the Kertch Straits was going to make this surrender ineffective.<sup>111</sup> France had hoped, through its diplomatic assistance to Turkey, to obtain permission for free navigation in the Black Sea.<sup>112</sup> Nevertheless the Sultan succeeded in warding off this French demand with a clever maneuver of other western powers, too.<sup>113</sup>

In Article III and IX of the Treaty of Belgrade, it was stated that Russia should not be able, either on the Sea of Azov or on the Black Sea, to construct and possess a fleet and other vessels and in addition commerce by Russians should be done on vessels belonging to Turks.<sup>114</sup> Russia was not able to secure proper right of navigation on the Black Sea and the ancient rule, prohibition of navigation on the Black Sea for foreign ships, remained for a while.<sup>115</sup>

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<sup>110</sup> C. Kumrow, p.25.

<sup>111</sup> G. Herrmann, p.17; E. Brüel, Vol. II (1947), p.271, C. Kumrow, p.25.

<sup>112</sup> N. Kurt, p.9; G. Herrmann, p.17.

<sup>113</sup> N. Kurt, p.9.

<sup>114</sup> N. Kurt, p.9; C. Tugin, p.72; S. Birkner, p.29.

<sup>115</sup> W. Linn, p.11.

### **2.3 The Beginning of the Straits Problem and the Peace of Küçük Kaynarca, 1774**

The Treaty of Belgrade was a serious diplomatic defeat for the Russians. They regained Azov, but they were not allowed to navigate on the Black Sea. However, under the government of Catherine II, Russian policy gained a stronger character again, as the Empress was firmly determined to realize the Black Sea policy of Peter I.<sup>116</sup>

From the second half of the 18<sup>th</sup> century Russia mostly favored the dissolution of the multinational Ottoman Empire. In this context it increased its influence on the Balkan folks, especially on Serbs. Furthermore, Catharine II attempted to win the sympathies of her people as the head of the Orthodox Church and her foreign policy was determined by the pursuance of Russian interests over Poland and the Ottoman Empire.<sup>117</sup> With the progressive development of these rich territories of the Tsarist Empire, increasing trade in the Black Sea region was needed.

Russia was involved in the Polish Civil War which lasted from 1768 to 1772. In 1768 Russian troops followed Polish refugees to Ottoman territory.<sup>118</sup> Besides this violation of Turkish borders, Russia's encouraging the rebellion of Greece and Balkan folks led the Sultan to declare war on Russia in 1768 with the provocation of France.<sup>119</sup> Russia occupied the Crimea and penetrated into the Balkans; at the same time Catherine II sent Russian warships from the Baltic Sea through Gibraltar into the Mediterranean to reinforce an uprising by the Greeks against the Ottoman.<sup>120</sup> Russian warships attacked the Islands of Morea and Chios. The Ottoman fleet was sunk by the Russian fleet in the Mediterranean and the fleet sailed towards the Straits of Dardanelles.<sup>121</sup>

The appearance of the Russian Navy facing the Turkish Straits made a severe impact on western powers; thenceforwards they recognized a new rival in the Mediterranean. France saw the prospect of a further expedition to the Russian Empire, threatening its pre-eminence in the Levant and in the Orient and it abounded from its

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<sup>116</sup> E. Brüel, Vol. II (1947), p.271.

<sup>117</sup> C. Kumrow, p.26.

<sup>118</sup> C. Kumrow, p.26; S. Birkner, p.30

<sup>119</sup> C. Tugin, p.75; C. Kumrow, p.27.

<sup>120</sup> C. L. Rozakis & P. Stagos, p.20.

<sup>121</sup> N. Oral, p.222.

attempt to stir up Orthodox Christians in the Balkans against the Ottoman Empire.<sup>122</sup> Instead of attacking the Strait of Dardanelles, Russia declared a blockade on all Turkish Mediterranean Ports especially the Strait of Dardanelles. The case of the blockade caused conflict among powers when the neutral trade was endangered in the Mediterranean. This circumstance led to complaints in the Petersburg Cabinet. Although the demand for effective blockade was not universally acknowledged at that time, the Russian government promised to avoid a repetition of the unfortunate incidents.<sup>123</sup> In the following years of the blockade, Russia penetrated so deeply into the Balkans that it was only a question of time when Istanbul would fall into their hands.<sup>124</sup> Although the peace negotiations had failed several times due to the Black Sea and the Straits question, the war ended in 1774 with the peace of Küçük Kaynarca (Kutchuk Kainardji), a village on the southern bank of the Danube River.

The Küçük Kaynarca Treaty would have lasting consequences for both the Ottoman Empire and the Black Sea. The Ottoman recognized Russia as a coastal state of the Black Sea and Russia gained trade privileges in the Ottoman Territory on an equal footing with other western powers. In addition it obtained for its commercial ships both freedom of navigation in the Black Sea and the right of passage through the Turkish Straits<sup>125</sup> as defined by Article XI the key points of which are quoted as follows:

“... there shall be free and unimpeded navigation for the merchant ships belonging to the two contracting powers, in all the seas which wash their shores; The Sublime Porte grants the Russian merchant vessels employed by the other powers for commerce and use in the ports free passage from the Black Sea into the White Sea [the Mediterranean] and reciprocally from the White Sea into the Black Sea, also power of entering all the ports and harbors situated in the seas or in the channels which join these seas. The Sublime Porte also allows Russian subjects to trade in its states by land and as well as by water and upon the Danube in their ships in conformity with this article, with the same privileges and advantages enjoyed by the nations, whom the Sublime Porte favours most in trade, such as the French and English; and the capitulations of those two nations and others shall, just as if they were here inserted word for word, serve as a rule, under all circumstances and in every place, for whatever concerns commerce as well as Russian merchants who, upon paying the

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<sup>122</sup> S. Birkner, p.30.

<sup>123</sup> C. Kumrow, p.27.

<sup>124</sup> Brüel, *International Straits*, Vol.II, p.271.

<sup>125</sup> Y. Inan (1995), p. 8; C. Tugin, p.76; E. Brüel, Vol. II (1947), p.271.



same duties may import and export all kinds of goods and disembark their merchandize at every port and harbor upon the Black as upon the other Seas, and Constantinople ”<sup>126</sup>

Thus after about three centuries, for the first time the Ottomans had to recognize a foreign merchant vessel free and unhindered navigation rights in the Black Sea and for the first time allowed the passage of foreign commercial ships by an international treaty through the Strait of Bosphorus.<sup>127</sup> It is clear that here Russian ships were ensured free shipping from the Black Sea to the Aegean Sea. In other words, with this treaty “the Ottoman Rule” would start to become void, because the legal background of the Ottoman’s monopoly of the Bosphorus and the Black Sea had changed after Russia had become a coastal state of the Black Sea. The Black Sea was not an inland sea any longer and closing the Straits for foreign commercial ships had already lost its legal foundation.<sup>128</sup> The Treaty brought not only the end of the six-year war between Russia and the Ottoman, but it also proved the end of Ottoman hegemony continuing since 1475 in the Black Sea and thereby the end of the status of the Black Sea as a *mare clausum*.<sup>129</sup> Herewith the Treaty gave the Black Sea an open or high sea status; henceforth the Turkish Straits became a natural waterway, which linked two high seas.<sup>130</sup>

The treaty was an important diplomatic success for Russia; it had not yet reached the height of its position against the Ottoman. Russia obtained extensive territories both to the west and east of the Ottoman. In the east it reached the Caucasus Mountains and in the west secured a protectorate over the Christian population on the Danube.<sup>131</sup> According to Article III of the Treaty, Turkey was forced to recognize the independence of the Crimea,<sup>132</sup> a state which, however, should only last until annexation by Russia in

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<sup>126</sup> Hurewitz, J. C. (1958). *Diplomacy in the Near and Middle East: A Documentary Record 1535-1914, Vol I*. D. Van Nostrand Company LTD.: Princeton, p.56.

<sup>127</sup> Y. Inan (1995), p. 8.

<sup>128</sup> Brüel, *International Straits*, Vol.II, p.271; C. Kumrow, p.30.

<sup>129</sup> N. Oral, p.223.

<sup>130</sup> Gürkan, I. (July 1995). The Turkish Straits Regime in Historical Perspective (1453-1936). *Turkish Straits New Problems New Solutions*, pp. 165-225.

<sup>131</sup> C. L. Rozakis & P. Stagos, p.20.

<sup>132</sup> Art. III. “All the Tartar peoples ... shall, without any exception, be acknowledged by two Empires as free nations, and entirely independent of every foreign power, governed by their own Sovereign, of the race of Ghengis Khan, elected and raised to the throne by all the Tartar peoples; which Sovereign shall govern them according to their ancient laws and usages, being responsible to no foreign Power whatsoever; for which reason, neither the court of Russia nor the Ottoman Porte shall interfere, under

1783.<sup>133</sup> Russia succeeded in getting the fortresses of Yeni Kale and Kertch along the coast of the Crimean peninsula giving Russia a permanent foothold on the shore of the Black Sea. Thus, Russia obtained the access to the Black Sea and established herself as a major coastal state of the Black Sea and as a result of such development; the Black Sea would become both a subject of international law and also a long-lasting question of European politics in terms of its legal status.<sup>134</sup> Furthermore, the Treaty would also serve as a model for the next treaties regarding the Black Sea because the above-mentioned situation continued under nearly similar conditions. It can be said that this peace treaty form was a natural conclusion to the account of the Turkish Straits' early political history.<sup>135</sup>

In the history of the Turkish Straits it has been accepted that the date of the Treaty of Küçük Kaynarca marks the beginning of the “question of the Turkish Straits”. Russia had gained by the Treaty free navigation for its merchant vessels through both the Strait of Dardanelles and also the Strait of Bosphorus. From then on the other European powers demanded the same right for their commercial ships to pass through the Bosphorus in the Black Sea. However, there was no regulation about the warships. The Ottomans sought security opportunities for herself against the Russian fleet, as a result of this it closed the Strait of Dardanelles for all foreign warships under the ancient

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any pretext whatever, with the election of the said Khan, or in the domestic, political, civil, and internal affairs of the same; but, on the contrary, they shall acknowledge and consider the said Tartar nation, in its political and civil state, upon the same footing as the other Powers who are governed by themselves, and are dependent upon God alone. As to the ceremonies of religion, as the Tartars profess the same faith as the Mahometans, they shall regulate themselves, with respect to his Highness, in his capacity of Grand Galiph of Mahometanism, according to the precepts prescribed to them by their law, without compromising, nevertheless, the stability of nation, with the exception of the fortresses of Kertach and Jenicale (with their district and ports, which Russia retains for herself), all the towns, fortresses, dwellings, territories, and ports which it has conquered in Crimea and in Kuban; ... the Sublime Ottoman Porte engages, in like manner, on its part, to abandon all right whatsoever which it might have over the fortresses, towns, habitations, etc., in Crimea, in Kuban, and in the island of Taman; to maintain in those places no garrison nor other armed forces, ceding these States to the Tartars in the same manner as the Court of Russia has done, that is to say, in full power and in absolute and independent sovereignty. In like manner the Sublime Porte engages, in the most solemn manner, and promises neither to introduce nor maintain in future, any garrison or armed forces whatsoever in the above mentioned towns, fortresses, lands and habitations, nor, in the interior of those States, any intendant or military agent, of whatsoever denomination, but to leave all the Tartars the same perfect liberty and independence in which the empire of Russia leaves them.” See: J. C. Hurewitz (1958), p.55.

<sup>133</sup> S. Birkner, p.30.

<sup>134</sup> A. S. Esmer, p.290; N. Oral, p.224.

<sup>135</sup> Brüel, International Straits, Vol.II, p.270-271.

rule of the Ottoman Empire as always and it extended this regulation to the Bosphorus.<sup>136</sup> The ancient rule continued to be current for all foreign warships, which remained essentially in force until 1918.<sup>137</sup>

The Treaty of Küçük Kaynarca represents the end of an epoch in the Black Sea. On the one hand Russia succeeded in reaching its centuries-long dream of the warm water; on the other hand the exclusive position of the Ottomans for about three centuries came to the end. Nevertheless the Sublime Porte succeeded in retaining absolute control over the Turkish Straits until 1841, allowing special passage regime rights for merchant vessels by bilateral treaties, while maintaining the ancient rule against the passage of any foreign warship through the Turkish Straits.<sup>138</sup> Russian warships, as well as any other foreign warships, were definitely prohibited through the Turkish Straits from and into the Black Sea. Nonetheless, Russia gained access from Azov to the Black Sea where they could construct a naval fleet.

With the Treaty of Küçük Kaynarca, the Russian empire was able to attain its interests on the maritime trade with products from the Russian regions in the north of the Black Sea via the Turkish Straits towards the Mediterranean and the opposite direction. However, the Straits and the Black Sea also gained more importance from a security policy perspective for Russia. In the time of Catharine II, in order to make Russia a great power, Russia's large part of the economic investment was made on the north coast of the Black Sea. The economic development led Russia to establish a new security perspective in the Black Sea. The protection of this region from attacks had important significance for Russia because its main interest was to ensure that no warships could enter the Black Sea through the Bosphorus.<sup>139</sup> Russia did not neglect its target on the Turkish Straits due to the different interests of the other European powers with regard to the Straits. Therefore for many centuries, the possibilities, to possess Constantinople and gain the control of the Straits or to exercise control over the Straits

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<sup>136</sup> C. Kumrow, p.30. Because the Black sea was an inland sea, it was enough to close the Dardanelles to warships of all nations. But now the Black Sea was not an inland sea any more. Therefore, the Ottoman declared the Bosphorus was closed to warships of all nations.

<sup>137</sup> G. Herrmann, p.18; W. Linn, p.12.

<sup>138</sup> G. Aybay & N. Oral (1998), p.86; F. A. Váli, p.20.

<sup>139</sup> F. A. Váli, p.20.

at least together with the Ottoman Empire were always considered by Russia.<sup>140</sup>

Due to the above-mentioned security reason and the historic mission, Catherine II allied herself with Austria and then marched her troops into Crimea in 1783, whose independence had been secured in the Treaty of Küçük Kaynarca in 1774. Russia declared the annexation of the Crimea and then Sevastopol (Holy City), which the Ottomans had to recognize by a treaty in 1784. Catherine II began with the establishment of a military base at Sevastopol and the Black Sea fleet was again built quickly on a much larger scale than what Peter the Great had built. The real aim was the conquest of the Ottoman capital and the fulfillment of the so-called mission. According to this plan, the Ottomans were to be ousted from Europe, and a Greek empire, the capital city of which was Constantinople, under Russian control should be established.<sup>141</sup> An extensive colonization of Russia was begun and in this respect many shipbuilding yards were constructed, fortresses were fortified and the Black Sea fleet was soon launched. The western powers realized Russia's domination over the Black Sea and they feared that the Black Sea might be taken under control by Russia and that it could exploit more and colonize the Black Sea shore. What was more difficult than the above-mentioned situation was Russian pressure on the Straits because Russian dominance would be irresistible in the Mediterranean and would damage the interests of other powers.<sup>142</sup>

Great Britain had no desire for a conquest in the Black Sea or Mediterranean, but London was against sovereignty of any other powers in the Mediterranean as well. It was worrying for its sea trade route to India, which was under its control. For this reason Britain positioned itself openly on the side of the Ottomans on the grounds of protection and integrity. Yet this integrity was considered as an attempt to secure its Far East trade route in the Mediterranean. On the other hand, the other western power, France, succeeded in securing from the Sultan some privileges that served very large French economic interests in the Middle East, especially in Egypt and Syria. These privileges led France to continue a friendly policy with the Sultan in 16<sup>th</sup> and 17<sup>th</sup>

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<sup>140</sup> After World War II this Russian request was forwarded by a note to the Turkey. It will be extensively examined in Chapter 4.

<sup>141</sup> C. L. Rozakis & P. Stagos, p.21; A. S. Esmer, p.291; Brüel, International Straits, Vol.II, p.273; S. Birkner, p.34,

<sup>142</sup> Brüel, International Straits, Vol.II, p.274.

centuries.<sup>143</sup> Therefore, France was also positioned herself on the side of the Ottoman.

The amplification and expansion of Russia along the north shore of the Black Sea threatened the Ottomans and the western powers so much that with the incitation of western powers and hoping to regain Crimea back the Ottomans declared war against Russia in 1787. However, due to the French Revolution other problems appeared for the western powers. Austria was terrified by possible social and political upheavals like in France. Therefore, Austria ended the alliance with Russia and signed a separate peace agreement with the Ottomans in 1791. On the other hand, the war ended with the treaty of Jassy (Yaş) in 1792. The treaty confirmed the provisions of the treaty of Küçük Kaynarca of 1774, and the annexation of the Crimea by Russia was again recognized by the Ottoman. The treaty confirmed again free navigation rights of Russian merchant ships in the Black Sea and the Turkish Straits. At the same time, the Sublime Porte retained the right to regulate the nature and the size of the vessels that could pass through the Straits. In addition, getting “firman”, which was a special permission of the Sultan, would be a precondition before a Russian merchant ship passed through the Straits. In other words, all Russian merchant vessels passing through the Straits could be checked by the Sublime Porte.<sup>144</sup> With this treaty Russia had firmly consolidated its position in the Black Sea. The Black Sea, which had been an “inland sea” of the Ottomans for a long time, was turning into an “international sea”.<sup>145</sup> However, the Ottomans preferred to establish an equal state policy in the Black Sea instead of giving a high position to Russia. As a result of this policy the Sublime Porte accorded limited freedom of navigation through the Turkish straits into the Black Sea, which had been granted to Russia by the treaty of Küçük Kaynarca, to western powers’ merchant vessels. This privilege was also accorded to Austria in 1784, England in 1799, France in 1802, Prussia in 1806, Norway, Sweden, Spain in 1827, the US 1830, Tuscany 1833 and Belgium in 1838.<sup>146</sup> Free navigation through the Turkish Straits supplied great practical importance for merchant vessels, yet after the Treaty of Jassy, the prohibition against foreign war vessels in the Turkish straits continued unchanged.

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<sup>143</sup> C. L. Rozakis & P. Stagos, p.18-19.

<sup>144</sup> N. Oral, p.226.

<sup>145</sup> C. L. Rozakis & P. Stagos, p.2

<sup>146</sup> Hurewitz, J. C. (1962, July). Russia and the Turkish Straits: A Revaluation of the Origins of the Problem. *World Politics, Vol.14. No.4*, pp. 605-632, see footnote in p.607; F. C. Erkin, p.23; E. Brüel, Vol. II (1947), p.274.

## 2.4 Passage Rights of Warships during the Napoleonic Period

Shortly after the French Revolution a new problem erupted in the Mediterranean. Napoleon's France occupied the Ionian Islands and the coast of Albania taking an influential position in the eastern Mediterranean at the end of the 18<sup>th</sup> century. This change and instability in the Mediterranean worried Russia regarding its security and historic mission. The Russian perspective was that if there were the possibility of a possible attack by Napoleon on the Ottoman Empire, which had lost its old power, the Ottomans might not protect the Straits and Russia might face a dangerous situation. In addition, if the Mediterranean were to be captured by a strong state, Russia could not have accomplished its historic mission.<sup>147</sup>

Although Russia's commercial vessels had gained free passage through the Turkish Straits, the Straits were already closed for all non-Turkish warships. This principle was considered particularly offensive by Russia, fearing that its fleet might be confined in the Black Sea. On the other hand, as long as Russia had no interest in the warm waters, this principle was a protection element for Russia against its enemies. However, Russia with its historic mission mostly preferred a weak neighbor on its southern frontier instead of a strong one.<sup>148</sup>

The war between France and Great Britain continued in 1798 with the French sending a fleet to the eastern Mediterranean. Malta Island, which was being managed under the orders of Tsar Paul, some islands in the Ionian Sea and on southern shore of Albania were occupied by Napoleon's troops. This occupation gave Russia a rightful justification to join the Napoleon's enemies. In this process Russia-Ottoman relations entered a new phase and a political anomaly of an alliance began between Turkey and Russia against the common enemy France. Since, France occupied the places in the eastern Mediterranean and Aegean Sea held by the Ottoman, which were at the same time Russian interests as well. In addition, one of the important reasons of the Russo-Ottoman alliance was Russia's security concern regarding the Turkish Straits.<sup>149</sup>

Napoleon's next aim was Egypt, a province of the Ottomans – according to

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<sup>147</sup> C. Tugin, p.96-97.

<sup>148</sup> Brüel, *International Straits*, Vol.II, p.277; C. Kumrow, p.31.

<sup>149</sup> W. Linn, p.13; N. Kurt, p.10; C. Tugin, p.97.

rumor – after Napoleon’s invasion of Egypt he would attack India. Great Britain had lost its colonies in North America after their independence in 1776; therefore London was searching for a new colony in the Far East, especially in India. Napoleon’s plan provoked Great Britain. After the occupation of Egypt, the Ottomans initially began negotiations to sign an alliance with Russia and Great Britain and with their support the Sublime Porte declared war on France in 1798 that had been its traditional ally for about three centuries. In early September of 1798, Russians and Ottomans undertook a joint maritime military operation against the French on the Ionian Islands in the Mediterranean for which the High Porte allowed for the first time the Russian Black Sea Fleet to pass through the Turkish Straits. A main point of Russian-Ottoman alliance was that the alliance agreement was signed about one month later, after the passage of Russian warships through the Straits, in December 1798.<sup>150</sup> The Tsar would create a precedent for the passage right of warships through the Turkish Straits by sending his fleet long before the alliance agreement was formally signed such as in the famous “Kriepost” case.<sup>151</sup> The Russian Black Sea fleet docked in the Bosphorus without permission, taking advantage of the difficult situation of the Sublime Porte. The gravity of the situation forced the Ottomans to give passage permission to the Russian navy with the obligation to take orders from the Ottomans until the signing of an alliance. With the Russians’ acceptance of this condition, both fleets sailed into the Aegean Sea to start an operation against France.<sup>152</sup> This permission was granted only to mount a combined Russia-Ottoman fleet’s offensive against Napoleon’s navy in the Mediterranean and in the Ionian Islands.<sup>153</sup> More than one month after the passage of the Russian fleets through the Straits, an alliance agreement was signed between the Ottomans and Russia. In the early part of 1799, England, which saw its routes to India endangered by the French, advanced into the eastern Mediterranean, and joined the alliance. After signing the alliance agreement by the way Great Britain obtained free passage right from the Sublime Porte for its merchant vessels into the Black Sea in

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<sup>150</sup> C. Tugin, p.118-119, According to Hurewitz; “... the Russian Black Sea navy were in fact permitted to sail through the Bosphorus early in September 1798, nearly four months before the formal conclusion of the first Russo-Ottoman alliance” See: J. C. Hurewitz (1962), p.621. According to Rozakis&Stagos; „In December 1798 a Russo-Ottoman alliance was signed, with its goal the expulsion of the French from the eastern Mediterranean...[and]...The Russian fleet passed through the Straits in 1799, united with the Ottoman fleet, sailed to the Ionian Sea...” See Rozakis&Stagos, p.22.

<sup>150</sup> Rozakis&Stagos, p.22; Brüel, International Straits, Vol.II, p.277.

<sup>151</sup> Brüel, International Straits, Vol.II, p.277.

<sup>152</sup> C. Tugin, p.114-115.

<sup>153</sup> J. C. Hurewitz (1962), p.621; C. Tugin, p.114.

1799.<sup>154</sup>

Thus, the Ottomans and Russia contracted the first defensive alliance, which had entire separate and secret articles, for a period of eight years during the war against France.<sup>155</sup> In the secret Article I of the agreement, the High Porte pledged to allow passage of Russian warships through the Straits to fight the French on the Ionian Islands. The Treaty also provided in Article II that the Russian navy would be available against the common enemy France during this war. The Ottomans promised for their part that these warships might return to the Black Sea without any hostile act and the Russian fleet could be stationed in the Mediterranean only for the duration of the war, Russian warships and other armed vessels were to have free entry and exit through the Straits to procure munitions or reinforcements. In the secret Article III it was highlighted that the Russian fleet could not establish the right as a pretext for claiming future free passage of warships through the Turkish Straits and in Article IV it was considered to close the Black Sea to all armed vessels and warships of any Power whatsoever.<sup>156</sup> Russia's warships were to be subjected to a single formality and identifying the Russian warships was to be agreed upon some particular procedure.<sup>157</sup> Thus, for the first time since 1453, the Ottomans allowed the passage of a foreign

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<sup>154</sup> F. C. Erkin, p.23. According to Tukin; England gained free passage right for its merchant vessels into the Black Sea in 1799 but it was not implemented until France gained this privilege in 1802. See; C. Tukin, p.120-121

<sup>155</sup> Y. Inan (1995), p.8; P. G. Wobst, p.8; C. L. Rozakis & P. Stagos, p.22; C. Tukin, p.120. The same agreement period was specified in the defensive alliance of 1799 between Great Britain and the Ottoman too: "Article XII: ... it was agreed to fix the Term of Eight Years for this Definitive Treaty of Definitive alliance..." See: J. C. Hurewitz (1958), p.67.

<sup>156</sup> J. C. Hurewitz (1962), p.621; C. Tukin, p.112. Hurewitz notes additionally that "... in separate and secret articles Russia undertook to provide the Ottoman government with a fleet of twelve ships of the line and, if required, an army of 75,000 to 80,000 men. The Sublime Porte for its part consented "for this time only" to the free passage of Russian war vessels through the straits..." See: J. C. Hurewitz (1958), p.65; According to Wobst: "Der Vertrag sollte den gegenseitigen Schutz der territorialen Integrität zum Gegenstand haben, und die Pforte gestattete deshalb, um das Vertrag Ziel zu erreichen, für dieses eine Mal die Durchfahrt der russischen Flotte." See: P. G. Wobst, p.8.

<sup>157</sup> J. C. Hurewitz (1962), p.622; C. Tukin, p.118. In answer to the argumentation of Russian archivist S. Goriainov, who notes (in his book `Le Bosphore et les Dardanelles, Paris 1910) that under the terms of the 1798 the Ottoman granted Russian warships free navigational rights in both the Black Sea and the Mediterranean. However, Hurewitz expressed that "...This was not unconditional free passage, as Goriainov and Dranov sought to convey. Rather was it passage limited to the immediate emergency and conditioned by needs of war, by presence of the Russian Black Sea fleet in the Mediterranean on allied duty, by the demands for replenishing its supplies and ranks, and above all by the voluntary cooperation of the Sublime Porte, which neither surrendered any sovereignty over the Straits nor shared with others its defense. In brief, Russia might enjoy naval transit not as of right but only on Ottoman sufferance." See: J. C. Hurewitz (1962), p.622.



warship through the Turkish Straits and it was the first exception to the principle of the closing of the Straits for foreign warships. With this alliance agreement Russia finally succeeded in passing its warships through the Turkish Straits, which had been its dream for centuries.

The Ottoman, of course, quite reluctantly made this decisive concession, and sought to eliminate it as soon as the French danger no longer existed in the Orient.<sup>158</sup> In the following years Russian warships passed through the Turkish Straits and the Ottomans and Russian fleets in the Mediterranean expelled the French from the Ionian Islands. The Ionian Islands belonging to the Ottomans were managed as a Protectorate Island under Russo-Ottoman alliance.<sup>159</sup> As a result of the negotiations after securing the Ionian Islands, Russia and the Ottomans agreed in 1800 that to stabilize of the Ionian Sea, Russia might keep 3,000 soldiers for 3 months in the Mediterranean and the Ottomans agreed to provide their rations. Thus, as a pretext Russian warships were passing through the Straits for carrying troops from the Black Sea to the Mediterranean. However, Russia did not withdraw its troops from the Mediterranean after three months; moreover it tried to keep its troops in the Mediterranean as long as possible.<sup>160</sup>

France was pushed back as a whole from the eastern Mediterranean giving Great Britain an advantage to be able to maintain its preeminence in the Mediterranean. The war between France and Great Britain was ended in 1802 with the signing of the treaty of Amiens.<sup>161</sup> In the same year Ottoman Empire also concluded a peace treaty with France and with this treaty France also regained the free passage right for its merchant vessels.<sup>162</sup> Egypt was returned to the Ottoman. England kept Malta and became dominant power in the Mediterranean again. Although this proximity between the Ottomans and France and the balance in the Mediterranean unsettled Russia, and it did not accept Napoleon's offer regarding the partition of the Ottoman. Tsar Alexander I believed that the integrity of the Ottomans as a weak neighbor might serve better

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<sup>158</sup> G. Herrmann, p.18.

<sup>159</sup> P. G. Wobst, p.9; W. Linn, p.15; C. Tukin, p.123; Váli notes that „The Russian force expelled the French from the Ionian Islands (formerly a Venetian possession) and only withdrew in 1801. But within two years these islands were occupied by the Russians and at one time 11,000 Russian soldiers were stationed there.“ See: F. A. Váli, p.21.

<sup>160</sup> C. Tukin, p.123-124.

<sup>161</sup> C. L. Rozakis & P. Stagos, p.23

<sup>162</sup> C. Tukin, p.130; S. Birkner, p.36.

Russian historic mission.<sup>163</sup> Additionally, negotiations between Russia and the Sublime Porte were opened with the Alliance Agreement of 1798 while Russian troops were in the Mediterranean. Therewith Tsar hoped that it should be agreed by a secret clause to close the Turkish Straits for all warships except Russia's. Thus, the Russian fleet could so often pass through the Straits to the common protectorate over the Ionian Islands and it could exist as a power in the Mediterranean for its historic mission.<sup>164</sup> As a result, a new Treaty of Alliance was concluded between the Ottomans and Russia in 1805, a treaty which had separate and secret articles. It repeated first of all the provision of the alliance agreement of 1798. In the secret Article I of the Treaty of 1805 it was stated that the renewed alliance aimed to contain France and restore the balance of power in Europe. Furthermore, it declared that the Ottomans should for the duration of the war facilitate the passage of warships through the Straits and Russia might be obliged to send its military transports into the Mediterranean. Article IV stated that the Ottomans should facilitate the passage through the Straits of Russian warships for the entire duration of the presence of Russian army on the Ionian Islands.<sup>165</sup> The secret Article VII was the subject of an important historical controversy on account of different translations. According to the French translation of the Turkish text of the secret Article VII by Gabriel Noradounghian, the legal counselor at the Foreign Ministry of the Ottoman, it provided that:

“The two contracting parties, having agreed on the closure of the Black Sea, declared that any attempt by any power whatsoever to violate it shall be considered a hostile act against them. Consequently, they pledge to oppose with all their naval forces the entrance into that sea of every vessel of war and every ship carrying military stores”<sup>166</sup>

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<sup>163</sup> E. Zechlin, p.3; Brüel, *International Straits*, Vol.II, p.277.

<sup>164</sup> P. G. Wobst, p.9; W. Linn, p.13.

<sup>165</sup> J. C. Hurewitz (1962), p.627.

<sup>166</sup> J. C. Hurewitz (1958), p.76. (Translated from Gabriel Noradounghian version). According to Oral “(...) The Perry's Treaty series has reproduced in French what would appear to be the Noradounghian version.” See: N. Oral, p.229.

Translation of secret Article VII from original text has been made by some authors differently. One of the translation from Russian version of Sergey Goriainov provided that; “The two high contracting parties agree to consider the Black Sea as closed and not to permit the appearance therein of any flag or armed vessel of any power whatsoever, and if any should attempt to appear there in arms, the two high contracting parties undertake to regard such an attempt as a *casus foederis* and to oppose it with all their naval forces, as being the only means of assuring their mutual tranquility; it is understood that the free passage through the canal of Constantinople will continue in effect for the vessels of war and military transports of His Imperial Majesty of All the Russians, to which in each instance the Sublime

The Ottoman Empire and Russia agreed in the secret Article VII to close the Black Sea as a common property and they refused the passage of all warships of other powers through the Straits into the Black Sea. Moreover, the article declared that any violation against the territory of both signatories would be considered to be a hostile act, namely a *casus belli*.<sup>167</sup>

Since the Ottomans definitely needed help in 1798, it was forced to give limited permission for Russian war vessels to pass through the Straits for the duration of the war. However, this time, the closing of the Straits for all foreign warships was added in Article VII of the Treaty of Alliance of 1805 by the request of Russia. Although the validity period of the Treaty of 1805 was unclear, it ensured -in favor of Russia- that the Black Sea was secured such a protected port for Russia against European powers, especially France and England. It also gave the passage right for Russian warships through the Turkish Straits. In other words, this meant that Russia reached at last its desire on the warm water, which had been aimed by Tsars over centuries.

### **3. The Mutual Agreements Period on the Turkish Straits**

The Treaty of 1805 was signed with Russia but the Ottomans could not escape from its misgivings that Russia might often dispatch its warships from the Black Sea to the Mediterranean. Shortly after the Russia-Ottoman Treaty of 1805, it was concluded that France achieved remarkable victories over Austria and Russia at Austerlitz.

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Porte will furnish every assistance and grant every facility that may be required." See: C. L. Rozakis & P. Stagos, p.168.

But Hurewitz accused the well-known Russian archivist Serge Goriainov about his Russian version of secret Article VII. Hurewitz says: "(...) Russia was far from confident in formulating its Straits policies or happy with the results, as it took in 1798-1806 its first tentative steps to procure mastery over the waterway (...) The classical Tsarist Russian work on the subject was Sergei Goriainov, at the time director of a central imperial archives in St. Petersburg. *Bosfor / Dardanely*, originally published in the Russian capital in 1907, appeared in French translation (*Le Bosphore et les Dardanelles*) three years later. The book was based almost wholly on records-largely unpublished- in the foreign Ministry at St. Petersburg. The Author referred nowhere to available literature on the Straits question. Palpably intended as an official statement, the work was used as such. And although it was nothing but a political tract disguised as scholarship, for lack of alternative Russian documentation it was also used by Western and Turkish as well as Russians scholars. Goriainov's thesis, derived from his manipulation of the facts, has continued since World War II to enjoy the USSR's blessing (...)" See: J. C. Hurewitz (1962), p.609-610.

<sup>167</sup> N. Oral, p.228.

Napoleon sent his General Sebastiani to Istanbul to conclude an alliance treaty with the Ottoman. Therewith France's attention was, firstly, to prevent the passage of Russian warships through the Straits, so that it could no longer interfere in French activities in the Middle East. On the other hand, in 1806 Russia attacked the Ottoman's territory around the Danube and in response to this the Sublime Porte declared war against its previous ally Russia and announced that it had closed the Straits for all war vessels of other powers.<sup>168</sup> This meant that the Ottomans denounced the "stillborn" Treaty of 1805 which had been signed less than one year before as a continuation of the Alliance Agreement of 1798.<sup>169</sup>

England strove to prevent the Russia-Ottoman war with violence since it needed a strong Russia as an ally against Napoleon. To bring the war to a speedy conclusion, an English warship tried to pass through the Dardanelles in 1807 and appeared facing Istanbul, but it had to return soon, as the replenishment vessels were hindered by the Turkish defense.<sup>170</sup> In the following years the fickle allegiances of powers resulted in a surprising change of partners on world politics.

The peace of Tilsit between Napoleon and Alexander I brought a new configuration of powers. Napoleon approached Russia to break up the Russian-English alliance in order to carry out his Egyptian-Indian plans with Russian help. Of course, Napoleon was now betraying his partner. He discussed the division of the Ottomans known as "the sick man of Europe", but the plan failed on account of the matter of division of the Turkish Straits and Istanbul.<sup>171</sup> The High Porte was greatly troubled by these developments, and it turned to England, which was then opposed by the Franco-Russian alliance. England recognized this partnership because it wanted to prevent the Russian Black Sea Fleet, which was jeopardizing British interests, from entering the Mediterranean Sea. As a result, the Ottomans and England signed an alliance agreement in 1809 named Treaty of Kale-i Sultaniye (Çanakkale). Article XI of the Treaty was about the closing of the Straits:

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<sup>168</sup> N. Kurt, p.11; G. Herrmann, p.19;

<sup>169</sup> Russian scholars Count Sergei Gagarin and Baron B.E. Nol'de criticized the Goriainov work and they described the Treaty of 1805; „stillborn ... the result of a casual combination of the period of coalitions against the great Napoleon, entered into, to top it all, for only nine years. " See: J. C. Hurewitz (1958), p.12.

<sup>170</sup> W. Linn, p.13; G. Herrmann, p.19; N. Kurt, p.11.

<sup>171</sup> C. Kumrow, p.34; P. G. Wobst, p.9; F. A. Váli, p.19-21.

“As ships of war have at all times been prohibited from the entering the canal of Constantinople, viz. in the straits of the Dardanelles and of the Black Sea, and as this regulation of the Ottoman Empire is in future to be observed by every Power in the time of peace, the Court of Great Britain promises on its part to conform to this principle...”<sup>172</sup>

The closing of the Straits for all foreign warships was defined in the Treaty as “the ancient regulation of the Ottoman Empire”. England recognized with the treaty Ottoman’s right in time of peace to close the Turkish Straits to foreign warships and it promised to respect this rule.

With the Treaty of 1809, the rule of closing of the Straits for all foreign warships, which hitherto had been a principle of national law, became then the subject of a treaty under international law.<sup>173</sup> Until then the Ottomans could decide alone to close or to open the Straits for foreign warships in time of peace or war, but from then on it had to close the Straits in time of peace. In 1809 the Sultan, for the first time, lost his “free decision right” to regulate the Turkish Straits. In other words, the Sublime Porte was becoming accountable to England in terms of the closing of the Straits; it had to permanently share its sovereignty on the Straits. On the basis of the same Article of the Treaty, "against every power, whatever it may be," the Ottomans had to undertake the obligation to close the Straits for all warships, and thus the riparian state of the Black Sea, namely Russia was deprived of its previous exceptional position. Thus, it was recognized that the Great Britain endeavored to close down the Dardanelles by stamping of a European power in order to put a stop to Russian ambitions in the Mediterranean. The Bosphorus was closed to the Russian naval forces, thus making the entry into the Mediterranean impossible. The Turkish Straits were mostly a question between the Ottomans and Russia, but with this treaty the Straits became a problem of rivalry between Russia and England because from then Russia had to persuade England to reach its historic mission.<sup>174</sup>

However, in addition, it is also understood that because the Treaty emphasized that the Ottoman Empire was bound only in peace to close the Straits, also in time of

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<sup>172</sup> J. C. Hurewitz (1958), p.83.

<sup>173</sup> Y. Inan (1995), p.9.

<sup>174</sup> C. Tugin, p.157; N. Kurt, p.11-12.

war conditions were unclear in the Treaty. How could it be determined whether the Ottomans was at war or not? Furthermore, in the Treaty there was no stipulation in the case of the Sublime Porte entering a war or imminence of a war if it opened the Straits for its partner state except Great Britain; what would be the Great Britain's position as an ally? Since the Article expressed that Great Britain, as an ally of the Sublime Porte, promised to confirm to this principle only in time of peace.

### **The Peace of Hünkâr Iskelesi, 1833**

Despite the reconciliation with Tilsit Agreement, relations between Russia and France slowly crumbled due to Napoleon's and Alexander I's different interests on world politics. The Russia-Ottoman war, which began in 1809, was ended with the Agreement of Bucharest in 1812. With the treaty Russia gained a new area in the north Black Sea region but the Straits remained closed for Russian warships in contrast to Russian expectations.<sup>175</sup> However, Russia did not abandon its efforts to secure passage right to its warships through the Straits.

In 1821 the Greek liberation struggle and revolts of Orthodox Christians, incited and assisted by Russia, began in the Ottoman territory.<sup>176</sup> The Sublime Porte responded to these by refusing to allow Greek ships to pass through the Straits. As a result of this implementation, foreign cargo loads of ships were hindered from passing through the Straits and, of course, Russian merchants from their ports in the Black Sea were damaged especially.<sup>177</sup> Russia attempted to organize an action plan with the European powers in favor of the Greeks, because in a one-sided Russian approach was seen as a threat to the stability in Europe which had been established by the Treaty of General Alliance in 1815 after Napoleonic Period. As a continuation of the Bucharest Agreement and with the support of Austria and England, the Akerman Agreement was signed between Russia and the Sublime Porte in 1826. The Ottomans undertook to accept the passage right of states whose merchant ships had not yet had the right to pass

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<sup>175</sup> Brül, *International Straits*, Vol.II, p.280; C. Kumrow, p.36; C. Tugin, p.164.

<sup>176</sup> I. Gürkan, p.169; Y. Inan (1995), p.10; C. Tugin, p.166.

<sup>177</sup> Anderson, M. S. (1966). *The Eastern Question 1774-1923*. Lonson: Macmillan Education LTD.; S. Birkner, p.41.

through the Straits into the Black Sea.<sup>178</sup>

In the following years, on the occasion of the autonomy of Greece problems increased between the Ottomans and Russia and western powers as well. Russia declared war on the Ottomans and, in the end, the Edirne (Adrianople) Agreement was signed in 1829. The treaty reiterated the free passage rights of Russian merchant ships and moreover it opened the Black Sea to merchant ships of all nations. It was the first time that free passage of merchant vessels through the Straits was formalized. In other words, a general regulation was enacted with regard to free passage of foreign merchant ships through the Turkish Straits in both directions.<sup>179</sup> Thus, the treaty declared a liberty passage right through the Bosphorus and the Dardanelles for all merchant ships navigating under any flag. The Treaty made it impossible for the Ottomans to maintain its trade monopoly in the Black Sea. The Black Sea was no longer only a Russian-Turkish sea and it was opened for all trade of all other nations' merchant ships.

Russia had been steadily trying to extend into the Black Sea and the Mediterranean via the Turkish Straits since the Treaty of the Küçük Kaynarca of 1774. A new opportunity presented itself when Mehmet Ali Pasha, who was then the governor of Egypt, staged a revolt against his Sultan in 1832. Having penetrated into Syria and Asia Minor, he marched to the Dardanelles, threatening to occupy Istanbul in 1832. At the beginning of 1833 the Sublime Porte initially requested assistance from the western powers.<sup>180</sup> However, since Austria did not have enough ships to help the Ottomans and France supported Mehmet Ali Pasha secretly, they did not respond positively. On the other hand, due to the fact that the Great Britain did not desire a break in its relations with Russia and France, it suspended the Ottoman's request. At the beginning, to engage the attention of western powers, the Sublime Porte did not request the assistance of Russia, but then the Ottomans no chance other than to ask for help from Russia.<sup>181</sup> Having changed its politics about the eastern problem since the Treaty of Edirne in 1829, Russia had since then supported the territorial integrity of the Ottomans as a weak neighbor instead of the collapse of the Ottoman. Russia feared that Mehmet Ali would capture Istanbul with the support of France and as a result Russia would have a strong,

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<sup>178</sup> C. Tugin, p.168; S. Birkner, p.41.

<sup>179</sup> I. Gürkan, p.170, Y. Inan (1995), p.10.

<sup>180</sup> C. L. Rozakis & P. Stagos, p.23; Y. Inan (1995), p.11.

<sup>181</sup> C. Tugin, p.177-179; Y. Inan (1995), p.11.

resistant neighbor instead of a weak one. It had already gained advantages by the Treaty of 1829 and did not want to lose them; therefore the Ottoman's above-mentioned request was a rare opportunity for Russian interests on the Turkish Straits and Istanbul.<sup>182</sup> The Tsar wasted no time and as early as on 8 February 1833 a fleet of nine Russian ships anchored in the Istanbul Strait to protect the Ottomans against Mehmet Ali Pasha's army. After this incident the western powers were able to see the Russian risk on the Straits and Istanbul, they believed then that Russia was on the point of taking possession of Istanbul or securing a decisive influence on the Sultan.<sup>183</sup> Western powers made efforts in order to send back the Russian army from Istanbul, and with the diplomatic effort, they succeeded at first in having the Sublime Porte and Mehmet Ali Pasha sign an armistice treaty in Kütahya in 1833. Mehmet Ali Pasha accepted to withdraw his army while his jurisdiction was extended to Syria. However, the Russian fleet did not withdraw and remained in the Bosphorus when a fleet of the alliance of England and France was directed to the Dardanelles.<sup>184</sup> Before the Russian fleet returned into the Black Sea; in return for its assistance, Russia gained far-reaching privileges in the Defensive Alliance Treaty of Hünkâr Iskelesi, which was signed for the duration of eight years on 8 July 1833.<sup>185</sup>

The Treaty opened a new phase in the question of the Straits. It was similar to the Treaty of 1805 in a certain aspect and also included a separate and secret annex. Through the Treaty under Article I the signatories agreed to an alliance on land and on sea; it provided mutual assistance between Russia and the Sublime Porte if either of them was attacked by a third state. Both, the Treaty of Edirne in 1829 and also the Convention signed in 1830, were confirmed again, and the arrangement regarding Greece was concluded in 1832. Under Article III Russia undertook to defend the territorial integrity and independence of the Ottomans by providing military assistance upon the request of the Ottoman. Thus, both articles (I and III) provided for the mutual

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<sup>182</sup> W. Linn, p.15; Y. Inan (1995), p.11; I. Gürkan, p.170; Wobst described that; "... angebotene Hilfe mit dem Worten angenommen haben: „Ein ertrinkender klammert sich auch an eine Schlange.“ In höchster Bedrängnis rief der Sultan im Januar 1833 die Russen zu Hilfe, da zu befürchten stand, dass die Truppen des aufständischen Vasallen die Hauptstadt einnehmen können." See: P. G. Wobst, p.12

<sup>183</sup> I. Gürkan, p.170; C. Tükin, p.205; Brüel, International Straits, Vol.II, p.280.

<sup>184</sup> C. Kumrow, p.37; Brüel, International Straits, Vol.II, p.281; According to Tükin, it was only a fleet of France not an alliance fleet. See: C. Tükin p..226.

<sup>185</sup> A. S. Esmer, p.292; N. Oral, p.232; C. Kumrow, p.37; Y. Inan (1995), p.11; W. Linn, p.16.



presence of the naval forces on the Black Sea.<sup>186</sup> The separate and secret Article provided:

“... the two contracting parties bound to afford to each other mutually substantial aid and the most efficacious assistance for the safety of their respective dominions. Nevertheless, as his Majesty the Emperor of all the Russian, wishing to spare the Sublime Ottoman Porte the expense and inconvenience which might be occasioned to it, by affording substantial aid, will not ask for that aid if circumstances should place the Sublime Porte under the obligation of furnishing it, the Sublime Ottoman Porte, in the place of the aid which it is bound to furnish in case of need, according to principle of reciprocity of the Patent Treaty, shall confine its action in favor of the Imperial Court of Russia to closing the Straits of the Dardanelles, that is to say, to not allowing any foreign vessels of war to enter therein under any pretext whatsoever.”<sup>187</sup>

According to the secret clause, instead of the military assistance of the Sublime Porte, the Sultan was obliged to close the Dardanelles to all warships when requested by Russia. In other words; in the event of endangering Russian security the Ottomans was requested to close the Dardanelles for foreign warships rather than material assistance. Thus, Russia considered the Sublime Porte as a shield for itself and guaranteed its own security in the Black Sea region against any attack from the Mediterranean. The Ottomans had by then become a guardian of the Black Sea for the security and its own security as well.<sup>188</sup> The Turkish Straits were opened to commercial ships by the Treaty of the Küçük Kaynarca in 1774; the Sublime Porte was abandoning its ancient rule of keeping the Dardanelles closed to all warships.

The secret article of the Treaty of Hünkâr Iskelesi was open to interpretation and debate in many ways. The Treaty of 1809 between the Ottomans and England had closed the Straits to all warships in time of peace. Nevertheless the secret article of the Hünkâr Iskelesi Treaty could be interpreted to mean that Russia might gain the free passage right through the Straits for its warships in time of peace only by requesting the Sublime Porte to do so, while the Straits were closed to warships of other nations in time of peace. This result could be obtained from the sense and purpose of the Treaty because, in terms of mutual assistance, Russian warships might pass through the Straits

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<sup>186</sup> J. C. Hurewitz (1958), p.16.

<sup>187</sup> Ibid, p.16.

<sup>188</sup> Y. Inan (1995), p.12; N. Oral, p.232.

by making a request to the Ottomans against a third state. On the other hand, the secret Article regarded only the Strait of Dardanelles; in this case it was unclear whether the Russian navy could pass from the Black Sea into the Straits of Istanbul in time of peace contrarily to the Treaty of 1809. Or, in another case, it was difficult to answer whether the English fleet could pass through the Straits in time of war with Russia if the Ottomans were in peace with both England and Russia.<sup>189</sup> When the secret article of the Treaty became known to the western powers they were understandably upset with Russia's dominant position. They saw in all cases a threat of the treaty to their interests in the Mediterranean and in the Far-East. The French and British governments protested to Russia and they agreed to abolish the provisions of the Treaty of 1833.<sup>190</sup>

## **4. The Multilateral Agreements Period on the Turkish Straits**

### **4.1 The London Treaties of 1840 and 1841**

The secret article of the Hünkâr Iskelesi Treaty caused a crisis between the western powers and Russia. This situation made the Eastern Question deeper. Indeed, the diplomatic efforts of the Austrian Chancellor Metternich prevented the beginning of a war on the Turkish Straits even when he could not resolve the crisis. This tension lasted until Mehmet Ali Pasha's second rebellion of Egypt against the Sultan in 1839. Russia was ready to send another fleet to the Straits to assist the Sultan but it was aware of the reaction of the western powers. The European powers feared that Russia would intervene militarily in the Ottoman Empire in this case, thereby further strengthening its position on the Straits again. Therefore, England decided to hinder any unilateral intervention regarding the solution of the said rebellion and it would not risk leaving Russia again in controlling the Straits and in the part of the protector of the Sultan. On the other hand, Austria did not desire to lose its own interests on the Balkans and it did not want Russia to act alone on the Eastern Question, like England, France and Prussia.<sup>191</sup> As a conclusion, Mehmet Ali Pasha's revolt provided the opportunity for the western powers to change Russia's dominant position on the Sublime Porte and with the effort of Austria and England they tried to find a common European solution. However,

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<sup>189</sup> J. C. Hurewitz (1958), p.106; C. Tükin, p.236.

<sup>190</sup> C. Tükin, p.243; N. Oral, p.233.

<sup>191</sup> C. Kumrow, p.38-40; C. Tükin, p.249, 256; N. Kurt, p.14.

England distrusted France due to France's encouragement of Ali Pasha in the previous case and it feared strengthening France's influence in the Mediterranean, too. Within a short time it became clear that France was still in sympathy with Ali Pasha. Since France wanted to find a solution between Ali Pasha and the Sultan, it was opposed to British efforts as the British efforts aimed considerably at Ali Pasha.<sup>192</sup>

In the process of the diplomatic initiatives Russia finally agreed to be a party of a common resolution having realized that the treaty of 1833, which would have expired in the following two years, was not to be renewed in view of the changing European situation.<sup>193</sup> The Ottomans weakened and the contention for the Straits between powers ever before became more visible on international political stage. The powers preferred the Straits to stay under Ottoman's control instead of being under the control of one of them.<sup>194</sup>

Despite many difficulties in the end, an understanding was reached among five powers, England, Russia, Austria, and Prussia on the one side and the Ottomans on the other; they signed a pact in London on the peace terms to be presented to Ali Pasha on 15 July 1840. The Convention regulated the structure of the relationship between the Sublime Porte and Mehmet Ali Pasha in an Annex and he was threatened with compulsory enforcement if he was not satisfied with those conditions.<sup>195</sup> In the preamble it was emphasized that the Agreement was requested by the Sultan and that the rights of the sovereignty of the Sultan were respected and the integrity and political independence of the Ottoman Empire were secured by the signatories.<sup>196</sup>

With regard to the Straits, the Convention assumed that Mehmet Ali Pasha's forces threatened Constantinople; and in the case of an attack, with the request of the Sultan, the powers would undertake to defend Constantinople and the Straits themselves. In addition, in light of the signing process of Hünkâr Iskelesi Agreement of 1833, this time it was specified that with the request of Sultan forces of other nations would withdraw when their presence was no longer necessary. It was stated in Article

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<sup>192</sup> P. G. Wobst, p.15; C. Tükin, p.260; S. Birkner, p.46.

<sup>193</sup> N. Kurt, p.15; Herrmann, p.26.

<sup>194</sup> Y. Inan (1995), p.13.

<sup>195</sup> Brüel, *International Straits*, Vol.II, p.281; J. C. Hurewitz (1958), p.116.

<sup>196</sup> P. G. Wobst, p.15-16; C. Tükin, p.243; F. C. Erkin, p.28.

### III of the Convention:

“[...] in such case, to comply with the request of that Sovereign, and to provide for the defense of his throne by means of a cooperation agreed upon by mutual consent, for the purpose of placing the two Straits of the Bosphorus and Dardanelles, as well as the Capital of the Ottoman Empire, in security against all aggression. It is further agreed, that [...] and when His Highness shall deem their presence no longer necessary, the said forces shall simultaneously withdraw, and shall return to the Black Sea and to the Mediterranean, respectively.”<sup>197</sup>

Article IV emphasizes the exceptional nature of the measure provided for in Article III and underlines the ancient rule of the Ottomans is in no way affected. Moreover, the application of the ancient rule of the Ottomans Article IV gives full authority to the Sultan in time of peace. On the other hand, the contracting parties declared that they committed themselves to respecting the application of the ancient rule to all foreign war vessels.

“[...] against all aggression of Mehmet Ali, shall be considered only as a measure of exception adopted at the express demand of the Sultan, and solely for his defense in the single case above-mentioned; but it is agreed, that such measure shall not derogate in any degree from ancient rule of the Ottoman Empire, in virtue of which it has at all times been prohibited for ships of war of Foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus. And the Sultan, on the one hand, hereby declares that, excepting the contingency above-mentioned, it is his firm resolution to maintain in future this principle invariably established as the ancient rule of empire; and as long as the Porte is at peace, to admit no foreign ship of war into the Straits of the Bosphorus and of the Dardanelles; on the other hand, [...] [the contracting parties] engage to respect this determination of the Sultan, and to conform to the above-mentioned principle [...]”<sup>198</sup>

It is significant that Russia wished during the negotiations to close the Straits for

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<sup>197</sup> J. C. Hurewitz (1958), p.117.

<sup>198</sup> Ibid. During negotiations it was intensive discussed whether the Straits shall stay open or not for the warships. From the beginning England argued to close the Straits for war vessels. This issue is explained by Linn so: „... Dieser soll den herzog von Wellington gelegentlich gefragt haben, was er befürworte: Schließung oder Öffnung der Dardanellen für alle Kriegsschiffe. Die Antwort Wllington`s soll gelautet haben: Schließung, denn Russland habe sämtliche Stützpunkte in der Nähe, während England in jenen Gewässern zu weit non den seinigen entfernen sei. Damit deckten sich eigenartigerweise die Interessen der beiden großen Gegenspielern England und Russland, beide wollten die Schließung der Meerengen, jenes um die Russen von Konstantinopel fern zu halten, dieses um den Briten die Einfahrt ins Schwarze Meer zu verwehren und damit die eigenen Küsten zu schützen.“ See: W. Linn, p.18.

warships in time of war as in time of peace; it desired to make an inviolable principle of the ancient rule in time of war as well by raising it to the norms of European international law.<sup>199</sup> This Russian demand, which was planned to protect Russia against all aggression from the southern direction via the Straits, was refused by western powers, especially England. If this Russian proposal had been adopted at the conference, the Ottomans could not have requested any assistance from other powers in case there had been any aggression towards the Straits or Constantinople. The aim of the demand was understood by other powers at the beginning of the negotiations and it was refused.<sup>200</sup> Yet, it was seen that the question of the right of passage of warships through the Straits had been lifted to an international plane by the Convention.

Mehmet Ali Pasha initially refused to comply with the conditions of the Convention, and the Allies militarily protested against him, he finally accepted to sign the treaty in 1841. Having established peace with Ali Pasha, France returned to the European concert, and it became one of the contracting parties of the treaty and agreed to respect the ancient rule.<sup>201</sup> Thus, for the first time the Straits problem was settled collectively by the Straits Treaty of London on 13 July 1841.<sup>202</sup>

The big five in Europe, namely France, England, Austria, Prussia, Russia, and the Ottomans concluded the above-mentioned treaty in London; it was mainly a restoration form of the Convention of 1840 establishing a regime for the Turkish Straits that survived without major change until the outbreak of World War I. With Article I of the Treaty of 1841 the ancient rule of the Ottomans received for the first time international recognition.<sup>203</sup> In other words, the Treaty of 1841 fully restored the principle of invariability established as the ancient rule which forbade the passage of warships through the Turkish Straits. As result, the rule of closing of the Straits, which until then the Sublime Porte enjoyed as a discretionary prerogative for centuries, was transformed into an objective rule of international law. This new situation meant the Black Sea was to remain as a closed sea for warships of all non-littoral states and, in light of the same

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<sup>199</sup> C. Tugin, p.271; P. G. Wobst, p.16;

<sup>200</sup> P. G. Wobst, p.16; G. Herrmann, p.29.

<sup>201</sup> N. Kurt, p.16; C. Tugin, p.277.

<sup>202</sup> Brüel, *International Straits*, Vol.II, 1947, p.282.

<sup>203</sup> I. Gürkan, p.171; Brüel, *International Straits*, Vol.II, 1947, p.282.

perspective, the Russian Black Sea fleet remain locked in the Black Sea.<sup>204</sup> Article I, which was literally similar to Article IV of 1840, provided that:

“His Highness the Sultan on the one part, declares that he is firmly resolved to maintain for the future the principle invariably established as the ancient rule of his Empire, and in virtue of which it has at all times been prohibited for the Ships of War of Foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus; and that, so long as the Porte is at peace, High will admit no foreign Ship of War into said Straits.”<sup>205</sup>

From another perspective, it can be said that the Sublime Porte agreed to limit its absolute control; it had thus far exercised over the Turkish Straits at an international level when the first multilateral treaty was signed in London.<sup>206</sup> The ancient rule remained in force, but in reality, the authority of the Ottomans was limited over the Straits, namely that the Porte would not allow the passage of foreign warships as in the past. However, this was a requirement of the agreement not at its own discretion. Furthermore an exception was made to Article II consistent with past practice; the Sultan would reserve the right to give a special permit, firman, for the passage of lightly armed craft utilized by the embassies of friendly countries in time of peace. With the Article III of the Treaty it was specified that the Sultan might communicate the present Convention to all the powers with which the Sublime Porte maintained friendly relations and invite them to adhere to the treaty.<sup>207</sup> On the invitation of the Sublime Porte a number of powers such as Denmark, Sweden, Norway and Belgium declared later their adherence to the Convention.<sup>208</sup>

With the Treaty of 1841 for the first time, the passage of warships through the international straits was made the subject of a treaty in which all great powers were involved. With this characteristic, the treaty represented a decisive, qualitative step in the development of passage regime of international straits. On the other hand, the

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<sup>204</sup> N. Oral, p.234. According to Rozakis & Stagos; “The Convention of 1841 blocked the passage of Russian battleships through the Straits and constituted a concession from Russia. The concession, however, secured for Russia some advantage.... The principle of closing the straits to all warships in actuality had value for Russia since its fleet in the Black Sea was weak. Thus Russia was secured from any possible threat that it would be unable to resist with its limited military and naval forces.” See: C. L. Rozakis & P. Stagos, p.25.

<sup>205</sup> J. C. Hurewitz (1958), p.123.

<sup>206</sup> G. Aybay & N. Oral (1998), p.86.

<sup>207</sup> J. C. Hurewitz (1958), p.123.

<sup>208</sup> I. Gürkan, p.171.

construction of the Convention of 1841 was transformed into an international issue. Although six contracting states were stated in the Treaty, as stated in the preamble there were two parties, the five big powers as a bloc on the one side and the Sublime Porte on the other, and in addition, being bound not only *vis-a-vis* the Sublime Porte, but also mutually *inter se*. As a result this decision, it was not possible to change any provision of the Treaty between the Sultan and one of the five big powers. In other words, the treaty ensured a balance among the big powers on the Straits problem; and anyone of the five contracting parties could not change any provision of the Treaty alone for its own benefit with the Sublime Porte by a bilateral agreement. In that case, the ancient rule of the Ottomans elevated to the status of international law,<sup>209</sup> namely in time of peace, any change of provisions of the Treaty was possible only with the common will of the powers.

Thus, the Straits regime was guaranteed by the five big powers, making the ancient rule of the Ottomans a subject of European International Law, the western powers succeeded in demolishing the privileged position of Russia on the Turkish Straits and Constantinople which it had acquired in the Treaty of 1833.<sup>210</sup> On the other hand, since England succeeded in transforming the provisions of the bilateral agreement of 1809 into an international character of agreement. It can be said that the Treaty of 1841 was a diplomatic success for Great Britain in terms of its interests.<sup>211</sup> To sum up, the passage regime was now opening the Turkish Straits for all merchant vessels and closing for all foreign warships in time of peace, which would continue until World War I.

## **4.2 The Paris Treaty of 1856**

The Treaty of 1841 terminated the Russian privileged position over the Straits, which it had held since 1833. Shortly afterwards, the political significance of the Convention was understood especially by Russia. Russia had lost possibilities to attain its aim on the Constantinople and its historic mission on the Mediterranean, which was

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<sup>209</sup> A. R. Deluca, p.3; Y. Inan (1995), p.15; F. C. Erkin, p.28; Brüel, International Straits, Vol.II, p.282.

<sup>210</sup> Y. Inan (1995), p.14-15; P. G. Wobst, p.17.

<sup>211</sup> C. Tukin, p.283.

much more feasible in the weak period of the Ottoman. The London Treaty of 1841 was the first European act against Russia. In other words, with the signing of the Treaty, not only the Ottomans but also an alliance of European States was an obstacle to the Russian intention on the Straits and Constantinople. Due to the condition of the Treaty of 1841's condition Russia resented its diplomatic failures. Nevertheless, Russia did not give up its struggle and followed every opportunity to renew the Treaty and to change its provisions in favor of its aims.<sup>212</sup>

After the revolution in 1848 Western European governments concentrated all their attention on their own states.<sup>213</sup> Having hoped to solve the Eastern Question in the Russian sense, Tsar Nikolas I offered to the British government a plan for partition of the "sick man", as he had called the Ottoman Empire. However, due to the fact that England was interested in the existence of the Ottoman Empire, it rejected the Russian proposal.<sup>214</sup> Thus, Russia decided to strengthen alone its influence over the Ottoman. In 1853, a dispute between the Catholic and the Orthodox Church about holy places in Jerusalem provided the Tsar an opportunity to request protectorate over these places in accordance with the Treaty of Küçük Kaynarca of 1774 with which Russia had gained a protector position over the Orthodox Christians in the Ottoman territory. However, on grounds of its internal affairs, the Ottomans denied the Russian request.<sup>215</sup>

The rejection of the Russian demand resulted in cutting of diplomatic relations between Russia and the Sublime Porte. After a short time, at the beginning of June of 1853, Russia without a declaration of war against the Ottomans occupied some areas - Moldova and Wallachia- at the entrance of the Danube River. The occupation of the Ottoman's territory by the Russian army meant the breaking of the peace, in other words, it meant infringement of the Treaty of 1841. Upon this situation, the fleets of Great Britain and France, which were at the entrance of the Dardanelles, passed the Dardanelles and anchored at the Bosphorus in order to protect the territorial integrity and independence of the Ottomans as a requirement of the Treaty of 1841.<sup>216</sup>

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<sup>212</sup> Brüel, *International Straits*, Vol.II, p.283; (Y. Inan (1995), p.14; F. C. Erkin, p.29.

<sup>213</sup> C. Kumrow, p.44.

<sup>214</sup> C. Tugin, p.285-286; F. C. Erkin, p. 29.

<sup>215</sup> W. Linn, p.19; G. Herrmann, p.30; P. G. Wobst, p.18.

<sup>216</sup> G. Herrmann, p. 30; C. Tugin, p.296; F. C. Erkin, p. 29. On the contrary, the Russian Embassy in London protested the passage of the fleets of England and France. He argued that England and France had



At the beginning of October of 1853, the Ottomans declared war against Russia. On the other hand, the British and French fleets were staying at the Bosphorus but they remained neutral. Despite Ottoman's invitation they did not send their fleets to the Black Sea. In November, when the Ottoman's fleet at Sinop was sunk by the Russian army, the fleets of Great Britain and France passed the Black Sea and in March 1854 they also declared war against Russia in March 1854. After having signed an alliance declaration with the Ottoman, they landed their troops in the Crimea.<sup>217</sup> In December Austria became a party of the alliance and then Russia withdrew its army from the Danube River entrance. Before finishing the war, Great Britain, France and Austria continued negotiation in terms of a priori treaty draft in Vienna and they agreed on four points about closing the Straits and neutralization of the Black Sea. However, the neutralization of the Black Sea and the draft treaty limitation regarding military and naval forces in the Black Sea was unacceptable for Russia. Insomuch as to be free from the restrictions, Russia put forward a proposal at the negotiations in which it had to abandon its traditional policy which was the closing of the Turkish Straits to warships except Russians. It also proposed freedom of passage to the warships of all nations on condition that the Sultan always kept the right to close the Straits in time of war in which the Ottomans were involved. But, the proposal was not approved by the other powers.<sup>218</sup>

The Crimean War finished after the fall of Sevastopol in September 1855 and at last, by agreeing to the four points offered by Russia, a treaty with a special Annex Convention about the Turkish Straits and the Black Sea was signed in Paris on 30 March 1856 by Great Britain, France, Austria, the Ottoman, Sardinia<sup>219</sup> and with the addition of Prussia on the one side and Russia on the other.<sup>220</sup> The Treaty under Article X reiterated the firm obligation of the Sultan to maintain the ancient rule and the respect of the powers to the closing of the Straits like in the Treaty of 1841. As in the past, the

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violated the Treaty of 1841 by passing their fleets through the Dardanelles in time of peace. According to him, because there was no war declaration it was continuing the time of peace. See: W. Linn, p.19.

<sup>217</sup> C. Kumrow, p.45; G. Herrmann, p.30.

<sup>218</sup> Brüel, *International Straits*, Vol.II, p.284; C. Tugin, p.327.

<sup>219</sup> Austria participated in the negotiations because the Ottoman had permitted Austrian troops in 1854 to occupy Moldavia and Walachia (Rumania); Sardinia participated because it had entered the war in 1855; and Prussia had also been a party to the Treaty of 1841. See: J. C. Hurewitz (1958), p.153.

<sup>220</sup> P. G. Wobst, p.30; C. Tugin, p.339; C. Kumrow, p.45.

right of giving special permit, firman, by the Sultan for the passage of lightly armed craft utilized by the embassies remained. Under Article XI the Black Sea was neutralized:

“... its waters and its ports, thrown open the mercantile marine of every nation, are formally and in perpetuity interdicted to the flag of war, either of the Powers possessing its coasts, or any other Powers, with the exceptions mentioned in Articles XIV and XIX of the present Treaty.”<sup>221</sup>

Under Article XII the freedom of navigation for merchant vessels of all nations in the Black Sea was recognized. Additionally, the riparian states of the Black Sea, Russia and the Sublime Porte, were forbidden to establish or maintain any military arsenal. The effect of the neutralization of the Black Sea Coast and the exception of the neutralization were organized respectively by Article XIII and XIV:

“... the maintenance or establishment upon its coast of military-maritime arsenal becomes alike unnecessary and purposeless: His Majesty the Emperor of all Russians, and His Imperial Majesty the Sultan engage not to establish or to maintain upon that coast any military-maritime arsenal.”

“Their Majesties the Emperor of all the Russians and the Sultan having concluded a Convention for the purpose of settling the force and the number of light vessels, necessary for the service of their coasts, which they reserve to themselves to maintain in the Black Sea, that Convention is annexed to the present Treaty, and shall have the same force and validity as if it formed an integral part thereof. It cannot be either annulled or modified without the assent of the Powers signing the present Treaty”<sup>222</sup>

As regards to Article XIV, Russia and the Ottomans agreed for basic security of their coasts on the Black Sea that each should only be entitled to maintain 4 light warships of not more than 200 tons and 6 light steam vessels of 50 meters in length and 800 tons at the maximum tonnage.<sup>223</sup> Moreover, regarding the liberty of the Danube River, the Treaty authorized the contracting parties to station two light vessels at the mouth of the Danube by annexed Article III.

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<sup>221</sup> J. C. Hurewitz (1958), p.155.

<sup>222</sup> Ibid.

<sup>223</sup> Brüel, *International Straits*, Vol.II, p.281; J. C. Hurewitz (1958), p.156.

It can be said that one of the most important changes of the Treaty of 1856 on grounds of its international status is the neutralization of the Black Sea. For the first time “neutralization” was applied as a legal principle to an entire sea.<sup>224</sup> The Turkish Straits had already been closed to warships of all nations by the Treaty of 1841, but after the signing of the Treaty of 1856 the Black Sea became closed to warships of riparian states, namely Russia and the Ottoman, too. The two riparian states were not allowed to keep their naval forces except limited light armed vessels for their basic security of trade, in the Black Sea any longer. Furthermore, the construction of arsenals and dockyards on their own territorial waters on the Black Sea were forbidden by this Treaty. The goal of this restriction was to weaken the Russian naval forces in the Black Sea, because the Ottomans could keep its naval forces and establish any dockyards in the Straits or the Marmara Sea and the Mediterranean as well.<sup>225</sup> The Treaty was probably the strongest setback for Russia since the Treaty of Küçük Kaynarca with which it gained foothold on the shore of the Black Sea. The neutralization of the Black Sea meant a deprivation of the use of their own sea for the Ottomans and Russia, but this restriction was imposed as a sanction against Russia.<sup>226</sup> In the following years, its negative effect would be much more felt by Russia on grounds of the military and trade in the Black Sea.

### **4.3 The London Treaty of 1871**

The balance constituted on the Turkish Straits by the Treaty of 1841 was broken to the disadvantage of Russia at the Treaty of 1856, and since then Russia tried to find opportunities to change the provisions of the Treaty of 1856. Russia would not tolerate the restriction of its sovereign right and prohibition of its naval forces in the Black Sea any longer. Due to this aim, Russia was only waiting for the right time to attempt to change the clauses of the Treaty of 1856.<sup>227</sup> In addition, after the Paris Treaty during the construction of the Suez Canal from 1859 until 1869, the world sea trade direction moved to Asia via the Mediterranean and Suez Canal. This essential development on

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<sup>224</sup> N. Oral, p.236.

<sup>225</sup> Y. Inan (1995), p.16; C. Tugin, p.343.

<sup>226</sup> C. Tugin, p.343; S. Birkner, p.55.

<sup>227</sup> G. Herrmann, p.32.

the sea trade was also extremely important for Russia in point of its interests on the Mediterranean and East Asia.<sup>228</sup>

Shortly after signing the Treaty, relations among the western powers rapidly changed and the wars between France and Austria in 1858, Prussia and Denmark in 1864, Prussia and Austria in 1866 caused new alliances to arise among the states and the western powers endeavored to secure Russian friendship in favor of their interest. The war between France and Prussia in 1870 gave Russia an opportunity to change the obligation of the Treaty of Paris without having to face western powers. Russia argued that it was deeply affected by the neutralization of the Black Sea and it had been placed at a distinct disadvantage by the arrangement in comparison to the other signatories, and that as consequence of actual developments, the political situation had entirely altered as compared to the situation at the date of the Treaty. Russia wanted to denounce the provisions of the Treaty of 1856 regarding the neutralization of the Black Sea. Having secured the consent of Bismarck, Russia informed the other signatories of the Paris Treaty by a circular note on 31 October 1870 that the provisions of the Treaty of 1856 which limited its sovereign rights in the Black Sea were unacceptable and no longer applicable by Russia.<sup>229</sup> Russia also underlined that its purpose was not to reopen the Orient question.

This unilateral termination of Russia was a violation of international law<sup>230</sup> and this decision made a great impact in Europe. However, besides the impact in Europe, these quite modern arguments caused great consternation among the western powers too. There was also no wish to solve this problem by a war in Europe.<sup>231</sup> Following this unilateral abolition and denunciation of the Treaty Bismarck endeavored to find a common solution without war. His proposal to solve this problem at a conference relieved the tension and in London Prussia, Great Britain, Austria, France, the Ottoman, Italy and Russia convened at the conference and they signed on 13 March 1871 a new treaty about the Black Sea and the Turkish Straits.

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<sup>228</sup> N. Kurt, p.20.

<sup>229</sup> N. Kurt, p.20; G. Herrmann, p.33; W. Linn, p.23; C. Tukin, p.349; Brüel, *International Straits*, Vol.II, p.288.

<sup>230</sup> Y. Inan (1995), p.17; Gortschakow, the Prime Minister of Russia at that time, had defined the international law so that: "international law applied to the simple minded peoples, and that agreements only bound states which were too weak to demolish them, and only protected those states which were strong enough to defend them." See: F. C. Erkin, p.32

<sup>231</sup> (Brüel Vol. II, 1947), p.288.

The new Treaty revised the Black Sea clauses of the Treaty of 1856 and Russia obtained what it had demanded. Both the special agreement between the Sublime Porte and Russia regarding the limitation of their naval forces in the Black Sea and the neutralization of the Black Sea were repealed under Article I of the Treaty”

“Article XI, XIII, and XIV of the Treaty of the Paris of March 30, 1856, as well as the special Convention concluded between Russia and the Sublime Porte, and the annexed to said Article XIV, are abrogated, and replaced by following Article.”<sup>232</sup>

With Article II of the Treaty, the ancient rule, closure of the Straits to warships in time of peace, was again affirmed. However, to the rule mentioned was an exception added allowing the Sultan to open the Straits to friendly and allied powers in time of peace

“The principle of the closing of the Straits of the Dardanelles and the Bosphorus, such as it has been established by separate Convention of March 30, 1856, is maintained, with power to His Imperial Majesty Sultan to open the Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure execution of March, 1856.”<sup>233</sup>

The Treaty of 1871 was a great diplomatic success for Russia. With the Treaty Russia gained freedom of action for its naval forces in the Black Sea. On the other hand, whilst the ancient rule was still valid, western powers, especially Great Britain, which are non-coastal states in the Black Sea, secured access to the Black Sea with the Sultan's permission under the entente of friendly states or allied powers. Considering the Russian permanent request regarding the Straits, it can be understood that the importance of the said exception clause is the closure of the Straits to warships of non-riparian states of the Black Sea. However, it can also be argued that the treaty formally gave Russia the position of an allied friendly power of the Sublime Porte to gain passage right through the Straits for its warships. The interpretation of the above mentioned rule would become a discussion point between riparian and non-riparian states in the next cases. In addition, by insistence of non-riparian states this exception would also be repeated with a different expression in the Montreux Convention of 1936.

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<sup>232</sup> J. C. Hurewitz (1958), p.174.

<sup>233</sup> Ibid.

## 4.4 The Berlin Congress, 1878

Although Russia declared its aim was not to reopen the Orient Question, it did not keep its promise to the western powers. It provoked the Balkan folks against the Ottomans under its leadership to establish their own independent states. It succeeded in attaining its aim, and in Bosnia and Herzegovina a rebellion broke out in 1875 firstly, and after that respectively in Bulgaria, Montenegro and Serbia.<sup>234</sup> As a result of those political developments, in 1877 Russia declared war on the Ottomans for protection of the Christian-Orthodox folks. Its troops crossed Caucasian and Balkan frontiers and moved on towards Istanbul. Since the rebellions in Balkans, western powers did not attach attention to the Russo-Ottoman war firstly, but against the occupation possibility of Istanbul and Straits by the Russian army England sent its fleets to the Dardanelles in 1878. Thus, between Russia and the Ottomans the Treaty of St. Stefano (Ayastefanos) was signed on 3 March 1878, which never entered into force. With the Treaty Bulgaria was set up, the Ottomans lost east Anatolian cities, and moreover, under Article 24 of the Treaty, the Ottomans had to accept the passage of any merchant vessel through the Straits which navigated to or from Russian Ports in time of war and peace.<sup>235</sup> With this article Russia took full trade sovereignty in the Black Sea and if there were any war with the Ottoman, Russia could transport military support through the Straits to use against the Ottoman.<sup>236</sup> These Russian advantages in Balkans, East Anatolia and especially the Russian threat on the Straits led England and Austria to worry about their own interests.

Due to the pressure of western powers, Russia consented to discuss the Treaty of St. Stefano in a conference. Upon Bismarck's proposal, a conference convened in Berlin that all signatories of the Treaty of Paris of 1856 attended where they concluded the Treaty of Berlin on 13 July 1878. The Treaty did not bring any change to the previously valid Straits regime, namely that "the ancient rule" and "passage possibility by the

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<sup>234</sup> C. Tugin, p.367, Y. Inan (1995), p.18. According to Erkin; the Treaty of 1871 was a diplomatic success of the Russia, but each success of Russia on the Straits Question meant a springboard for Russian diplomacy to obtain other new opportunities. As it was experienced in the following years, and in addition Gortschakow already expressed that: "To solve the Straits problem in favor of Russia, it is necessary to get the Ottoman to weak by supporting the Balkan folks against to the Sublime Porte." See: F. C. Erkin, p.33.

<sup>235</sup> N. Kurt, p.22; P. G. Wobst, p.24.

<sup>236</sup> Y. Inan (1995), p.18

Sultan's permission for warships of friendly and allied powers of the Ottoman" were reaffirmed by the powers although the interpretation of the ancient rule was controversial at the conference. The rule was under Article LXIII so concluded:

"The treaty of Paris of March 30, 1856, as well as the Treaty of London of March 13, 1871, are maintained in all such of their provisions are not to be abrogated or to be modified by preceding stipulations."<sup>237</sup>

In addition, the free passage of merchant vessels in the time of peace, which was valid from the Treaty of Adrianople of 1829 and reconfirmed by the Treaties of 1856 and 1871, remained in force. Nevertheless, regarding the free passage of merchant vessels of neutral states, which had been stated in the Treaty of St. Stefano, there were not any decisions made.

During the conference Russian and British interests clashed again. The British Foreign Secretary, Lord Salisbury, defended the view that the closing of the Straits to warships of other nations depended on the "independent determination" of the Sultan. The Russian representative, Count Shuvalov, objected and expressed that the principle of the closing of the Straits was a European principle, and therefore, it had to be binding to all the powers including the Sublime Porte.<sup>238</sup> The most interesting aspect of the discussion was that Great Britain and Russia changed then their position about the Turkish Straits. Until then, Great Britain had always defended closing of the Straits to all warships of all nations because Great Britain had always been worried about the influence of Russia on the Sultan, but on the contrary for keeping the key of its house, Russia had always requested to solve the Straits Problem only between both riparian states, Russia and the Ottoman, not at a conference with other non-riparian powers.<sup>239</sup>

Meanwhile, before the Berlin Conference Great Britain and the Ottomans had concluded a secret agreement, which was endorsed formally in 1879, with the Sublime Porte on 4 June 1878 and it had acquired the Island of Cyprus as a reward for securing the Ottoman's territory in the case of Russian's retention of the Ottoman territory in East Anatolia and the Caucasus, Kars, Ardahan and Batumi, which it secured by the Treaty of St. Stefano.<sup>240</sup> In addition, in 1882 England occupied Egypt with its Suez

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<sup>237</sup> J. C. Hurewitz (1958), p. 191.

<sup>238</sup> F. A. Váli, p.24; P. G. Wobst, p.24; N. Kurt, p.23; I. Gürkan, p.174.

<sup>239</sup> P. G. Wobst, p.24; N. Kurt, p.24.

<sup>240</sup> N. Kurt, 23; J. C. Hurewitz (1958), p.190.

Canal, which had been opened since 1869. By having Cyprus Great Britain obtained a new foothold on its Far East trade route. This meant that Cyprus was becoming the new British station to control its Mediterranean and east policies; in other words, Istanbul and the Straits were important for Great Britain because it needed a foothold on the Mediterranean to control its interests on the Far East route, and it had also secured a new one. By the end of the 19<sup>th</sup> century, the attitude of France and Britain on the Straits question had undergone a gradual change.<sup>241</sup> It is evident that the changing of the position of the powers was based on only their interests and their powerful status at that time; it did not concern the requirement of international law.

The Treaty of Berlin remained in force until World War I. In practice, the Ottomans occasionally allowed the passage of armed vessels for humanitarian or other proper reasons. The closing of the Turkish Straits as a main principle was applied until the First World War and Russian attempts to obtain free navigation through the Straits for its warships remained unsuccessful.<sup>242</sup> On the other hand, in the subsequent years it was also experienced that the position of the powers on the Straits Question would change in parallel with their interests on the grounds of political developments.

## **CHAPTER 3 The End of the Ancient Rule and the Opening the Straits**

### **1. The Straits during World War I**

The debate of the interpretation of Article II of the London Treaty of 1871 regarding the passage permission of the Sultan to the warships of the friendly and allied powers, which was reconfirmed by the Treaty of 1878, continued until the First World War. In this context, after the signing of the Treaty of Berlin the big powers especially

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<sup>241</sup> F. A. Váli, p.25. According to Brüel; "The influence which England had in Turkey after the Congress of Berlin however weakened quickly inter alia as a result of a more general change in English policy in the near East where England gradually began to regard the solution of the Turkish empire into as many small states as possible as being the most serviceable thing for English interests." See; E. Brüel, Vol. II (1947), p.316.

<sup>242</sup> I. Gürkan, p.174; F. A. Váli, p.25.



Russia managed to exert enough political pressure on the Sublime Porte to gain passage permission through the Straits.

In the following years of the Berlin Treaty, Russian attention turned to Asia and Far East. The Russian new politics would bring some new conflicts among the big powers on the Straits because of changing of their Orient and Asian policies. In 1891, at the Bosphorus on account of carrying military aid, the Ottomans prevented the passage of Russian unarmed ship named Kostroma, for which Russia sometimes took the same permission after the Berlin Treaty of 1878. Upon this obstacle Russian protested to the Sublime Porte and gained permission from the Sultan for the passage.<sup>243</sup> In the same year, for the return of the Russian troops from Asia, the Sublime Porte gave permission upon the request of Russia and reported this passage to the western powers on 16 September 1891. Upon Russia's demands, Great Britain (on 12 November 1891), Austria and Italy (on 16 November 1891) expressed that a collective agreement could not be changed by a unilateral act and urged the Sublime Porte to fulfill its task about closing the Straits to warships of all nations.<sup>244</sup> This situation does not lack a certain irony because Great Britain put forward the closing of the Straits again contrarily to its position at the Berlin Conference. Furthermore, in 1902, after some discussions Russia gained again passage permission from the Sultan into the Black Sea for its four unarmed warships flagged merchant ships, which belonged to its Baltic fleet. Thereupon, Great Britain protested and declared that it would reserve the same right for English warships in a similar case.<sup>245</sup> During the Russian-Japanese War in 1904-1905 two auxiliary cruisers, "Petersburg" and "Smolensk", modified as merchant ships managed to pass the Straits. When these ships reached the Mediterranean, they hoisted their war flags again and armed themselves with guns which had been hidden in their cargo. Additionally, the Great Britain merchant ships in the Mediterranean were searched by these Russian ships. Thereupon, Great Britain and Germany protested against Russia.<sup>246</sup> During the war, besides the difficulties of sailing from the Baltic Sea to the Far East, the Russian

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<sup>243</sup> C. Tugin, p.234.

<sup>244</sup> G. Herrmann, p.36; N. Kurt, p.25; C. Tugin, p.397.

<sup>245</sup> C. Tugin, p.399- 403; F. C. Erkin, p.39; E. Brüel, Vol. II (1947), p.311.

<sup>246</sup> E. Brüel, Vol. II (1947), p.312; G. Herrmann, p.25; C. Tugin, p.404; F. C. Erkin, p.39. Besides the determination of the territorial waters and passage regime of the international straits, the modification of the warships to merchant ships for the passage through the Straits was discussed at Hague Conference in 1907 at first. But same implementations of modification of ships would repeat in the next years, during the World War II as well. It will be examined in Chapter 6.

Navy found itself immobilized in the Black Sea and the closing of the Turkish Straits to Russian warships helped the Japanese.<sup>247</sup> Therefore, in order to pass its warships through the Turkish Straits Russia tried to modify them as merchant ships.

In the following years many changes occurred on the stage of world politics and European interests in the Middle East increased greatly. With the Treaty of Berlin of 1878, Bulgaria became a vassal state of the Ottomans and Romania gained its independence and then the Kingdom of Romania was founded in 1881. It meant that the Black Sea had new coastal states, in other words, from then on Romania and Bulgaria had to be accounted in regard to establishing the legal regime of the Black Sea although they were not signatories of the previous London Treaty of 1871 and Berlin Treaty of 1878 either. After having gained their independence both states had already begun to create their own fleets in the Black Sea. The treaties could not respond to such new developments and a new question occurred whether these treaties were applied to Romania and Bulgaria. In 1897, this question already arose in the case of the Bulgarian gunboat 'Nadejda', which had been built in Bordeaux. At first the request was refused by the Sublime Porte and, upon the refusal, Bulgaria as a Black Sea states declared its gunboat would pass through the Turkish Straits even if permission were not granted. Moreover, it emphasized that the Sublime Porte would be held responsible if the passage was prevented by the Ottoman. In a same case in the past, the Ottomans also gave passage permission to Romania's first warship 'Elizabeth', which had been built in England. Due to the fact that the Straits were the only outlets from the Black Sea for the riparian states, the permission was given to Bulgaria after having consulted with western powers.<sup>248</sup> Both these cases and the political changes in the Black Sea region as well as other parts of the world showed that harmony in the Black Sea could not remain with the maintenance of the Ottoman rule. That is why the Ottoman's practice of the Treaties of London of 1841 and of Berlin of 1878 underwent a change in a liberal direction.

Before World War I, two new powers, Germany and the United States of America, appeared on the world political scene. The United States of America had signed a trade agreement with the Ottomans in 1830. It had gained all the privileges

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<sup>247</sup> F. A. Váli, p.25.

<sup>248</sup> E. Brüel, Vol. II (1947), p.309.

regarding the merchant vessels that the European powers had. With this agreement, diplomatic relations between the Ottomans and U.S. were established. In the second half of the 19<sup>th</sup> century it began to be a visible power on the maritime. At the beginning of the 20<sup>th</sup> century technological progress made oil one of the most important materials for modern industry and shipping. Therefore, before World War I, in many other western powers one of the American interests in the Ottoman territory was the prospect of oil in Asia Minor, Mesopotamia and Iraq.<sup>249</sup>

On the other hand, to gain a new economic and military influence in the territory of the Ottoman, Germany appeared as a new actor on the Eastern Question by well-disposed friendships with the Sublime Porte. Germany provided military aid to the Sublime Porte and signed many agreements with the Ottomans in terms of army and reconstruction and investigation of the infrastructure such as the building of the Baghdad railway. In addition, it began to build a powerful high-sea navy parallel with its new policies on the Eastern question. It meant that the Ottomans obtained a new protector, namely that the influence of Germany on the Sublime Porte had in effect replaced England. Therefore, the western powers judged to themselves that German expansionism had begun to become the main danger compared to Russian expansionism in the Orient.<sup>250</sup>

After its defeat in the war against Japan in 1904-1905, the Russian navy had become quite weak and then Russia turned to European politics, namely that it placed again the Straits in the center of its political program. By signing a memorandum on 27 April 1907 about the partition of Persian influence zones, Great Britain and Russia became closer and Russia offered Great Britain to solve the Turkish Straits question yet its hope remained inconclusive. Great Britain had already showed during the negotiations of the above-mentioned memorandum that it would not oppose such a change about the Straits passage regime; moreover it refused Russian suggestion because any opposition might be expected from public opinion and it might a risk alarming other signatories to make a new formal agreement on the Straits question.<sup>251</sup> In 1908, at the time of annexation of Bosnia and Herzegovina by Austria, a new

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<sup>249</sup> C. L. Rozakis & P. Stagos, p.28.

<sup>250</sup> F. A. Váli, p.25, E. Brüel, Vol. II (1947), p.316.

<sup>251</sup> M.S. Anderson, p.280.

opportunity arose for Russia to conclude the Straits question around Russian proposal, which was “opening the Straits to warships of riparian states of the Black Sea under certain guarantees for the inviolability of Istanbul”. Russia and Austria agreed that Russia would not oppose the occupation of Bosnia and Herzegovina by Austria, in return for this, Austria promised to support the Russian proposal at the next possible conference about the Turkish Straits. This endeavor on the part Russia also failed.<sup>252</sup>

After the occupation of Tunis by France in 1881, Tripoli (Trablusgarp) was the last possession remaining to the Ottomans in North Africa. Italy had already tried to occupy Tripoli, but the political balance did not give it any chance to do so in 1890. In 1900, France acquired Morocco offering to Italy to take Tripoli, and in 1902 Austria agreed that Italy should keep Tripoli, while England promised not to oppose any Italian action in Tripoli. In 1909 Italy secured Russian approval about occupation of Tripoli in return for a promise not to oppose Russian proposal about opening the Turkish Straits to Russian warships. On 28 September 1911, in view of the danger of Italians in Tripoli Italy presented an ultimatum to the Ottomans in which it asked the Ottomans to consent to the occupation and Tripoli-War between Italy and the Ottomans came to the point of outbreak.<sup>253</sup> Thereupon, since the Ottomans were now a belligerent and the Treaty about the Straits became *ipso jure* invalid, in terms of their defense they mined and closed the Dardanelles and on 5 March 1912 declared that the passage was allowed to neutral merchant vessels only with pilot service at daytime.<sup>254</sup> Having claimed that due to the closing of the Straits its maritime trade was harmed, Russia protested against the Ottoman. After occupying the Dodecanese (12 Ada) Island<sup>255</sup> in the Aegean Sea, Italy contemplated a naval offensive to strike at the Straits and bombed the entrance of the Dardanelles on 18 April 1912. The Italian action evoked the displeasure of the western powers and Great Britain endeavored to encourage the other powers to protest Italy because in case of war it would be impossible to protect neutral merchant ships. The

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<sup>252</sup> P. G. Wobst, p.25-26; C. Tukin, p. 409-410; F. C. Erkin, p.40; E. Brüel, Vol. II (1947), 299. Anderson defines so the willing of Russia that: „... Above all he [Russia] showed himself willing to agree to an Austrian annexation of Bosnia Herzegovina if in return Aehrenthal [the Foreign Minister of Austria] would support the opening the Straits to Russian warships.“ See: M.S. Anderson, p.280. According to Brüel, Russia proposed that the Straits question could be resolved between only the riparian states, Russia and The Ottoman. “... England would not accept the Russian proposal that the matter should be settled by direct agreement between Russia and Turkey ...” See: E. Brüel, Vol. II (1947), p.325.

<sup>253</sup> M.S. Anderson, p.287-288.

<sup>254</sup> N. Kurt, p.25; G. Herrmann, p.37; E. Brüel, Vol. II (1947), p.299.

<sup>255</sup> These Island were known „12 Ada“ in Turkish.

War ended in 18 October 1912 with the treaty of Ouchy (Uşi). On the other hand, the Tripoli War had not finished yet, and the Balkan War began in October 1912 and continued until August 1913. Until the War of the Balkan the Ottomans faced many internal and external difficulties. A large part of the Empire was no longer controlled by the Sultan. The Ottomans lost many islands in the Aegean, a considerable part of its territory in Europe, North Africa and Caucasia in *de facto* or *de jure*. During the Balkan War against Bulgaria, Greece, Serbia and Montenegro the Ottoman's European possessions were reduced to Eastern Thrace, namely that in the European side it lost all its territory north of the line Enos-Midia. With the Treaty of Bucharest of 1913 the war finished and all the islands of the Aegean were given to Greece, except Gökçeada (Imbros) and Bozcaada (Tenedos) that are located at the entrance of the Dardanelles. The Dodecanese and Rhodes were given temporarily to Italy here by the Treaty of Ouchy.<sup>256</sup> The Ottomans found themselves in an exhausted state and the hearth of the Sublime Porte became open to any attack both from the Aegean side and the Black Sea side.<sup>257</sup>

On the other hand, the political tendency was changing rapidly before the First World War. The friendly relations between Austria and Russia, which had been established in 1908, were broken by virtue of the Pan-Slavic policies of Russia in the Balkans. Additionally, Great Britain and Russia were worried because of German expansion in the Orient and German penetration on the Sublime Porte. For nearly two centuries Great Britain had been considered to be an ally of the Sublime Porte. However, at the beginning of 20<sup>th</sup> century, British sentiments changed towards the Ottomans and, as a result of this, the Ottomans looked to Germany to be its new ally against other powers which had interest on its territory as well as on the Straits. Consequently, the new alliance between the Ottomans and Germany caused insecurity and unrest among the powers. The unrest seemed to become acute when Liman Von

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<sup>256</sup> According to the Ouchy Treaty, Italy had to return Dodecanese and Rhodes. The Ottoman had to withdraw its troops from Tripoli and Benghazi. On the other hand, in course of the Balkan, the Ottoman worried that Greece would occupy the above mentioned islands. Therefore, the Ottoman and Italy signed a secret agreement. The Sublime Porte suggested remaining these islands under the control of Italy until the end of Balkan War. However, after the Balkan War, Italy did not leave these islands. In the following years, due to political instability in the region and the outbreak of World War I this issue remained unclear. As result, these Islands were ceded to Greece after the World War II. Thus, the Aegean dispute began between the Greece and Turkey which is still ongoing. See: *Hayta, N. Ege Adalari Meselesinin Tarihcesi Hakkında 3 Subat 1922 Tarihli bir Rapor [A Report on 3 February 1922 about History of the Aegean Islands ], Atatürk Araştırma Merkezi [Atatürk Research Center], pp. 225-248.*

<sup>257</sup> F. A. Váli, p.26.

Sanders as commander of garrison was sent to Istanbul for supervision of the Ottoman army at the end of 1913. This step startled Russia because Germany could have obtained actual control of the Straits for which Russia had been striving for centuries. At the beginning of 1914 besides restructuring of economic life of the Ottoman, its army was reorganized and instructed by German officers. World War I broke out on 28 June 1914 between Russia, Great Britain and France (Allies) on one side and Germany and Austria-Hungary on the other. The Allied powers wanted the Ottomans to join the Allies or at least they wanted that it would stay neutral for the security of the transfer route between Russia and other Allied powers.<sup>258</sup> But, only a few weeks after the outbreak of World War I, Germany and the Ottomans under the management of the Young Turkic Cabinet signed a secret alliance treaty on 2 August 1914.<sup>259</sup> By the secret treaty the Ottomans secured German and Austrian assistance in the event of a war against Russia, but it declared itself neutral on 3 August 1914. Even though it declared its neutrality it felt itself under possible war threat. Having decided to lay mines in the Dardanelles and the Bosphorus in order to secure its neutrality, the Sublime Porte reported to the other powers with a diplomatic note. Not merely merchant vessels of belligerent states but also neutral merchant ships were obliged to pass under pilotage and the passage of merchant ships was restricted in daytime with a circular note on 28 September 1914. As a result, ships passages were delayed for days and sometimes completely stopped in virtue of the defensive measures of the Ottoman; therefore it was protested by the powers.<sup>260</sup> Some measures and regulations about the passage of merchant vessels for own security in such a dangerous situation could be understood, but sometimes the complete prohibition of merchant vessels in the Straits amounted to a breach of the Treaty of Edirne of 1829. In subsequent days, warships were forbidden to enter Turkish territorial waters, which were fixed at six nautical miles in the circular note of 1 October 1914. No powers protested the Ottomans upon their determination of the width of the territorial sea at six nautical miles instead of three.<sup>261</sup>

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<sup>258</sup> W. Linn, p.27. According to Linn: "Russland hätte also im Einverständnis mit Frankreich die im Krieg neutral gebliebene Türkei nach dem Kampfe allein angegriffen und Meerengen in Besitz genommen." See: W. Linn, p.27.

<sup>259</sup> Hurewitz, J. C. (1956). *Diplomacy in the Near and Middle East, A Documentary Record:1914-1956, Vol II*. Canada: D. Van Nostrand Company (Canada) LTD., p.1; P. G. Wobst, p.27.

<sup>260</sup> C. L. Rozakis & P. Stagos, p.89.

<sup>261</sup> E. Brüel, Vol. II (1947), p.331-332 and 335. The legality of laying mines in the international straits had been discussed at the second peace conference of Hague of 1907. At the end of the conference laying mines in the territorial sea had been accepted but in the international straits left open to act of the straits state. See: E. Brüel, Vol. I (1947), p.89.

The two ships “Sultan Süleyman” and “Resadiye”, which had been built in British shipyards for the Ottoman’s navy, were commandeered by Great Britain and were not delivered to the Sublime Porte. These ships were crucially important for the national security of the Ottoman, thus Turkish feelings were greatly embittered. This event led to a breach between the Sublime Porte and the Allied powers. Shortly thereafter two German warships “Goeben” and “Breslau” appeared at the entrance of the Dardanelles which had been being dogged by French and English ships in the Mediterranean and passage permission was requested for these two warships by Germany. Even though it was declared by some states that this was a breach of the Straits Convention of Paris of 1856 and London of 1871, they were allowed to enter into the Dardanelles by the Sublime Porte on 10 August 1914.<sup>262</sup> Upon this event, the Sublime Porte proclaimed that the Ottomans had bought these two ships from Germany so that there was no breach of the above-mentioned treaties. The passage of these ships and their purchase were greatly criticized. Nevertheless, even if the purchase of the ships were fictitious, the Ottomans argued that the passage was lawful according to the Treaty of 1871 and also of 1878 because the Sultan was free to open the Straits to warships of friendly or allied states. In this case, the Sublime Porte was protested by Allied powers because of the passage of German warships but also it struggled to stay out of the war. It was able to succeed in staying out of the war until an Ottoman fleet, including Goeben and Breslau under the Ottoman’s flag, sailed in the Black Sea in October 1914. The Russian coasts in the Crimea were bombarded by the above-mentioned warships.<sup>263</sup> With this action the Allies declared war on the Ottomans who became an ally of the Central Powers. By joining the war the Ottomans became a belligerent state and it meant that the Treaties of 1856, 1871 and 1878 regarding the Straits were directly abrogated because they had regulated the passage regime of the Turkish Straits only in time of peace, namely that the treaties were valid only if the Ottomans were not belligerent. In time of war the Ottomans were free concerning the regulation of the Straits.

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<sup>262</sup> Y. Inan (1995), p.19; M.S. Anderson, p.312-313.

<sup>263</sup> F. C. Erkin, p.47; Macfie, A. (1996). *The Eastern Question 1774-1923*. New York: Addison Wesley Longman Inc., p.55; I. Gürkan, p.176.

The Turkish Straits were once again a matter of international concern. Since Russia was isolated and cut off from any support coming through the Turkish Straits from its Allies, Germany obtained a considerable advantage by setting the Ottomans at its side, although the Ottoman's army was tired and weakened after Tripoli and the Balkan Wars. The control of the Straits, which were closed to all merchant ships and warships of the Allied powers as belligerent states, had a major impact in the course of the war. In February 1915, France and Great Britain undertook to open up the Turkish Straits with their naval forces. The first naval attack on Dardanelles failed against a strong defense of the Turkish army in the Strait on 18 March 1915, and the second attack also failed; thus the action had to be called off in January 1916. These attacks resulted in large losses to both sides and cost over five hundred thousand human lives. The strategic importance of the Straits was understood once more and the strong defense of the Straits extended the war by two years. In the end, it was experienced that it was impossible to get the Straits by fighting at the narrow. But, at the beginning of the attack, the Allies were sure to capture the Straits; they even agreed in some secret agreements on the partition of the Ottomans if they won the war. France and England reversed their old policy against the annexation of Istanbul and the Straits by Russia. They had agreed that Istanbul and the western shores of the Bosphorus, the Sea of Marmara and the Dardanelles, the coast of Asia Minor between the Bosphorus and the River Sakarya, Southern Thrace as far as a line Enes-Midia, the Island of Marmara, Gökçeada (Imbros) and Bozcaada (Tenedos) were all assigned to Russia. Italy subsequently also agreed to the partition of the Ottoman, receiving its share like the other Allied powers.<sup>264</sup> However, due to the Russian Revolution in September 1917 the annexation plan changed. The withdrawal of Russia from the alliance against the Central powers caused Russian politics on the Straits to change and a new secret agreement among the Allied powers without Russia about partition of the territory of the Ottomans to be signed. Since Russia had lost its previous power, it turned its all attention to internal problems giving priority to ensure its own security. In this context,

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<sup>264</sup> Y. Inan (1995), p. 20; P. G. Wobst, p.29; W. Linn, p.29. According to Macfie: "As a result the Russians, fearful of the long-term consequences of Anglo- French occupation on the Constantinople and the Straits, laid immediate claim to the area, and in the so-called Constantinople agreement of March 1915 secured allied recognition of their claim. ... During the following years the Allies (later joint by Italy) made a number of pacts including the MacMahon Agreement of July 1915-March 1916, the Sykes-Picot Agreement of 3 January 1916, and Tripartite agreement of 18 August 1917, which not only provided for the more or less complete partition of the Ottoman, but also laid the foundations for a series of bitter controversies in the post-war period." See: A. Macfie, p.56.



the Russian government signed a declaration under Lenin's leadership on 7 December 1917 and expressly disavowed any claim on Istanbul and the Turkish Straits.<sup>265</sup> Russia was not interested in free passage of Russian warships through the Straits anymore; for its own security concern it considered that the necessity was to prevent foreign warships from sailing in the Black Sea. When compared to the negotiations process of the Treaty of Berlin of 1878, the Russian position about the Straits regime changed again.

The war ended with the defeat of the Central powers and each of them signed an armistice treaty with the Allies. An armistice was signed with the Ottomans at Mudros on 30 October 1918 and under its terms the warships of the Allied powers entered the Turkish Straits and occupied the strategic points of the Anatolia including Istanbul. The Armistice contained a rigid condition for the Ottoman. In the first Article of the Armistice, the Ottomans had to accept the opening of the Straits and the occupation of all military facilities on both sides of the Straits and the Sea of the Marmara by the Allied powers. The article was:

“Opening of Dardanelles and Bosphorus and secure access to the Black Sea. Allied occupation of Dardanelles and Bosphorus forts.”<sup>266</sup>

The Armistice terms meant that the Ottomans renounced the “Ancient Rule” which they had held with some changes since 1453. There was no detailed regulation about the passage regime of the Straits in the above-mentioned Article, but it can be understood that the Straits from then on would not under Ottoman's sovereignty any longer. Moreover, the army would immediately be immobilized; all warships in Turkish waters or in waters under Turkish control would be surrendered. In addition, by Article 7 of the Armistice the Allies reserved the right to occupy strategic points of the Ottomans if situations should arise which threatened the Security of the Allies.<sup>267</sup>

## **2. Internationalization of the Straits and the Treaty of Sevres, 1920**

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<sup>265</sup> E. Brüel, Vol. II (1947), p.341.

<sup>266</sup> J. C. Hurewitz (1956), p.36.

<sup>267</sup> Oran, B. (2010). *Turkish Foreign Policy 1919-2006*. Salt Lake City: The University of Utah Press, p.61-62.

The Turkish Straits had been a major political and diplomatic problem among the powers for centuries, especially from the middle of the 18<sup>th</sup> century until the beginning of the 20<sup>th</sup> century. But, during World War I they became a war theatre. Due to their strategic position, the powers focused their attention on the domination of the Straits. As it was experienced, the next struggle of Allies was to make a treaty regarding the Straits. Since a new passage regime in the Straits would be shaped in favor of interests of the Allies while the Straits were under the pressure of them.

The Armistice of the Mudros continued for nearly two years. In this period the Straits were opened to all merchant ships and warships of all nations under the control of Allied powers especially British forces.<sup>268</sup> Furthermore a major part of the Ottoman soil on European side, in the Middle East, even in Anatolia, was occupied by the Allied powers. The Sultan's government in Istanbul had been working under the pressure of the Allied powers and these conditions triggered nationalist sentiments in Anatolia. Under the leadership of Mustafa Kemal Atatürk a liberation struggle of Turks began in Anatolia and a counter-government was established in Ankara. A program named National Pact (Misak-ı Milli) was adopted in the Istanbul Assembly on 28 January 1920, which was prepared in Ankara, approving goals of national independence, territorial integrity, and armed resistance to foreign occupation. Article 4 of the National Pact focused on the Straits question. The Straits problem was phrased by the National Pact as follows:

“The security of the City of Istanbul (which is the seat of the Khalifate of Islam, the capital of the Sultanate, and the headquarters of the Ottoman Government), and likewise the security of the Sea of Marmara must be protected from every danger. Provided this principle is maintained, whatever decision may be arrived at jointly by us and all other Governments concerned, regarding the opening of the Bosphorus to the commerce and traffic of the world, shall be valid.”<sup>269</sup>

Istanbul was formally occupied by Allied forces on 16 March 1920 and Parliament was closed. Only after a month, the Grand National Assembly was founded in Ankara on 23 April 1920. Istanbul was under the control of Allied forces under the leadership of Great Britain. Greece had also occupied north Thrace, moreover by

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<sup>268</sup> F. C. Erkin, p.52.

<sup>269</sup> A. Macfie, p.124; F. A. Váli, p.30.

gaining British consent; it occupied Western Anatolia including Izmir to attain its “Megali Idea”.<sup>270</sup> Under these conditions the Sultan was obliged by Allied powers to sign the Treaty of Sevres and the Treaty was concluded on 10 August 1920. The Treaty was signed almost two years after the Armistice, by virtue of disagreement among the Allied powers. It was prepared by the Allies to regulate the Straits regime in terms of their interest and to occupy the territory of the Ottoman; however the treaty of Sevres was never ratified by signatory parties.<sup>271</sup> Due to internal differences among Allied powers and the awakening of nationalist feelings of the Turks under the leadership of Mustafa Kemal Atatürk, who had established the Grand National Assembly in Ankara independently from the Sultan's parliament, the Treaty of Sevres was not ratified. After the World War the Allies tried to find a common solution to the management of the Straits and Istanbul. British opinion was that the Straits were supposed to be led by a commission. On the other hand, American perspective about international straits was liberal regulation, namely that the U.S. policy favored opening the international straits to merchant ships and warships.<sup>272</sup> American position on the Turkish Straits had already been declared by President Wilson on 8 January 1918. According to point twelfth of “President Wilson’s 14 Points”:

“... and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees”<sup>273</sup>

As will be seen, the Treaty of Sevres included President Wilson’s above-mentioned suggestion and the second section of the Treaty, namely that the articles between 37 and 61 regulated the Turkish Straits. Although the Treaty was not ratified and was not important in practice, it played a vital role in view of its effect on the next Treaties about the Turkish Straits and helped to understand later developments on the passage of the Straits. According to the Treaty, a Commission of the Straits was established to

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<sup>270</sup> B. Oran, p.70; Worbst, p. 33 and 39.

<sup>271</sup> Y. Inan (1995), p.22; N. Kurt, p.29; I. Gürkan, p.178.

<sup>272</sup> Howard, H. N. (January 1947). United States and the Problem of the Turkish Straits. *Middle East Journal*, Vol.1, No.1, S. 59-72.

<sup>273</sup> See: *President Woodrow Wilson's Fourteen Points*, <[http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp)>, (accessed August 14, 2017). See also; H. N. Howard (1947), p.63. According to Erkin; after the Mudros Armistice on 30 October 1918 the Wilson’s twelfth point had already began to apply in the Turkish Straits and the Straits was immediately opened to all ships of all nations. This was the first step to open the Turkish Straits for all ships including warships. See: F. C. Erkin, p.52.

ensure freedom of navigation through the Straits.<sup>274</sup> The Commission would be totally independent of Turkish authority and would have own a flag of its own. In the Commission while four Balkan and riparian states, Turkey, Greece, Bulgaria and Romania would have only one vote and each of the Allies power had two votes, which meant that the Straits were to be internationalized. According to Article 39 the Commission was responsible for all waters between the Mediterranean mouth of the Dardanelles and the mouth of the Bosphorus in the Black Sea, and within three miles from each mouth in both seas. Furthermore, when necessary, the Commission could exercise its authority on the shores. The zone of the Straits had to be demilitarized under Article 178, namely the Straits were neutralized. Under Article 37 it was provided that:

“The navigation of the Straits, including the Dardanelles, the Sea of Marmara and the Bosphorus, shall in future be open, both in peace and war, to every vessel of commerce or of war and to military and commercial aircraft, without distinction of flag. These waters shall not be subject to blockade, nor shall any belligerent right be exercised nor any act of hostility be committed within them, unless in pursuance of a decision of the Council of the League of Nations.”<sup>275</sup>

In addition, the passage of belligerent warships was regulated in Articles 56-60. The passage of all warships would take place under the responsibility of the Straits Commission. The Article 57 provided that the passage of belligerent warships through the Straits under the control of the Commission had to take place with the least delay and without any interruption other than the necessities that the service required. Ships were to be prohibited from increasing their crew or their supplies of war materials

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<sup>274</sup> The practice of Commission was experienced by Treaty of Paris of 1856 at Danube mouth in the Black Sea. See Chapter 2. In addition, the Straits Commission's prototype was also set up again for the Danube by Article 347 of the Treaty of Versailles of 1919. See *Library of Congress at* <<https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>> (accessed August 14, 2017)

<sup>275</sup> For Article 37 see The Treaty of Peace with Turkey signed at Sevres (August 10, 1920), Treaty Series No.11, London (1920). Regarding the Straits Commission Article 40 was so: “The Commission shall be composed of representatives appointed respectively by the United States of America (if and when that Government is willing to participate), the British Empire, France, Italy, Japan, Russia (if and when Russia becomes a member of the League of Nations), Greece, Rumania, and Bulgaria and Turkey (if and when the two latter States become members of the League of Nations). Each Power shall appoint one representative. The representatives of the United States of America, the British Empire, France, Italy, Japan and Russia shall each have two vote. The representatives of Greece, Roumania, and Bulgaria and Turkey shall each have one vote. Each Commissioner shall be removable only by the Government which appointed him. ”

carrying out repairs beyond those necessary to complete the passage and taking provisions of supplies on board beyond those indispensable to the completion of the passage through the Turkish Straits. Except in case of necessity warships were to be prohibited from remaining more than 24 hours in the Straits and 24 hours between the passages of two enemy warships had to elapse. Moreover, in war time, including special supplies of war material and contraband of war destined for the enemies of Turkey or provisioning the warehousing of goods or carrying out repairs in the Turkish Straits would be laid down by the League of Nations, which was instituted by the Treaty of Versailles of 1919.<sup>276</sup>

The Treaty of Sevres was never ratified, but all the same, above-mentioned navigation order devised by the Allied powers was valid, *de facto*, until the Strait Convention of Lausanne came into force on 6 June 1924.<sup>277</sup> Although it was an unratified Treaty, the Sevres dictate was the first agreement which attempted to abolish the regulation about the prohibition of passage of warships through the Turkish Straits, which had been applied nearly for five centuries. Other than this, the freedom of navigation laid down in the above-mentioned article appeared as something imposed upon a defeated enemy not ordinary international law. Since at that time, when freedom of navigation for merchant ships and warships had been established by the Sevres Treaty, such a concept regarding international straits had not existed under the ordinary rules of international law.<sup>278</sup>

### **3. The Lausanne Convention, 1923**

The national war concluded with the victory of the Turkish Army. The Turkish Army entered Istanbul and Eastern Thrace; the Sultanate was abolished and the Turkish Republic was founded on 29 October 1923. But before the new Republic, Turkey would

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<sup>276</sup> For Article 57 see The Treaty of Peace with Turkey signed at Sevres (August 10,1920), Treaty Series No.11, London (1920). The rule was laid down in Hague Convention XIII (1907) with respect to the passage of belligerent warships through neutral territorial waters.

<sup>277</sup> I. Gürkan, p.178.

<sup>278</sup> According to Brüel; "The Treaty of Sevres with all its faults was any rate consistent in that it tried to create, under the most unblushing camouflage of international law a regime most suited to wishes of the victors, while its successor, the Lausanne Convention formed a legal torso." See: E. Brüel, Vol. II (1947), p.356.

have to prove itself in a war against Allied powers, all of who had invaded also most of Anatolia following World War I. After the occupation of west Anatolia by Greece, Mustafa Kemal took immediate steps and managed the national war with the new Turkish Army, which had been formed with a large number of volunteers, to remove the Greeks from Anatolia. On the other hand, the young Turkish government had concluded a friendships agreement with Russia on 16 March 1921 and the agreement had also caused great alarm among the Allied powers.<sup>279</sup>

France was busy with Germany after the Versailles Treaty. Other than this, due to British Orient politics and Greek's privileged position in west Anatolia given by England, France and Italy were distrusted. They also moved their army from the European side of the Straits and England remained alone upon the victory of the Turkish army against Greece. At the end the Allies saw that they could not implement the Treaty of Sevres.<sup>280</sup> After the victory of the Turkish Army in the national war an armistice was signed in Mudanya (Mudania) on 11 October 1922 and then a peace conference met at Lausanne which was held from 20 November 1922 to 4 February 1923, and again from 23 April to 24 July of 1923. At the end of the negotiation period of the Treaty of Lausanne, a specific Convention regarding the legal status of the Turkish Straits<sup>281</sup> was signed between the victorious states and the riparian states of the Black Sea, namely Turkey, Great Britain, Greece, Bulgaria, France, Japan, Italy, Romania, Yugoslavia and later Soviet Russia on 24 July 1923. Soviet Russia was invited by Turkey to participate in sessions related to the Straits regime of the

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<sup>279</sup> According to Treaty of Friendship: Article I: "... The Government of R.S.F.S.R. agrees not to recognize any international agreement relating for Turkey which is not recognized by the National Government of Turkey, at presented by the Grand National Assembly." And Article V: "In order to assure the opening of the Straits to the commerce of all nations, the contracting parties agree to entrust the final elaboration of an international agreement concerning the Black Sea to a conference composed of delegates of the littoral States, on condition that the decisions of the above-mentioned conference shall not be of such a nature as to diminish the full sovereignty of Turkey or the security of Constantinople, her capital." See: J. C. Hurewitz (1956) , p.95.

<sup>280</sup> P. G. Wobst, p.39-42.

<sup>281</sup> Article 23 of the Lausanne Treaty was: "The High Contracting Parties are recognized and declare the principle of freedom of transit [original: *liberté de passage*] and of navigation, by sea and by air, in time of peace and in time of war, in the strait of the Dardanelles, the Sea of Marmara and the Bosphorus, as prescribed in the separate Convention signed this day, regarding the regime of the Straits. This Convention will have the same force and effect in so far as present High Contracting Parties are concerned as if it formed part of the present Treaty." See: pp.22-23 at <<http://treaties.fco.gov.uk/docs/pdf/1923/ts0016-1.pdf>> (accessed August 2017, 2017).

Conference.<sup>282</sup> At the Conference, as a head of delegation, V. Chicherine represented Russia, Ukraine and Georgia. During negotiations he spoke on behalf of Russia, Ukraine and Georgia and defended their interests as coastal states of the Black Sea.<sup>283</sup> Soviet Russia signed the Convention on 14 August 1923 but, finding its provisions unsatisfactory, the Russian government refused to ratify it.<sup>284</sup>

With the Treaty territories of the new Republic of Turkey were mostly determined and both Straits, the whole of the Sea of Marmara and Gökçeada (Imbros) and Bozcaada (Tenedos) at the entrance of the Dardanelles came under Turkish sovereignty. The Allied powers attached great importance to establishing a new liberal passage regime through the Straits with the interests of their own, particularly under the light of past experience in the Straits, they would prefer to conclude a permanent passage regime while the new communist regime, Soviet Russia, still had an internal consolidation problem and felt externally vulnerable.<sup>285</sup> At Lausanne Convention negotiations, representatives focused mostly on four issues regarding the Straits: freedom of passage, international guarantee, straits commission and demilitarization. The Allied powers mostly wanted to retain the regime of the Treaty of Sevres<sup>286</sup> and wished to internationalize the Straits, while Turkey tried to ensure its own security in the Straits area.

The Straits showed its strategic importance at the Conference once again. Although Russia was an Allied Power in World War I and with Great Britain and other western powers fought against the Ottoman, it took its place regarding the regulation of the Straits and the status of the Black Sea against the western powers. At the

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<sup>282</sup> Şimşir, B. N. (1994). *Lozan Tegraflari II [Lausanne Telegrams II]*. Ankara: Türk Tarih Kurumu Basimevi., p.200. Russia attended the Conference about regulation of the Turkish Straits upon invitation of Turkey. Turkey and Russia had already concluded by Friendship Agreement of 1921 acting together regarding the passage regime of the Turkish Straits. See: Y. Inan (1995), p.26. Additionally, Russia wished to join the Conference, because since the Armistice of Mudros safeguard the security of the Powers bordering on the Black Sea was not recognized by Allied Powers. See: A. S. Esmer, p.294. On the other hand, while the American Government refused to be represented officially at the Lausanne Conference of 1923, it agreed to send observers to the Conference. See: H. N. Howard (1947) , p.65.

<sup>283</sup> See; Meray, S. L. (1970). *Lozan Barış Konferansı – Tutanaklar, Belgeler [The Conference of the Lausanne Convention-Official Reports and Documents], Vol. I*. Ankara: Ankara Üniversitesi Basimevi, p. 132-141.

<sup>284</sup> J. C. Hurewitz (1956), p.120; F. A. Váli, p.33; Y. Inan (1995), p.30. As a legal consequence of disapproval of the Convention, Russia could not take part in the Straits Commission. See: Y. Inan (1995), p.31.

<sup>285</sup> N. Oral, p.239.

<sup>286</sup> C. L. Rozakis & P. Stagos, p.93.

Conference long discussions were held among old Allies. During negotiations, Russia abandoned its historic mission and adopted its standpoint that the Straits should be closed to warships of non-Black Sea powers and they should be subject to Turkey's full control. Whereas only a few years before, at the beginning of the World War, Russia as well as the Allied powers had argued for freedom of passage of their ships to secure assistance between Russia and the other Allies.<sup>287</sup> At the Conference Russia hoped that England might recognize the closing of the Straits. The security of the Black Sea was of vital importance for the Russian government, which still had economic problems after the revolution because 70% of Russian corn was still transferred via the Black Sea and the Sea of Azov at that time.<sup>288</sup> On the other hand, England adopted the standpoint that demilitarization and the opening of the Straits both in time of war and peace to warships of all nations on equal rights of riparian and non-riparian states. It was opposed to the control of any single power on the Turkish Straits. England did not desire the Black Sea to be a Russian zone; therefore it put forward its thesis starting from the premise of bringing the Black Sea into an international zone.<sup>289</sup> The riparian States supported the England's claim that warships should have the right of passage through the Straits. They were afraid of the next possible domination position of Russia in the Black Sea and on the Straits and they hoped to establish the regulation of navigation through the Straits under the League Covenant.<sup>290</sup> Furthermore, Bulgaria and Yugoslavia, besides opening the Straits to warships of all nations, propped establishing a commission to be

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<sup>287</sup> P. G. Wobst, p.37; F. C. Erkin, p.56.

<sup>288</sup> Şamsutdinov, A. M. (1999). *Mondros'tan Lozan'a Türkiye Ulusal Kurtuluş Savaşı 1918-1923 (translated from Osvoboditelnaya Voyna Turtsii) [National War of Turkey from Mondros to Lausanne 1918-1923]*. Istanbul: Doğan Kitapçılık A.Ş., p.319. The head of the Russian delegation Chicherine argued that on the grounds of the preservation of peace in the Black Sea and the maintenance of peace in the Near East required the protection of Straits against foreign attack. This is only possible by closing the Turkish Straits to all foreign war vessels in time of war and also in time of peace. He emphasized that closure of the Straits would preserve equality amongst all nations in return keeping the Straits open would only inure to the benefit of the strongest maritime power. To the consternation of British delegation Curzon, The Turkish delegation İnönü supported the Russian-Georgian-Ukrainian proposal. He claimed that the proposal was the most approximated one to the security interests of Turkey. This was alarming for the allied Powers and Curzon articulated their fears by pointing out that the closure of the Turkish Straits would only turn the Black Sea into a lake of Russia with Turkey. "The Russian proposal, according to Curzon, would simply allow Russia the freedom to prepare and implement its plans in either the Black Sea or the Caucasus free from the fear of attack from the outside." See: N. Oral, p.242. According to Inan, Russia changed its political aspect after World War I because it was at that time powerless and it was interested in only its security at the Black Sea region, and at that time it had no possibility to domination of the Straits and Istanbul. See: Y. Inan (1995), p.28. Russian standpoint will be changed again after the Second World War. See: Chapter 5.

<sup>289</sup> A. M. Şamsutdinov, p.319-322; A. S. Esmer, p.294; I. Gürkan, p.178; F. A. Váli, p.32.

<sup>290</sup> A. M. Şamsutdinov, p. 321; E. Brüel, Vol. II (1947), p.372.



responsible for passage regime through the Turkish Straits.<sup>291</sup> The U.S. also defended the complete freedom of commerce in the international straits. According to the American view; international straits were concern of all nations, that is why it could not accept the position that commerce in the Black Sea would be an exclusive affair of the riparian States and that the unlimited control of the Straits would be given to any single power.<sup>292</sup> On the other hand, from Turkey's perspective the Conference was a diplomatic challenge stage to constitute its sovereignty on its own soil. After four years of world war, the national war also continued nearly four years until the Mudania Armistice of 1922 in Anatolia. Therefore, besides the Straits problem, there were too many discussion points for Turkey at the Conference such as determination of the west border, the Aegean islands, the Mosul problem, capitulations etc. In relation to the Straits problem, Turkey was more interested in maintaining its sovereignty over the Straits area and it desired to ensure its safeguard and territorial integrity. The clause of demilitarization of the Straits area would therefore jeopardize its security. It struggled to ensure that passage of warships of other nations through the Straits would not jeopardize its security.<sup>293</sup> Since the Armistice of Mudros, Turkey had sought the risk of the clauses on demilitarization of the Straits area, it emphasized and defended during the negotiations that international guarantee and Straits Commission capacity would not be enough for its security and territorial integrity.

#### **4. The Legal Regime in the Lausanne Convention**

From the defeat of the World War I there was a *de facto* passage regime which provided full freedom of passage through the Straits. In this direction the Allied powers would like to conclude a free passage regime in the Straits and they insisted on completing the internationalization of the Turkish Straits. At the Conference, in view of internationalization of the Straits, there were debates about free passage for warships,

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<sup>291</sup> A. M. Şamsutdinov, p.322.

<sup>292</sup> H. N. Howard (1947), p.67.

<sup>293</sup> F. A. Váli, p.32; A. N. Ünlü, p.82; A. M. Şamsutdinov, p.323. According to Erkin; at the end of the Conference Turkey approached to the English proposal. This attitude created a big astonishment on the Russia, which supported full sovereignty of Turkey on the Straits during the Lausanne Conference. However, Turkey remembered the case of the Treaty of Hünkâr İskelesi in 1833, therefore it would not take a position only side of Russia against the western powers. See: F. C. Erkin, p.56.

the Straits Commission, demilitarization of the Straits and an international guarantee for Turkish security interests in the Straits area as well as in the demilitarization zone.

#### **4.1 Freedom of Passage and Navigation**

At the conference the discussion regarding the Straits regime and Russian and British views concentrated on the status of the Black Sea: whether the Black Sea was a “closed” sea to be regulated by littoral States or an “international” sea subject to international law.<sup>294</sup> After lengthy discussions, a modified British thesis was accepted and the Turkish Straits’ regime problem was resolved based on the principle of freedom of passage through the Turkish Straits. This rule was guaranteed under Article I:

“The High Contracting Parties agree to recognize and declare the principle of freedom of transit and of navigation by sea and by air in the Strait of Dardanelles. The Sea of Marmora and the Bosphorus, hereinafter comprised under the term of the “Straits”<sup>295</sup>

The freedom of passage right of merchant vessels, war vessels as well as of civil and military aircraft were regulated in case of time of war and of peace in an annex of the Treaty.

For merchant vessels and civil aircraft;

*In time of peace*, the Convention provided for merchant vessels<sup>296</sup> complete freedom of navigation and passage through the Straits by day and night under any flag with any kind of cargo, without any formalities, charge or tax unless it was for services such as pilotage (although use of pilots was to be optional), towage or lighting. And without prejudice to the rights exercised in that respect by the service and undertaking under concessions granted by the Turkish government. Moreover, merchant vessels passing through the Straits were to inform the signal stations appointed by the Turkish

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<sup>294</sup> N. Oral, p.240. The Russian delegation, Chicherine, rejected Curzon’s view that the Turkish Straits were similar to one another. He emphasized that they did not constitute a passage between two high seas but served only as an entry and exit for a closed sea.

<sup>295</sup> J. C. Hurewitz (1956), p.124.

<sup>296</sup> In the Treaty; hospital ships, yachts, fishing vessels and non-military aircraft were also categorized as merchant vessels.

government about their name, tonnage, nationality and destination, although those provisions restricted the freedom of navigation.

*In time of war while Turkey was neutral*, the provisions provided for merchant vessels complete freedom of navigation and passage by night and day under the same conditions as above. Pilotage remained optional and it was emphasized that as a neutral state the duties and rights of Turkey could not authorize it to take any measures to interfere with navigation in the Straits or flight in the air of the Straits area.

*In time of war while Turkey was belligerent*, freedom of navigation for neutral vessels was made conditional whether they assisted the enemy, particularly by carrying troops, contraband or enemy nationals. If the merchant vessels and non-military aircraft did not assist the enemy, they might pass the Straits. Turkey had the right to visit and search vessels or aircraft and for that purpose aircraft were required to alight within certain areas specified by Turkey. Turkey had full power to take any necessary measures to prevent enemy vessels from using the Turkish Straits. But, these measures were not to prevent the free passage of neutral vessels.<sup>297</sup>

For warships and military aircraft;

*In time of peace*, in principle complete freedom of passage was accepted for warships<sup>298</sup> and military aircraft. However, there would be some restrictions regarding the total tonnage of warships. According to Annex Article 2a:

“... The maximum force which any Power may send through the Straits into the Black Sea is not to be greater than that of the most powerful fleet of the littoral Powers of the Black Sea existing in that sea at the time of passage; but with the proviso that the Powers reserve to themselves the right to send into the Black Sea at all times under all circumstances, a force of not more than three ships, of which no individual ship shall exceed 10.000 tons.”<sup>299</sup>

In this provision seems that Russia was protected against the domination of any one non-riparian power. However, it could not protect Russia as well as the Black Sea

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<sup>297</sup> Annex Article 1a and 1b. See The Treaty of Peace with Turkey, and Other Instruments (Lausanne on July 24, 1923), Treaty series No.16, London (1923), p.113-115.

<sup>298</sup> In the Treaty, fleet auxiliaries, troopships, aircraft carriers and military aircraft were also categorized as warships.

<sup>299</sup> See Annex Article 2a, The Treaty of Peace with Turkey, and Other Instruments (Lausanne on July 24, 1923), Treaty series No.16, London (1923), p.115.

powers against the superiority of an alliance of non-riparian powers. In other words, each non-riparian state could send up to 10,000 tons and, if any alliance power was taken into account, the riparian states could not hold superiority in the Black Sea. Additionally, Turkey had no responsibility or legal obligation for regulating the number of warships which passed through the Straits. The Straits Commission was tasked to inform the powers twice in a year about the number of warships of each Black Sea coastal State.

*In time of war while Turkey was neutral*, neutral warships and military aircraft could pass through the Straits under the same conditions as in time of peace. Turkey as a neutral power could not take any measure to interfere with the navigation through the Straits or flight in the air above, namely that Turkey could not take any measures to prohibit any passage of neutrals even if its security were in danger. In other words, the sovereign rights of Turkey were limited. In addition, belligerent warships and military aircraft could pass through the Straits but they were forbidden to make any capture, to exercise search and visit, or to carry out any other hostile act in the Turkish seas or territories.

*In time of war while Turkey was belligerent*, the provision provided the freedom of passage for neutral warships and military aircraft without any formalities or charge or tax, if they did not assist an enemy of Turkey. Moreover, for safe passage Turkey would help neutral warships by providing necessary instruction or pilots. The measures taken by Turkey against enemy powers were not to be of such a nature as to prevent the free passage of neutral ships and aircraft. However, enemy warships and military aircrafts were excluded from passing the Turkish Straits. This rule was too liberal as far as wartime was concerned. In case of war, this Article made Turkey vulnerable against any enemy attack because in the straits, as a theater of war, each power could take some measures for its security.

In addition, by Article 3 of the annex the passage of submarines was regulated. Submarines of powers at peace with Turkey could pass through the Straits on the surface, with the sole condition that the officer in command of a foreign naval force

should inform the station located at the entrance of the Bosphorus and Dardanelles about the number and name of the vessels.<sup>300</sup>

## **4.2 Straits Commission**

In view of internationalization of the Straits, the next discussion point was constitution of the Straits Commission, which would have broad control over the Straits and the clauses on passage and demilitarization. Turkey argued that such a broad authority would infringe on its sovereignty both in the waters and in its own territory. As a result, the Straits Commission was composed of a representative of Turkey to be the president of the commission, and representatives of Great Britain, Italy, France, Japan, Bulgaria, Greece, Romania, Russia, and Yugoslavia. The Commission's function was to implement the measures under the auspices of the League of Nations and convey to the League an annual report giving an account of passages through the Straits. The reports were to include all information for the interest of commerce and navigation.<sup>301</sup> Thus, the Turkish Straits were internationalized.

In practice, internationalization of the international straits had not become a traditional standardization. With President Wilson's 12<sup>th</sup> point the discussion emerged on the world scene and it also provided that the powers could act in their own interest. The internationalization was also discussed in 19<sup>th</sup> century, but its application on the international Straits did not become a rule of international law.<sup>302</sup> For the first time, during the negotiations of 1856 Paris Treaty, the Russian representative Gortschakow proposed opening of the Turkish Straits to warships of all nations. But, as base of international law, the internationalization of the Turkish Straits was proposed by Russian international law experts Gigaref and Graf Komorowsky. They had defended the internationalization of the Turkish Straits transmission from the agreement of the Suez Channel.<sup>303</sup>

## **4.3 Demilitarization of the Straits and International Guarantee**

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<sup>300</sup> Ibid. P117.

<sup>301</sup> Ibid.p.125. Articles 10-16.

<sup>302</sup> P. G. Wobst, p.36. See more information in Chapter 6.

<sup>303</sup> Ibid.

Another discussion point was demilitarization of the Straits. According to Articles from 4 to 9 of the Lausanne Convention, both shores of the Bosphorus and Dardanelles up to a line as much as 15 kilometers from the Bosphorus coast and up to 20 kilometers from the Dardanelles in some places would be demilitarized. In addition, the islands in the Sea of Marmara except Emir Ali Adası, in the Aegean Sea the Turkish islands of Gökçeada, Bozcaada and Rabbit Islands and the Greek islands of Lemnos and Samothrace were demilitarized. Within the demilitarized zone neither Turkey nor Greece were not allowed to maintain fortifications, submarine engines of war other than submarine vessels, permanent artillery organization, military aerial organization or naval bases. Moreover, no armed forces were to be stationed there except for police forces with small arms.<sup>304</sup>

For the Security of Istanbul a special regime was concluded under Article 8. This provision allowed Turkey to maintain a garrison with a maximum strength of 12,000 men, to have a naval base and an arsenal. As an exception to the demilitarized zone, Turkey was allowed to transport its troops by sea and air and it could organize a system of observation, move military personnel and send a fleet through its territorial waters.

The demilitarization regime covered not only the Straits but also extended to the territorial waters of Turkey around the Straits. However, although all islands except Emir Ali Adası were demilitarized, the measures of demilitarization did not include the Sea of Marmara as an inland sea, as far as coasts and its waters were concerned; there were some clauses limiting the absolute right of Turkey to use its land and sea freely. The demilitarization measures were a serious restriction to the territorial sovereignty of Turkey in time of peace and these measures also caused Turkey's defense capability to diminish.

On the other hand, due to the demilitarization's clauses, Turkey was unable to defend its security in the Straits and secure the freedom of navigation. Turkey tried to gain a collective and individual guarantee from the powers for the entire demilitarized area. But, extending an absolute guarantee to the area left the Allies unprepared and

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<sup>304</sup> Article 4-9 of the Treaty of Lausanne see p.121-123 at <<http://treaties.fco.gov.uk/docs/pdf/1923/ts0016-1.pdf>> (accessed August 2017, 2017).

they particularly wanted to ensure the security of freedom of passage. Article 18 an international guarantee was defined as follows:

“The High Contracting Parties, desiring to secure that the demilitarization of the Straits and of the contiguous zones shall not constitute a justifiable danger to the military security of Turkey, and that no act of war should imperil the freedom of the Straits or the safety of demilitarized zones, agree as follows: Should the freedom of navigation of the Straits or the security of the demilitarized zones be imperiled by a violation of the provisions relating to freedom of passage, or by a surprise attack or some act of war or threat of war, the High Contracting Parties, and in any case France, Great Britain, Italy, and Japan, acting in conjunction, will meet such violation, attack, or other act of war or threat of war, by all the means that the Council of the League of Nations may decide for this purpose.”<sup>305</sup>

Other than the above-mentioned provisions the Allied powers desired to set the Convention in a general character. Due to Article 19, the signatories undertook to use every endeavor to induce other states to accede to this Convention.

Article 18 gave the Allies a permanent right to keep control on application of the Convention. It provided same equal status security of the demilitarized area and security of free passage against any external or internal threats. It supplied an international guarantee under the League of Nation. Thus, the constitutions of the Straits Commission and establishment of an international guarantee legitimized the interference of the Allies in any event in the Straits area. However, it must be remembered that Turkey was not yet a member of the League of Nation in 1923; it gained membership in 1932. On the other hand, the effectiveness of the international guarantee was unclear. What kind of violation required the international guarantee? An attack? A threat of war? Or, an act of war? What measures should be taken by the League of Nations? This provision contained many risks to Turkish security interest in the Straits area. The combination of the conditions of unanimity obligation in sessions for the action of the League, presence of other members of the League other than guarantor states (Great Britain, France, Italy and Japan) in the decision-making process and absence of any representative of Turkey in sessions of the League might cause a risk to territorial integrity of Turkey.<sup>306</sup>

As a result, with the Lausanne Convention the Black Sea states' monopoly weakened. The Turkish supremacy on the Turkish Straits ended and the Straits were

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<sup>305</sup> Ibid.p. 127.

<sup>306</sup> C. L. Rozakis & P. Stagos, p.99.

internationalized by the intervention of the western powers. Moreover, for merchant vessels more freedom provided which had been restricted with the Adrianople Treaty of 1829 and warships of all nations also gained passage right through the Straits in time of war and peace. In other words, the long-standing Ottoman rule, which had been continued by treaties between the owner of the Straits and other powers, was formally abolished. On the other hand, when compared to the Treaty of Sevres, the Convention of Lausanne laid down freedom of navigation as a principle not as something imposed upon conquered soil. Nevertheless restrictions such as neutralization, demilitarization, international control and guarantee were in reality like a camouflage to hide the political clauses of the Treaty of Sevres. Besides establishing *de facto* control in the Straits area by the Allies, the regulation of passage regime of the Turkish Straits remained to be regulated again by a treaty under the political anxieties of powers. Moreover, the provisions of the Treaty could not solve the Turkish security problem in the Straits area and Russian security demand in the Black Sea region either. On account of the above-mentioned reason the Convention was not ratified by Russia. It meant, the legal status of the Turkish Straits was concluded again by political changes in the world and it would also be affected from the next possible political changes after signing of the Lausanne Convention.

## **CHAPTER 4 The Montreux Regime of the Turkish Straits**

### **1. The Montreux Conference, 1936**

After the Lausanne Convention, young Turkey began to establish a new friendly policy completely free from prejudices. It made a great effort to reach regional cooperation and In this context it concluded friendship agreements with Germany in 1924, with Russia in 1921 and 1925, with Afghanistan in 1921 and 1928 and with Persia in 1926. In this direction, Turkey concluded a treaty of friendship and good neighborliness with France in 1926 and in addition, a treaty regarding the Mosul question between England and Turkey was concluded in 1926. After the resolution of the Mosul problem Turkey became a member of League of Nations in 1932. Moreover,



Turkey established friendly relations with Balkan States and it signed the Balkan Pact with Greece, Bulgaria and Yugoslavia in 1934.<sup>307</sup>

On the other hand, fundamental changes in the political circumstances in the international environment as well as changes in the Mediterranean contributed to premature obsolescence of the provisions of the Lausanne Convention of 1923. It was a typical post-war treaty and its clauses contained many risks to the security and integrity of Turkey and additionally, Turkish sovereign rights were restricted. After World War I, it seemed to the Allied powers completely realistic to be on the road toward disarmament and to give a guarantee under the League of Nations' security system.<sup>308</sup> However, political changes showed that the attempts of the League of Nations with regards to disarmament were not enough and that the guarantee of the League could not assure the stability of world peace.

The international political climate changed dramatically by the invasion Manchuria by Japan, as a member of the League, in 1933. Upon this event the League of Nations could not apply any sanctions to Japan. Turkey was aware of the approaching danger in the Straits area by virtue of demilitarization clauses and on 23 May 1933 at the Conference General Commission in London, whose subject was disarmament, it requested the cancellation of the demilitarization clauses of the Lausanne Convention. But, on the grounds that the request did not concern the Conference, it was refused.<sup>309</sup> Furthermore, Hitler's Germany began to rearm in 1934. Upon these developments, the Turkish Foreign Minister Tevfik R. Aras demanded clauses of the Lausanne Convention to be changed at the sessions of the League of Nations in April 1935 and in September 1935. Although this demand was supported by the Soviet Russian representative at the session, it was ultimately refused. Italy, another member of the League, occupied Ethiopia in 1935 and at the beginning it did not encounter any serious sanctions from the League. Moreover, Italy began to remilitarize the Dodecanese Island in the Aegean Sea in 1935.<sup>310</sup> In other words, the balance in the Mediterranean was damaged. This was both a source of anxiety for Turkey regarding the Straits area and a threat for the

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<sup>307</sup> B. Oran ,p.168-211.

<sup>308</sup> F. A. Váli, p.34.

<sup>309</sup> Meray, S. I., & Olcay, O. (1976) *Montrö Boğazlar Konferansı – Tutanaklar, Belgeler [The Conference of the Montreux Convention-Official Reports and Documents]*. Ankara: Ankara Üniversitesi Basımevi, p.1; Y. Inan (1995), p.42.

<sup>310</sup> Y. Inan (1995), p.43.

interests of other nations in the Mediterranean. Turkey considered the collective guarantee too slow and felt itself unsecure, as the two guarantor states of the Lausanne Convention – Italy and Japan – were aggressively pursuing their interests. The Convention provided some clauses for when Turkey was belligerent or a neutral, but there were no clauses for threat of war and there was no provision to allow Turkey to defend itself in such cases.

The post-war peace treaties, the Versailles Treaty and the Lausanne Convention had a special place in the new system established by Allied powers. On 7 March 1936, Germany entered the demilitarized Rhineland in 1936 in violation of the Versailles Treaty of 1919 and Locarno Convention of 1925 and then it unilaterally declared itself no longer bound by Locarno Agreement.<sup>311</sup> This meant the abolition of the Versailles Treaty and the guarantee system of League of Nations. These political developments showed that the struggle of the League of Nations regarding the limitation of armament and disarmament remained inconclusive. Therefore, an occasion to change the provisions of the Lausanne Conference appeared.<sup>312</sup> Turkey's preference was to solve the Straits problem diplomatically. As such it sent a note to the signatories of the Lausanne Convention on 10 April 1936.<sup>313</sup> Instead of freeing itself through a unilateral declaration, Turkey informed the signatory states that it was ready to negotiate the clauses of the Lausanne Convention. Turkey based its claim on the *clausula rebus sic stantibus* and it argued that the situation at the time was totally different from the period when the Convention was signed. The note proposed that the political situation in the Black Sea had become more peaceful, but in the Mediterranean the balance had been damaged and rearmament on land and sea had increased. Additionally, during this complete change of conditions, while the powers most closely concerned were proclaiming the existence of a threat, Turkey was exposed to great danger at its most vulnerable point – namely at the Straits area. Moreover, Article 18 of the Convention had been prepared to act as a counterbalance, but the political changes had shown that the guarantee mechanism could not work in these circumstances, therefore the Straits

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<sup>311</sup>Deutsch, R. (1971). *Die Entstehung des Meerengenvertrages von Montreux 1936*. Bukarest: Akademieverlag, p.28-31; E. Brüel, Vol. II (1947), p.385.

<sup>312</sup> According to Deluca; "... The Foreign Office was willing to recognize that the only provisions of the other post-war treaties which were 'to some extent' analogous to the provision of the Lausanne settlement of the Straits and Thracian zones were those providing for demilitarization of Rhineland. But London was careful not to admit this connection in public so as to avoid linking German question with that of the Straits." See: A. R. Deluca, p.20.

<sup>313</sup> S. I. Meray & O. Olcay, p.3.

were not still ensured by a real guarantee. In this regard, the guarantee was ineffectual, and the condition was broken. It meant that based on *rebus sic stantibus* it would be up to Turkey to terminate the legal status of the Straits by using the Lausanne Convention. However, in its note Turkey emphasized that from the beginning of its existence, the Turkish Republic had followed a policy of peace and understanding and that Turkey was ready to negotiate for the conclusion of a new Straits Convention which might secure a liberal commercial navigation between the Black Sea and the Mediterranean, in addition to the security of Turkey's territory.<sup>314</sup>

The peaceful attitude of Turkey in its note did not meet any real opposition from the signatory states of the Lausanne Convention. The note was promptly supported by Soviet Russia, who hoped that a new regime of the Straits would better suit its interests than the Lausanne Convention, which had never been ratified by the Soviet government. This is because, like Turkey, Soviet Russia was very interested in securing protection for its sensitive Black Sea coast and the industrial region of the Ukraine.<sup>315</sup> In addition, England had changed its policy regarding Turkey because of the damage to the balance in the Mediterranean, and it supported the Turkish suggestion alongside France. On the other hand, as riparian states, Bulgaria hoped in this way to find an opportunity to change the Neuilly Treaty, and Romania expressed its favorable response.<sup>316</sup> Turkey met with positive responses because it had chosen a favorable time to express its wish for revision. It made efforts to reach an amicable solution an exemplary way which could prove that the states were able to resolve conflicts at the negotiation stage. The next step was to discuss the question of the Straits at a conference, which was taken as a decision through diplomatic channels. Turkey began to prepare a draft Convention to change the existing Straits regime.<sup>317</sup>

The international conference was held in Montreux from 22 June to 20 July 1936 and except Italy all the signatories of the Lausanne Convention - Australia, Great

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<sup>314</sup> R. Deutsch, p.32; Y. Inan (1995), p.45; A. N. Ünlü, p.98; A. R. Deluca, p.30-31; Günes, S. (2007, December). Türk Bogazlari [Turkish Straits]. *ODTÜ Gelisme Dergisi* 34, pp. 217-250.

<sup>315</sup> C. L. Rozakis & P. Stagos, p.102; F. A. Váli, p.35.

<sup>316</sup> Y. Inan (1995), p.46. "Thus, it had obviously become clear to most contemporary observers that Turkey's behavior as 'the good boy' of Europe, in comparison with the conduct of the most recent and blatant violators of the League Covenant and the Versailles system, had proven a sound political investment." See: A. R. Deluca, p.27.

<sup>317</sup> C. L. Rozakis & P. Stagos, p.102; R. Deutsch, p.34.

Britain, Bulgaria, France, Greece, Japan, Romania, Turkey, Soviet Russia and Yugoslavia – were represented at the conference.<sup>318</sup>

At the Conference Turkey first offered a draft Convention, which contained a proposal for ensuring Turkish Sovereignty over the Straits area again. The draft proposed changes to clauses of the Lausanne Convention regarding demilitarization, the Straits Commission and the international guarantee.<sup>319</sup> The Turkish proposal made no reference to the Straits Commission and left intact the principle of freedom of passage for merchant vessels; however, it contained provisions to modify the passage of warships and the flight of military and civil aircraft over the Straits. Turkey proposed some limitations on the tonnage of warships passing through the Straits, the total tonnage and allowed duration of the non-riparian warships in the Black Sea. Additionally, the proposal described the closing of the Straits to submarines and aircraft at all times and to all foreign warships in time of war.<sup>320</sup> In this way, Turkey attempted to show that it was mainly interested in being secured against possible dangers from foreign warships passing through the narrow Turkish Straits and the restoration of its sovereign rights over the Turkish Straits area.

The Soviet Russian view was that, in principle, foreign warships could not enter the Black Sea. In other words, the Black Sea should be closed to all warships of non-

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<sup>318</sup> S. I. Meray & O. Olcay, p.3, p.15-20 and p.37-38. At the beginning Italy wanted to attend the Conference, because it thought that demilitarization of the Straits was an act against its interest in the Mediterranean. In this regard, Italy suggested support of Turkey in other areas in turn of its acceptance of the remilitarization, but Turkey disapproved. "In May, Baron Aloisi had suggested that Italian acceptance of the remilitarization of the Straits might be made easier, if Turkey would be prepared to give Italy a greater measure of support in other areas." See: A. R. Deluca, p.33. In the end, Italy did not participate in the Conference because it considered the meeting of the conference untimely, but it reserved for itself all rights stemming from the Lausanne Convention. See: F. A. Váli, p.36; E. Brüel, Vol. II (1947), p.389. Finally, it acceded to the Montreux Convention on 2 May 1939. Y. Inan (1995), p. 47.

The British Empire, which was a signatory of the Lausanne Convention, had become the British Commonwealth. Hence, the government of Australia and the government of United Kingdom of Great Britain sent a representative. However, New Zealand, Canada, India, the Irish Free State did not participate in the Convention but they informed the conference that they had no objection against the revision of the clauses of the Lausanne Convention. See: R. Deutsch. P.35; S. I. Meray & O. Olcay, p.3.

The U.S did not attend the Montreux Convention because it was not a signatory state of the Convention of Lausanne. It was interested in freedom of navigation through the Straits and the Lausanne Convention also supplied its expectation. See: H. N. Howard (1947), p.65-68.

<sup>319</sup> According to Brüel: „The Turkish proposal went far beyond remilitarizing the Straits which was asked for during the preliminary negotiations and which was the only alteration in the Lausanne Convention which could be based on what had happened since that time. She utilized the occasion to get the legal status of the Straits completely revised.“ See: E. Brüel, Vol. II (1947), p.391.

<sup>320</sup> R. Deutsch, p.134, 210 and 234.

riparian states except for friendly visits or navigation for humanitarian reasons. Although Russia was fully in accord with the Turkish draft regarding the limitation of passage of warships and the remilitarization of the Straits area, it disagreed with any limitation to the passage of warships of riparian states. On the contrary it argued that the warships of the riparian states should pass through the Straits without any limitation.<sup>321</sup> It sought to create a similar legal status to that which it obtained in the Treaty of Hünkâr Iskelesi of 1833.<sup>322</sup> But other than this, it supported passage of warships performing missions in accordance with decisions of the League of Nations. Behind Russia's view was the mutual assistance agreement with France in 1935. It was interested in the security of the Black Sea shores, including its industrial region in Ukraine, against possible threats of German or Italian attack.<sup>323</sup> By virtue of the Franco-Russian assistance agreement, France took place Russian's side except Russian desire concerning the Black Sea to be a closed sea.<sup>324</sup>

The British position at the Conference was freedom of passage for all ships through the Straits. Britain and Australia strongly emphasized that the Black Sea was a part of the high sea and it could not be closed to the navies of any nations. England agreed with Turkish proposal to change the passage regime of Lausanne Convention, but it defended reserving the Straits Commission.<sup>325</sup> In virtue of the peculiar geographical situation of the Black Sea and the Straits it was ready to accept some limitations. Since 1774 the Straits had been regulated by special treaties under political interest, however, this time, the rearmament of some countries could have destructive results in the Black Sea region. Besides some restrictions, it would establish a passage balance as in the Lausanne Convention, namely that riparian or non-riparian war vessels could pass in both directions without limitation. The British desire for the free passage of all ships was the exact situation that Turkey and Soviet Russia wished to avoid.<sup>326</sup> This is because the unlimited passage of all types of warships entailed a vital threat to Turkey in the narrow Straits, and it had been struggling to free itself from such threats since the Mudros Armistice in 1918. As for Russia, the passage and unlimited stay of foreign

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<sup>321</sup> S. I. Meray & O. Olcay, p.44-45.

<sup>322</sup> E. Brüel, Vol. II (1947), p.390.

<sup>323</sup> C. L. Rozakis & P. Stagos, p.103.

<sup>324</sup> F. A. Váli, p.38.

<sup>325</sup> S. I. Meray & O. Olcay, p.44.

<sup>326</sup> C. L. Rozakis & P. Stagos, p.103.

warships in the Black Sea was a situation against which Russia had fought for many centuries.

The riparian states of the Black Sea, namely Bulgaria and Romania, supported Soviet Russia with respect to the closure of the Black Sea to foreign warships. Other than this, Romania favored a new Convention with a connection to a collective security system, because it was opposed to giving an uncontrollable right to Turkey to allow foreign ships into the Black Sea. On the other hand, Japan disagreed with British opinion by objecting to opening the Straits to Russian warships. Japan was not a member of the League of Nations anymore and in case of war it could not be involved in any decision to close the Straits, therefore it wanted to limit Soviet Russian expansion in the Pacific Ocean.<sup>327</sup>

Generally, at the Conference England's proposal was on one side with the support of Japan, and Turkey's proposal was on the other side with the support of the riparian states of the Black Sea and France. England insisted for the Straits Commission, arguing that the existence of an international commission had a vital role in collecting statistics and furnishing relevant information to the signatories. However, Turkey was strongly opposed to the existence of such an organization and offered to take over the responsibilities and tasks of the Straits Commission. After constructive general discussions at the plenary session, on 25 June it was agreed to meet again on 6 June. Concurrently the technical committee, which consisted of naval and other experts and was established at the beginning of the Conference, worked on the Turkish proposal in order to prepare the new Convention, in light of the general discussions of the plenary sessions. But two days before the renewed plenary session, England proposed a new draft text that was a revised form of the Turkish proposal. England's proposal recommended some changes to, for example, tonnage limitations and the duration of warships in the Black Sea; the application period of the passage permission; and its proposal presented possibilities for warships to enter the Black Sea for humanitarian reasons under the control of League of Nations, and so on.<sup>328</sup> Questions related to both

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<sup>327</sup> C. L. Rozakis & P. Stagos, p.103-104.

<sup>328</sup> R. Deutsch, p.45; At the second session of the Conference a technical and a writing Commission were established. See: S. I. Meray & O. Olcay, p.47; R. Deutsch, p.39.

proposals were discussed and adopted in the new Convention and finally, on 20 July 1936 The Convention Regarding the Regime of the Straits was signed in Montreux.<sup>329</sup>

The Convention makes an initial distinction between warships and merchant vessels. The body of the Convention contains five sections: merchant vessels, warships, aircraft, general and final provisions. Moreover, the passage of the merchant vessels and warships are categorized whether the passage takes place in time of war or peace and whether Turkey is belligerent or neutral. Additionally, there are four annexes and a protocol of the Convention.

## **2. The Legal Status of the Turkish Straits under the Montreux Convention<sup>330</sup>**

### **2.1 Freedom of Passage and Navigation**

The Preamble defines the “Straits” as comprising the Bosphorus, the Sea of Marmara and the Dardanelles. Furthermore, the Preamble expresses that the Convention aimed to regulate the passage regime in the Turkish Straits – concluded by Article 23 of Lausanne Treaty of 1923 – and safeguard of both the security of Turkey in the Straits and the security of the other riparian states in the Black Sea region.

“Desiring to regulate passage and navigation in the Straits ... within the framework of Turkish security and of the security, in the Black Sea, of riparian States, the principle enshrined in Article 23 of the Treaty of Peace signed at Lausanne on the 24<sup>th</sup> July, 1923; have resolved to replace by the present Convention the Convention signed at Lausanne on the 24<sup>th</sup> July, 1923...”<sup>331</sup>

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<sup>329</sup> The authentic version of the Montreux Convention of 1936 is in French. S. I. Meray & O. Olcay, p.IX. The Ministry of Foreign Affairs of the Republic of Turkey. (2013). *Rapport Annuel – Sur Le Mouvement Des Navires A Travers Les Detroits Turcs*. Ankara: The Ministry of Foreign Affairs of the Republic of Turkey, p.5 and 28.

<sup>330</sup> For complete text of the Montreux Convention see Annex.

<sup>331</sup> Ibid. The official translation of the Convention is “freedom of transit passage” instead of “freedom of passage and navigation”. The original text in French was “la liberté de passage”. On the other hand, a new legal regime called “transit regime” was created by the Law of the Sea Convention of 1982. There is no connection between two cases, but to avoid of any misunderstanding it will be used in this study as “freedom of passage and navigation”. For translation from French to English see S. I. Meray & O. Olcay, p.479, 495. For more information see Chapter 6.

The guiding principle of the Convention was laid down by Article I. The principle of “freedom of passage and navigation in the Straits” was reiterated in the Convention and this principle placed outside the individual sections. According to Article 28, although the Convention can be denounced with two-years notice after a duration of twenty years, the principle of freedom of passage and navigation in the Straits should continue to be observed without any time limit. In other words, while the Convention is subject to denunciation, “freedom of passage in the Straits” is defined as an unchangeable principle of the future Conventions regulating the Turkish Straits. According to Articles 1 and 28:

“The High Contracting Parties recognize and affirm the principle of freedom of passage and navigation by sea in the Straits.” (Article I) and “... The principle of freedom of passage and navigation affirmed in Article I of the present Convention shall however continue without limit of time...” (Article 28)

As a principle “freedom of passage” through the Straits is guaranteed without any time limit. This means that freedom of navigation through the Turkish Straits was established without end. For the first time in the long history of the Turkish Straits, freedom of passage through the Straits was referred to as “a principle.” The Turkish Straits had not traditionally enjoyed freedom of passage and navigation. The freedom of passage was not a deeply-rooted principle in international law and it was added to the Montreux Convention as relatively recent practice in the 20<sup>th</sup> century.<sup>332</sup> Would freedom of use be open to all vessels without any restrictions? In other words, could all vessels pass through the narrow Turkish Straits without any limitation? The second paragraph of Article I and the other Articles of the Convention regarding the warships passing the Straits mention points such as tonnage and number limitation, duration limitation in the Black Sea, and the notification requirement for passage permission etc. Taken together, these proved that the passage might be regulated. The second paragraph of Article I provides that “the exercise of this freedom shall henceforth be regulated by the provisions of the present Convention.” However, the provision was interpreted differently by Turkey and other users and over the course of time some disagreements have emerged. In the interests of secure passage, Turkey has argued that it can take

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<sup>332</sup> C. L. Rozakis & P. Stagos, p.105.



some necessary measures and regulate the passage in the Straits, while some user states have claimed that Turkey has prohibited freedom of passage through the Straits.<sup>333</sup>

In the Montreux Convention, the passage of merchant ships, warships and aircraft through the Straits is also categorized according to the traditional categories of “time of peace” or “time of war” as in the Lausanne Convention. Yet in contrast to its predecessor, a new category was added in the new Convention: “When Turkey considers herself to be threatened with imminent danger of war”.

### **a) Merchant Vessels**

Merchant vessels are defined in Article 7 so that “the term ‘merchant vessels’ applies to all vessels which are not covered by Section II of the present Convention”. Because Section II relates to warships, merchant vessels are defined as being everything except warships, which are identified in the Annex II of the Convention.

*In time of peace*, the Convention provides freedom of passage for merchant vessels through the Straits which is regulated by Article 2, Article 3 and Annex I. For an interpretation of the Convention all three conditions should be taken into consideration:

“In time of peace, merchant vessels shall enjoy complete freedom of passage and navigation in the Straits, by day and by night, under any flag and with any kind of cargo without any formalities, except as provided in Article 3 below. No taxes or charges other than those authorized by Annex I<sup>334</sup> to the present Convention shall be levied by the Turkish authorities on these vessels when passing in transit without calling at a port in the Straits.

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<sup>333</sup> It will be discussed in Chapter 6.

<sup>334</sup> Annex I: “The taxes and charges which may be levied in accordance with Article 2 of the present Convention shall be those set forth in the following table. Any reductions in these taxes or charges which the Turkish Government may grant shall be applied without any distinction based on the flag of the vessel.” In the table, service is regulated according to the tonnage of ships and payment type is in Francs gold. The categories of the service are: Sanitary Control Stations, Lighthouses, Light and channel, Life Saving Services including Life-boats, Rocket Stations, Fog Sirens, Direction-finding Stations, and day Light Buoys and other similar installations. See: Rapport Annual-The Ministry of Foreign Affairs of the Republic of Turkey. (2013). *Rapport Annual – Sur Le Mouvement Des Navires A Travers Les Detroits Turcs*. Ankara: The Ministry of Foreign Affairs of the Republic of Turkey, p.41.

In order to facilitate the collection of these taxes or charges, merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 their name, nationality, tonnage, destination and last port of call (provenance). Pilotage and towage remain optional.” (Article 2)

“All ships entering the Straits by the Aegean Sea or by Black Sea shall stop at sanitary station near the entrance to the Straits for the purposes of sanitary control prescribed by Turkish law within the framework of international sanitary regulations. ... Vessels which have on board cases of plague, cholera, yellow fever, exanthematic typhus or smallpox, or which have had such cases on board during the previous seven days, and vessels which left an infected port within less than five times twenty hours shall stop at the sanitary stations indicted in the preceding paragraph in order to embark such sanitary guard as the Turkish authorities may direct. ... ” (Article 3)

The complete freedom of passage for merchant vessels through the Turkish Straits were guaranteed day and night. Furthermore, the Straits were opened to all nations and all cargos without discrimination. However, the freedom of passage and navigation does not mean that merchant ships have the same freedom as recognized in the high seas. Because one of the reasons of the Conference was the security of the Turkey in the Strait, different from high seas some additional formalities and obligations were established in the Montreux Convention by Article 3 and Annex I. With these two exceptions passage was regulated and liberal provisions were reduced.<sup>335</sup> In the period when the agreement was signed, health issues were a primary concern for all nations, and Article 3 addresses this issue in an effort to protect the densely populated Straits area from infectious diseases. As would be understood from the discussions during the Conference, to protect the Straits area and the Black Sea region, a clean bill of health control for vessels passing without in any way touching the Turkish Territory in the Straits during their passage is required by Article 3.<sup>336</sup> Article 3 imposes the obligation

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<sup>335</sup> E. Brüel, Vol. II (1947), p.393.

<sup>336</sup> S. I. Meray & O. Olcay, p.289-291. In light of security concerns the control of clean bill of health was offered by the Turkish draft text. Furthermore, at the technical committee, Turkish representative Dr. Arar, who was General Manager at the Ministry of Health of Turkey, expressed that vessels passing transit (without stop) through the Straits could carry infectious diseases and that to protect the Straits area from any diseases suitable measures should be taken. See: S. I. Meray & O. Olcay, p.290.

At the Conference, Turkey emphasized that only eight of the 5,444 merchant vessels which had passed through the Straits in 1935 from the Mediterranean to the Black Sea had a doctor on board and sixteen of them had been infected. See: N. Oral, p.106.

Neither the environmental pollution caused by ships nor the size of merchant vessels were considered as a security subject for the Straits at that time, therefore such conditions were not deliberated over in

for vessels at the entrance of each Strait to be subject to sanitary control.<sup>337</sup> Other than this, to pay taxes and charges the vessels should communicate their name, tonnage, nationality, destination and last port of call to the officials.

According to Annex I, taxes and charges may be levied by Turkish authorities in turn of service rendered. Although pilotage and towage remained optional, payment is obligatory for sanitary-control services<sup>338</sup> and for maintenance of lighthouses, light buoys, lifesaving services including signals, direction-finding stations and similar installations. It can be understood that Turkey is responsible for making the necessary traffic arrangements in order to ensure traffic-safety in the Straits. This means that in order to maintain necessary traffic arrangements in both directions Turkey can collect taxes and charges. However, taxes and charges may not be higher than the amount necessary to cover the cost of maintaining the services and can not be raised, but Turkey is allowed to reduce the amount when it does not make those distinctions based on the flag of the vessel. Also, merchant vessels may be required to pay taxes and charges for optional services such as towage and pilotage.<sup>339</sup>

As a result, in times of peace while freedom of passage and navigation of merchant vessels of all nations was guaranteed without a time limit, passage was regulated by some restrictions under the control of Turkish authorities. In other words, as a principle, freedom of passage for merchant vessels was guaranteed in the Turkish Straits in the Convention, and Turkey's security interests were taken into consideration, by giving necessary passage-control to the Turkish authorities too.

*In time of war, when Turkey is not a belligerent, the same provisions are applied as in time of peace. Pilotage and towage are in this case also optional. (Article 4)*

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the Convention. On the other hand, the innocent passage (unharmful) for protection of the rights of the coastal states was discussed first at The Hague Codification Conference in 1930, but it could not be adopted as a passage regime until the Territorial Sea Convention of 1958. For more information see Chapter 6.

<sup>337</sup> There is an exception to the sanitary control for warships. During passage through the Straits warships are not visited by Turkish authorities. But according to Article 22 of the Convention, sanitary rules can apply to them if they have on board cases of cholera, plague, yellow fever, exanthematic typhus, or smallpox, or if they have left infected ports. In such cases, they must pass through the Straits in quarantine and apply necessary protective measures in order to prevent any possibility of the Straits becoming infected. (Article 22).

<sup>338</sup> Although for the protection of the Straits the sanitary control charges were concluded, the legality of the sanitary services is questionable. E. Brüel, Vol. II (1947), p.410; A. N. Ünlü, p.109-110. This issue will be discussed in Chapter 6.

<sup>339</sup> Annex I of the Montreux Convention.

*When Turkey is a belligerent*, according to Article 5, merchant vessels not belonging to a state at war with Turkey enjoy freedom of passage and navigation through the Straits on condition that they do not in any way assist the enemy. However, such vessels should enter the Straits during day time and must follow the route indicated by Turkish authorities. Although there is no specific mention in the text of Article 5, Turkish authorities have the right to visit and search passing merchant vessels to be sure that the vessels do not assist the enemy. However, the overriding character of the Montreux Convention is freedom of passage of vessels, therefore Turkey should have good cause to visit and search the merchant vessels and pay attention not to hamper the freedom of passage and navigation of merchant vessels.<sup>340</sup> Other than this, in Article 5 nothing is expressed about taxes and charges for services and pilotage. This is however explained in Annex I. According to Annex I, “the tariffs shall not be increased in the event of the said services being made obligatory by reason of the application of Article 5”. From this provision it can be concluded that Turkey may introduce compulsory pilotage when it is at war.

The next case is imminent danger of war. This case was not stated in the Lausanne Convention but it was requested for in the Turkish note on 10 April 1936. *When Turkey is threatened with imminent danger of war*: Article 6 provided that through the provisions of Article 2 Turkey may require merchant vessels to enter the Straits only by day and they have to follow the route indicated by Turkish authorities. In this case, Turkey may make pilotage obligatory without levying charges for it (Article 6). The first part of Article 6 is thus formulated: “Should Turkey consider herself to be threatened with imminent danger of war, the provisions of Article 2 [the provision of peace time] nevertheless continue to be applied except that vessel must enter the Straits by day...”. It is evident that this provision is complicated. If Turkey considers itself threatened with imminent danger of war, passage is subject to the same regulations as in time of peace, but passage regulation is subject to wartime-like conditions. It can be said that in all cases an effort was made to balance the freedom of passage in the Turkish Straits on one side and the security of Turkey on the other side. In Article 6 Turkey obtained the right to protect itself during both a period of war and a period of threat, when an imminent danger of war is present. Just how an imminent threat of war is to be determined is not specifically mentioned in this article. However, it is clear that

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<sup>340</sup> C. L. Rozakis & P. Stagos, p.107.

Article 6, as in Article 5, lays down a potentially severe limitation on the complete freedom of passage.

As a result, in the case of war time it was concluded that while merchant ships of neutral states can pass through the Turkish Straits, some regulatory rights are given to Turkey to protect itself against any danger posed by merchant vessels – in accordance with the preamble of the Convention. In such cases the protection of both the interests of states using the Straits and the interests of Turkey are considered.

## **b) Warships**

The provisions regarding warships can be found in Articles 8-22 of the Convention. The Convention grants freedom of passage and navigation to warships in accordance with general international law (Article 10). However, the Montreux regime contains many qualifications and exceptions when compared with the Lausanne Convention, and therefore freedom of passage for warships is considerably restricted.

After a reference in Article 8, the definition and various categories of warships as well as the calculation of their tonnage and calibration of their guns are identified in Annex II. The classification of warships, which was not stated in the Turkish proposal but offered in the British draft text, was taken completely from the Treaty of Naval Armament signed on 25 March 1936.<sup>341</sup> In this framework, warships are categorized as capital ships, aircraft carriers, light surface vessels, submarines, minor war vessels, auxiliary vessels. The classification of warships was made under the effects of the World War I and the imminent danger of war. For this reason, the restrictions on tonnage and classification may contain political motivations.<sup>342</sup> A change of balance in the Mediterranean was not compatible with the security interests of Turkey and the riparian states of the Black Sea, nor with western powers at that time. In this framework

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<sup>341</sup> See footnote of the Annex II of the Convention; S. I. Meray & O. Olcay, p.491 and 507. For British draft text Article 7 see S. I. Meray & O. Olcay, p.444; R. Deutsch, p.74.

<sup>342</sup> According to Brüel: "... only certain classes of warships can pass through the Straits was inserted for political reasons viz: from a desire to exclude such ships as the German "pocket battleships" from the Black Sea." See: E. Brüel, Vol. II (1947), p.413.

in the Convention there is no extra or special provision about the change of tonnage or classification of warships, although the specifications of warships can always change through technological development. However, in contrast to the Lausanne Convention, the duration of the Convention was limited to twenty years.<sup>343</sup> Thus the Convention provided for the possibility of changing the classification of warships or other provisions after twenty years. Furthermore, at the time of signing of the Convention, the total tonnage of such warships was also much greater than the restriction on the tonnage of warships (maximum 10,000 tons) in Annex II. In other words, it was already known by signatories that there were many warships which had much more than 10,000 tons.<sup>344</sup> Therefore, it can be said that the restriction and distinction of warships in Annex II for passage through the Turkish Straits was prepared in a way that suited both security interests of Turkey in the Straits region and security interests of the other signatories in the Black Sea region and the Mediterranean.

The provisions of the Convention relating to warships are arranged as with merchant ships on the basis of peace time, war time and imminent threat of war. Moreover, the Convention contains some separate rules between riparian and non-riparian states of the Black Sea.

*In time of peace*, warships enjoy freedom of passage through the Straits under some limitations such as their character, their tonnage and their number. According to Article 10, whether belonging to the Black Sea or non-Black Sea powers, three classes of warships have a passage right through the Straits (Article 10). These three classes are light surface vessels (which cannot exceed 10,000 tons), minor war vessel and auxiliary vessels,<sup>345</sup>

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<sup>343</sup> Article 28.

<sup>344</sup> Gillespie, A. (2011). *A History the Laws of War: Vol III; The Customs and Laws of War with Regards to Arms Control*. US and Canada: Hart Publishing, p.33-34. The Japan battleships "Jamato Class", which had over 45,000 tons displacement, was produced in 1937. See: *Writer, S. (2015, December 3).*

*Militaryfactory: Detailing the development and operational history of the IJN Yamato Battleship*, <[https://www.militaryfactory.com/ships/detail.asp?ship\\_id=IJN-Yamato](https://www.militaryfactory.com/ships/detail.asp?ship_id=IJN-Yamato)> (accessed August 31, 2017). The German pocket battleship "KMS Admiral Graf Spee", which was produced in 1936 and had 16,200 tons. *Alex, D. (2017, July 14). Military Factory: Detailing the development and operational history of the KMS Admiral Graf Spee Pocket Battleship*, <[https://www.militaryfactory.com/ships/detail.asp?ship\\_id=KMS-Admiral-Graf-Spee](https://www.militaryfactory.com/ships/detail.asp?ship_id=KMS-Admiral-Graf-Spee)> (accessed August 31, 2017).

<sup>345</sup> According to Annex II of the Convention:

"Light Surface Vessels are surface vessels of war other than aircraft-carriers, minor war vessels or auxiliary vessels, the standard displacement of which exceeds 100 tons (102 metric tons) and does not

War vessels of non-Black Sea states may enter and pass the Straits only when their maximum tonnage does not exceed 15,000 tons and their number may not comprise of more than nine vessels (Article 14). If both Article 10 and 14 are taken into consideration, individual warships of non-Black Sea powers passing the Straits cannot exceed 10,000 tons and they can only carry smaller than 8 inch (203 mm) caliber guns. This means that Article 10 practically excludes modern capital ships, aircraft carriers and submarines of non-Black Sea states. Yet there are some exceptions. Warships of non-Black Sea states can exceed the 10,000-ton limit when “they pay courtesy visit a limited duration to a port in the Straits, at the invitation of the Turkish government. Any such force must leave the Straits by the same route as that by which entered” (Article 17).<sup>346</sup> In other words, they cannot continue their passage to reach the Black Sea. Said another way, they cannot complete whole passage; they have to leave the Straits by same route after their visit. The tonnage of the warships which visit a port in the Straits is not included in the calculation of tonnage of other warships entering the Straits (Article 14, Paragraph 3). The second exception is established by the fourth paragraph of Article 14. During passage through the Straits when warships have suffered damage and are obliged to stay within the Straits, their tonnage is not included in the calculation of tonnage of other war vessels entering thereafter. However, such vessels under repairs must be subject to special provisions relating to security as laid down by Turkey. The next exception is regulated by Article 9. Naval auxiliary vessels specifically designed for the carriage of fuel, liquid or non-liquid are exempted from the duty of notification and tonnage limitation, but they may pass the Straits singly.<sup>347</sup>

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exceed 10,000 tons (10,160 metric tons), and which do not carry a gun with a caliber 8 in (203 mm). The category of light surface vessels...”

“Minor War Vessels are surface vessels of war, other than auxiliary vessels, the standard displacement of which exceeds 100 tons (102 metric tons) and does not exceed 2,000 tons (2,032 metric tons), provided they have none of the following characters: ...”

“Auxiliary Vessels are naval surface vessels the standard displacement of which exceeds 100 tons (102 metric tons), which are normally employed on fleet duties or as troop transports, or some other way than as fighting ships, and which are not specifically built as fighting ships, provided they have none of the following characteristic: ... ” For the complete text see Annex.

<sup>346</sup> According to the preamble of the Convention, The Turkish Straits consist of the Dardanelles, the Sea of Marmara and the Bosphorus. This means that a courtesy visit to a port in the Straits does not indicate a ‘complete passage’ through the Straits.

<sup>347</sup> But in order to qualify for the exemption, these ships can carry no more than two guns against floating targets of a maximum caliber of 105 mm. and they cannot carry more than two guns of a maximum caliber of 75 mm. against aerial targets. See Article 9.

On the other hand, apart from the warships mentioned in Article 10, the Black Sea powers can send their capital ships into the Straits even if their maximum tonnage exceeds 15,000 tons. These ships may only pass through the Straits singly, escorted by not more than two destroyers (Article 11). Furthermore, unlike non-Black Sea powers, the Black Sea States under Article 12 have the right to send submarines which are purchased or constructed outside the Black Sea through the Turkish Straits. However, adequate notice of the laying down or purchase of such submarines should be given to Turkey. On the same condition, the Black Sea powers can send their submarines to be repaired in dockyards outside the Black Sea and these submarines may later return to their base. The submarines in either case must pass through the Straits by day singly and on the surface.

Article 13 regulates passage permission for all warships. The passage of war vessels must be preceded by a notification given to the Turkish government through a diplomatic channel. The normal period of notice is 8 days for the Black Sea powers, but non-Black Sea powers should give their notice 15 days before the passage. Moreover, the notification has to specify the destination, name, number and type of warships, the date of entry and if necessary, the date of return. The commanders of these warships must, without being under any obligation to stop, communicate to the signal stations at the entrance to the Dardanelles or the Bosphorus the exact composition of the force under their orders. Additionally, any change of date shall be subject to a notice of three days, when entry into the Straits for the outward passage must take place within a period of five days from the passage date in the original notification. If the entry of the warships does not take place within the next five days, a new notification must be given to the Turkish government and in this case the notification procedure (an 8 or 15-day period) must begin again.

War vessels in transit through the Straits shall under no circumstances make use of any aircraft which they may be carrying (Article 15). Furthermore, they must not

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According to Váli, the representatives of France insisted on the inclusion of this special provision in the Convention because the French Government in the pre-World War II period imported crude and refined oil from the Soviet Black Sea port of Batum. However, the Soviet government has availed itself of the privileges granted under Article 9 to naval tankers and in this way the Soviet Navy could expand into the Mediterranean and other seas since mid-1960s. See: F. A. Váli, p.46.



remain in the Straits longer than is necessary for them to complete the passage except in case of damage or peril of the sea (Article 16).

In addition, the aggregate tonnage which non-Black Sea powers may have in the Black Sea in times of peace is limited by Article 18. The maximum aggregate tonnage of non-Black Sea powers shall not exceed 30,000 tons in that sea. But, if the strongest Black Sea fleet was to exceed by at least 10,000 tons the status quo at the time of signature of this Convention, the maximum tonnage of the non-Black Sea powers would increase to 45,000 tons (Article 18 (a) and (b)). In comparison with 1936, the aggregate tonnage of the Soviet Navy, which was the strongest power of the Black Sea fleet, has already increased by more than 10,000 tons after the World War II. Therefore, the permissible tonnage of non-Black Sea powers in the Black Sea has increased to 45,000 tons. Other than this, each Black Sea power is obliged to inform Turkey on the 1<sup>st</sup> January and 1<sup>st</sup> July of each year of the total tonnage of their war vessels in the Black Sea, and the Turkish government shall convey this information to the Secretary-General of the League of Nations and the signatories. This provision was required for calculating the permissible total tonnage of non-Black Sea states in the Black Sea. However, after World War II the permissible tonnage increased to 45,000 tons and this provision became impractical. In addition, according to Article 18 paragraph (c), any individual non-Black Sea power may have at one time a maximum of two-thirds of the permissible tonnage in the Black Sea. That is to say, if the permissible aggregate tonnage is 45,000 tons for all non-Black Sea powers, any individual non-Black Sea power may have no more than 30,000 tons (two-thirds of 45,000 tons) of warships in the Black Sea. It should be remembered that these war vessels can only pass through the Straits by fulfilling the other above-mentioned provisions of the Convention. To provide the safety of coastal states of the Black Sea against any individual non-riparian states the permissible tonnage was limited, too.

However, exceptional rules prevail if one or more non-riparian states desire to send naval forces into the Black Sea for humanitarian purposes. These naval forces will be allowed to enter the Black Sea without the notification required by Article 13 if they do not exceed total tonnage of 8,000 tons altogether. In this case authorization must be obtained from the Turkish government, and Turkey must immediately inform the Black Sea powers about intended entry into the Black Sea. If there is no objection from Black Sea powers within 24 hours of receiving this information, Turkey will reply within 48

hours to the government making the request (Article 18(d)). The authorization clause and the humanitarian purpose clause are not very clear in this provision, as the framework of events requiring humanitarian aid was not specified in the Convention. Could Turkey refuse the passage of above-mentioned naval forces with or without any protest from the Black Sea powers? Or, could Turkey give passage permits following protest by a Black Sea power? How many protests are required to refuse the passage permit? From the negotiations it can be understood that humanitarian aid was not specified in the text because all events that required aid were considered, and it was intended to cover all possible disasters.<sup>348</sup> However, it is not easy to find any answers to other questions in the negotiations. But in the absence of such a clause it could be interpreted that only one protest by a Black Sea state is enough to refuse the passage of such naval forces through the Turkish Straits.

In addition, in contrast to the Lausanne Convention, the warships of non-Black Sea powers are prohibited from remaining in the Black Sea for a period longer than 21 days, whatever their reason to enter the Black Sea (Article 18/2). Thus, by the Montreux Convention, the Black Sea was given a special category for warships in which non-riparian states have been restricted and the riparian states have rights to navigation.<sup>349</sup> In other words, although during the conference it was not claimed that the Black Sea was a closed sea like in the past, some restrictions regarding the Black Sea were accepted by signatory states.

*In time of war when Turkey is not belligerent*, according to Article 19 neutral warships enjoy the freedom of passage and navigation through the Straits under the same conditions as laid down in Articles 10 to 18. However, this general rule is applied only to the warships of non-belligerent states, that is, warships belonging to belligerent states are not permitted to enter and pass through the Straits. The Convention put forward two exceptions. According to Article 19 paragraphs 4 and 5, one of the exceptions is when war vessels of belligerent powers become separated from their bases as a result of an outbreak of war, they are permitted to pass through the Straits in order to return to their base. These warships may sail under the law of war on the seas and they may not make any capture, exercise the right of visit and search or carry out any hostile act in the Straits.

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<sup>348</sup> S. I. Meray & O. Olcay, p.126.

<sup>349</sup> N. Oral, p.118.

The second exception is established in second paragraph of the same article. According to this paragraph, belligerent warships can pass when they wish to enter the Straits under collective security provisions (sanctions) of the League of Nations and by virtue of the treaty of mutual assistance binding Turkey, as concluded within the framework of the League of Nations. Furthermore, in this case, the third paragraph of the article lifts all restrictions on tonnage and armament for warships that are carrying out above-mentioned assistance missions:

“... in cases arising out of the application of Article 25<sup>350</sup> [the Covenant of the League of Nations] of this present Convention and in cases of assistance, concluded within the framework of the covenant of the League of Nations, and registered and published in accordance with the provisions of Article 18 of the Covenant. In the exceptional cases provided for in the preceding paragraph, the limitations laid down in articles 10 to 18 the present Convention shall not be applicable.” (Article 19, paragraph 2 and 3)

This provision was purely politically motivated. There were no such exceptions in either the Turkey's draft text or that of England regarding this provision.<sup>351</sup> The provision reflects the insistence of Soviet Russian, French and Romanian opinions at the conference and it was adopted despite the opposition of Japan and reluctant attitude of England. Russia wanted to close the Straits to all belligerents, but also wanted to secure the assistance of France in terms of the mutual assistance agreement with France.<sup>352</sup> On the other hand, the exceptions of Article 19 reflect the Treaty of London of 1871 according to which the Sublime Porte could open the Straits to friendly powers. The importance of these provisions still exists today, when it might be possible to interpret the Montreux Convention in such a manner as to replace the League of Nations with the United Nations (UN). In this case, according to this provision, Turkey could open the Straits to its alliances under any mutual agreements.

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<sup>350</sup> Article 25 of the Convention is: „Nothing in the present convention shall prejudice the rights and obligations of Turkey, or of any of the other High Contracting Parties member of League of Nations, arising out of the Covenant of the League of Nations.“

<sup>351</sup> S. I. Meray & O. Olcay, p. 434-454.

<sup>352</sup> S. I. Meray & O. Olcay, p.133-140; F. A. Váli, p.50; C. L. Rozakis & P. Stagos, p.112. According to Brüel; the original form of the exception was: “... warships could pass through the Straits if they were rendering assistance to state victim of aggression in virtue of a treaty of mutual assistance. This was framed with the Franco-Russian pact of mutual assistance in mind since this pact would be weakened if France could not send her fleet through the traits to the assistance of Russia.” Japan was no longer a member of League of Nations at this time, which is why it was opposed to this exception.

*When Turkey is belligerent*, all peacetime provisions (Articles 10 to 18) for the passage of war vessels through the Straits become inapplicable. According to Article 20 in the case that Turkey is belligerent; "... the passage of warships shall be left entirely to the discretion of the Turkish government." Stated another way, Turkey may freely prohibit the passage of all warships and is entitled to allow passage or entry in the Straits for certain powers or certain ships. Furthermore, Turkish sovereign rights over the Straits area are unrestricted and it may exercise its discrimination, too. It could be said that the ancient rule of Ottomans, which was abolished after signing Mudros Armistice in 1918, was restored again for warships if Turkey was belligerent.

*If Turkey considers itself to be threatened with imminent danger of war*, according to Article 21 it has the right to apply the provision of Article 20. In other words, it may forbid the passage of warships altogether. If Turkey deems that there is an imminent peril of war which is likely to jeopardize its safety, it may close the Straits to the war vessels of any or all nations by a unilateral decision. However, this rule cannot be used for the warships which passed through the Straits in either direction before Turkey closed the Straits, who thus they find themselves separated from their home ports. In this case, such warships may return to their home ports despite the closing of the Straits. But Turkey may, notwithstanding this exception, refuse the entry and passage to warships of states that threaten Turkey. In other words, war vessels of powers who have threatened Turkey may be prevented from returning to their home ports (Article 21, Paragraph 2).

Due to the fact that Article 21 gives a wide measure of control to Turkey who alone can decide to forbid passage, and in order to avoid any unfortunate consequences, the third paragraph of the same article obliges Turkey to notify all other signatories and the secretary of General of the League of Nations about its extraordinary measure. The same paragraph furthermore provides that if the Council then decides by a two-thirds majority that the measure taken by Turkey was not justified, and the measure was also considered unjustified by the majority of the signatories of the Montreux Convention, the Turkish government would have to discontinue the closure due to the alleged threat of imminent war. Put another way, it would have to open the Straits to warships as generally prescribed by the Convention.

This case – an imminent danger of war – was not in the Lausanne Convention and it was one of the Turkish criticisms of the regime of this Convention. As such, Turkey obtained its wishes through this provision and gained the right to apply some sanctions when it considers itself threatened.

Taking into consideration the clauses for warships, it can be deduced that freedom of passage through the Straits for warships was generally established with some restrictions, such as tonnage, armament and duration in the Black Sea. Although the security interests of Turkey and the Black Sea states were considered, the clauses both reflect the effects of political atmosphere of that period and the effects of provisions in old treaties of the Turkish Straits.

### **c) Aircraft**

The freedom of passage granted to warships and merchant vessels in the Straits by the Montreux Convention does not extend to the matter of overflight by aircraft. Article 23 provides that in order to assure the passage of civil aircraft between the Black Sea and the Mediterranean, the Turkish government must indicate the air routes available for this purpose outside the forbidden zones which may be established in the Straits. This means firstly that Turkey may establish forbidden zones. Civil aircraft may use these routes with a general notification given to Turkey in terms of their regular air schedules. But, for occasional flights the notification must be given three days in advance. According to second paragraph of the same article, “the Turkish government moreover undertakes, notwithstanding any remilitarization of the Straits, to furnish the necessary facilities for the safe passage of civil aircraft authorized under the air regulations in force in Turkey to fly across Turkish territory between Asia and Europe. The route which is to be followed in the Straits zone by aircraft which have obtained an authorization shall be indicated from time to time.”

Article 23 refers only to civil aircraft and does not say anything on the subject of military aircraft. According to negotiations of the conference, the regulations regarding military flights above the Straits have been left to the provisions of general international

law about the rules for air flight over the straits.<sup>353</sup> However, the regulation about civil aircraft in the above-mentioned article does not make any distinction between the cases of peace and war. This means that Turkey may apply this provision both in peace time and war time whether it is a belligerent or not. But it is not easy to interpret whether Turkey can control the entrance of both warships and merchant vessels in time of war when it is belligerent, because then Turkey must be able to control the flight of foreign States over the Straits. In the Convention it is not clear whether or not Turkey could forbid civil enemy aircraft, i.e. one belonging to a country at war with Turkey, when it is a belligerent.<sup>354</sup>

#### **d) General Provisions – Turkish Sovereignty in the Straits**

Section IV of the Montreux Convention eliminated the Straits Commission established by Lausanne Convention. That is, the Convention does not contain international guarantees for the regulation of the Straits regime and all functions of the Straits Commission were transferred to the Turkish government. According to Article 24, the Turkish government shall collect the information necessary for the purpose of controlling the limitations on tonnage and duration of warships in the Black Sea (concerning the application of Articles 11, 12, 14 and 18). An external control of the provision is that as soon as the Turkish government has been notified of the intended passage of any foreign warship through the Straits, the Turkish government should inform the representatives of the contracting parties in Ankara about its tonnage, the day fixed for its entry into the Straits and if necessary, the probable date of its return. In addition, Turkey should address the Secretary General of the League of Nations and the contracting parties with an annual report giving details of the passage of foreign vessels through the Straits.<sup>355</sup> Ultimately, the Straits commission was demolished and Turkey became the guardian of the Turkish Straits not only for its own interests but also for

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<sup>353</sup> N. Oral, p13; C. L. Rozakis & P. Stagos, p.115.

<sup>354</sup> Aircraft passage over the straits is not a research topic of this thesis.

<sup>355</sup> After the signing of the Lausanne Convention, the above-mentioned tasks were fulfilled by the Straits Commission. Since the signing of the Montreux Convention, the Turkish Foreign Ministry has been collecting all information on the passage of ships and has been conveying an annual report to the representatives of contracting parties in Ankara and the General- Secretary of the United Nations.

international interests in the Straits. In addition, in Article 25 it was expressed that any provision of the Montreux Convention does not prejudice the rights and obligations of Turkey and other signatories arising out of the Covenant of the League of Nations.

### **e) Final Provisions – Ratification, Revision and Denunciation of the Convention**

Articles 26-29 of the Convention contain the ratification, duration and amendments provisions. It was laid down by Article 26 that the Convention should come into force as soon as six ratifications of signatories, including Turkey, reached the French government via the diplomatic channel, which it should archive as a depository state.

Article 27 provides that the Convention shall be open to accession by all the signatories of the Lausanne Convention of 1923. Stated another way, the Convention was conceived of as a closed agreement with limited participation and is not open to accession by all states. As a natural consequence of this clause, the Montreux Convention replaced the Lausanne Convention, but it can be said that this provision was added in order to ratify the Convention by Italy, which did not participate in the Montreux Conference.

According to Article 28, the Convention was to remain in force 20 years from the date of its entry in force. However, the second paragraph of the same Article gives an exception. The principle of freedom of passage and navigation announced in Article 1 should continue in force without a time limit. If two years prior to the expiration of the 20-year period no party has given notice of denunciation to the French government, the Convention is to continue in force until two years after such notice has been given. In the event of denunciation of the Convention, the signatory powers agreed that they would be represented at a conference for the purpose of concluding a new convention. This Article guarantees the continuance of the legal regime of the Turkish Straits by an international convention. Established in the conditions prior to World War II, it protected against any bilateral attempt to change the passage regime, ensuring the powers take joint decisions at a next possible conference.

On the other hand, the possibility of revising the Convention was foreseen by Article 29. It provides that at the expiry of each period of five years from the entry into force of the Convention, one or several of the signatory states might request for the revision of one or more of the provisions of the Convention. This request for revision, if it should relate to Article 14 and 18 (aggregate tonnage and number of war vessels in the Straits and aggregate tonnage in the Black Sea), must be supported by another signatory state, in other words, it must be supported by at least two signatory states. In case of modifications to any other article of the Convention, it must be supported by two other signatories, namely three signatory powers altogether. Notice for any request for revision must be given to all parties three months prior to the end of the five-year period. Furthermore, the notification must contain details of the proposed amendments and the reason which has given rise to them.

In the event that exchanging of notes through diplomatic channels does not result in an agreement on proposals, the signatory states agreed to be represented at a conference to be held for this purpose. Such a conference can make decisions regarding the revision of parts of the Convention only by unanimous vote. For the revision of Articles 14 and 18 a majority of three-quarters of the signatory powers is sufficient. However, the majority must include three-quarters of the signatory powers that are riparian states of the Black Sea, including Turkey. In other words, today, any proposal regarding aggregate tonnage of war vessels in the Straits and Black Sea and their duration in the Black Sea must be supported by three of four riparian signatories, Turkey, Russia, Bulgaria, Romania and Ukraine. Furthermore, any request about Articles 14 and 18 must be supported by Turkey. In this context, if Turkey does not support any revision proposal of Articles 14 and 18, the request cannot enter into force. Expressed another way, something like a *de facto* veto right has been given to Turkey for the revision of the above-mentioned articles. It is understood that to maintain the balance established by the Montreux Convention in the Black Sea region, exclusive rights are given to riparian states on change probability of the Convention. The revision procedure of the Convention reveals the intention of the signatories to preserve the life of the agreement and to do away with the anxieties of the Black Sea powers and Turkey. Other than this, it is shown that against any individual and bilateral Turkish attempt at revising the Convention, the rights of the Black Sea states were guaranteed by the



above-mentioned provision and it is impossible to revise the Convention without the Black Sea states' votes.

## **2.2 Remilitarization of the Straits**

On 20<sup>th</sup> July 1936, a protocol, which is legally of equal weight with the main body of the Montreux Convention, was signed by the signatories and attached as an annex protocol to the Convention. According to the protocol:

“At the moment of signing the Convention bearing this day's date, the undersigned Plenipotentiaries declare for their respective Governments that they accept the following provisions: 1) Turkey may immediately remilitarize the zone of the Straits as defined the Preamble to the said Convention. 2) As from the 15<sup>th</sup> August 1936, the Turkish Government shall provisionally apply the regime specified in the Convention. 3) The present Protocol shall enter into force as from day's date.”

By this protocol the demilitarization of the Straits, established by Lausanne Convention in 1923, was demolished. Moreover, without waiting for the ratification of the Convention, the immediate right to remilitarize the Straits was given to Turkey. A reason for Turkey's participation in the Conference was representing its security interests against the demilitarization conditions of the Straits area. Thus, Turkey obtained its aim and it can be said that the protocol was another diplomatic success by the Turkish government, because it could immediately put into force the remilitarization clauses without waiting for the ratification of the Convention.<sup>356</sup> In addition, from 15 August 1936 Turkey also obtained the tentative right to apply the regime specified in the Montreux Convention irrespective of the ratification procedure.

The Convention was ratified on 9 November 1936 at the French Foreign office by all signatory states except Japan. The Japanese ratification was deposited on 19 April 1937 and Italy acceded to the Montreux Convention on 2 May 1939.<sup>357</sup> Turkey immediately began to remilitarize the Straits zone and after being provided the

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<sup>356</sup> The demilitarization clause of the Lausanne Convention contains the Aegean Islands Lemnos and Samothrace, which belongs to Greece. However, the protocol of the Montreux Convention only gave Turkey remilitarization rights in the Straits area. In this context, remilitarization of the above-mentioned islands by Greece in accordance with the Protocol of Montreux Convention of 1936 has caused debate between Turkey and Greece. Said debate falls out of the scope of this thesis.

<sup>357</sup> Y. Inan (1995), p.47.

information by the Turkish government, the Straits Commission held a meeting on 3 August 1936 and agreed on its own dissolution. Turkey informed the Secretary General of the League on 5<sup>th</sup> August on the application of the new regime in accordance with the protocol of the Convention. The first report, which covered the period starting on the date the Convention came into force on 15 August 1936, was sent to the League of Nations by the Turkish government on 26 February 1938.<sup>358</sup> Thus, Turkey undertook the task of Straits Commission and the Straits zone came under the control of the Turkish government once more.

While the Convention was adopted, security was the most important issue in terms of imminent danger of war for Turkey, the Black Sea states and other powers which had interest in the Mediterranean. Therefore, the ratification and application of the Convention contains some marks of haste. The new passage regime in the Turkish Straits was established by customary law. By the Montreux Convention, the Black Sea states were given control of provisions and control over the presence of war vessels in the Black Sea, which were established with many classifications of warships under the political interests of the powers; while control regarding the passage of war vessels in the Straits was given to Turkey. In other words, the classifications of warships gave a legal right to Turkey to prohibit the passage of war vessels which do not meet the classifications in order to secure not only Turkish security interests but also to secure other signatories' interests. For example, when a German pocket battleship or Japanese Yamato-Class battleship wished to pass through the Straits, the passage could be rejected lawfully, because the Montreux Convention did not allow for battleships and the tonnage of those ships did not fit the tonnage restrictions. Because of the rapid changes in world politics, the Montreux Convention's duration was determined to be 20 years. Although the Convention became liable to denunciation on 9 November 1954, it is still in force today. Moreover, except for the discussion over revision after World War II, neither a formal request for denunciation of the Convention nor for the revision of any provision has yet been submitted.

Consequently, today the Convention is valid and is still applied in the Turkish Straits. Since the signing of the Montreux Convention, the technology, types and sizes of ships has developed, and many rules have been added to international law, regarding,

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<sup>358</sup> E. Brüel, Vol. II (1947), p.405.

for example, pollution of the seas, and so on. Therefore, applying the Montreux Convention in the Straits and the rules required in international law can be problematic. Discussion points and some solutions to these questions will be offered, but first, the application of the Montreux Conventions up until today will be examined, and the provisions of the Convention will be discussed in light of current international law in Chapter 6.

## **CHAPTER 5 Turkish Straits after World War II**

### **1. The Straits Regime Practice from 1936 to 1939**

The years between the signing of the Montreux Convention and the spring of 1939 witnessed some momentous political developments and as a result of these developments Turkish policy and position changed. Italy, which did not participate in the Montreux Convention, later changed its mind and acceded to it on 2 May 1938.

The imminent danger of war and the development of alliances signalled that powerful states were interested in the Turkish Straits. Although the Convention was very well received, especially in Soviet Russia, at the end of 1936 Litvinov proposed a bilateral Soviet-Turkish pact for the common defense of the Straits to the Turkish government. Turkey declined such a diminution to its sovereignty in the Straits and informed the British government of the Soviet's plans.<sup>359</sup> On the other hand, Nazi Germany, having reached the naval agreement with England on 17 July 1937, opened negotiations with the Turkish government regarding the Montreux Convention. The negotiations broke down when Turkey argued that Germany was not a signatory of the Lausanne Convention of 1923 and therefore did not have the right of accession to the Montreux Convention.<sup>360</sup>

In the spring of 1939, following the German entry into Prague in March 1939 and the Italian occupation of the Albanian territories in April 1939, the British

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<sup>359</sup> Howard, H. N. (1974). *Turkey, the Straits and U.S. Policy*. Baltimore and London: The Johns Hopkins University Press, p.157.

<sup>360</sup> *Ibid*, p.159; F. A. Váli, p.55.

government began to establish alliances against further territorial expansion by Mussolini and Hitler. In this context, Turkey signed a mutual assistance agreement with England on 12 May 1939 and with France on 23 June 1939.<sup>361</sup> Meanwhile, France and England began negotiations with Soviet Russia in order to bring Russia to their side against the Nazi-Fascist alliance. However, the negotiations remained unsuccessful and Soviet Russia signed a pact with Germany on 23 August 1939, instead of joining the Anglo-French camp. This unexpected announcement created a new situation for Turkey and it faced a difficult dilemma as a defender of Straits.

The peace-time provisions of the Montreux Convention were only applied until the spring of 1939, namely until the German entry into Prague. Following this event, war time provisions (with Turkey not a belligerent) were applied in the Straits. This implementation continued until the Turkish war declaration against Germany on 23 February 1945.

Before concluding a pact with Germany, Soviet Russia proposed the conclusion of a treaty of mutual assistance to Turkey. Turkish Foreign Minister Şükrü Saracoğlu was invited by Soviet Russia and visited Moscow twice between the dates of 25 September and 17 October 1939 for discussions about the draft mutual assistance agreement. However, at the first meeting on 26 September, Stalin and Soviet Foreign Minister Molotov offered to revise the Montreux Convention and demanded the closing of the Turkish Straits to all warships of non-Black Sea states in time of war. This request, which did not belong to the mutual assistance agreement, was refused by Saracoğlu and he emphasized that provisions for the methods of revision of the Montreux Convention were determined within it. At the second meeting on 14-16 October, Molotov brought the revision of Montreux Convention on the agenda once more. Yet this time it was proposed by Soviet Russia that Turkey would decide on the implementation of the Montreux Convention regarding the passage of warships of non-Black Sea powers and Articles 20 and 21 (in the case that Turkey is belligerent or it considers itself to be threatened with imminent danger of war) with the consent of the Soviet government. The idea of joint defense of the Straits by Turkey and Soviet Russia was hinted. This would mean that although there was a treaty regarding the passage regime of Turkish Straits, Soviet Russia could take advantage of every opportunity to

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<sup>361</sup> F. C. Erkin, p.126; Y. Inan (1995), p.99.

manage the Straits with Turkey by bypassing the Montreux Convention. Moreover, Soviet Russia suggested the above-mentioned demand as a precondition for the mutual assistance agreement between Russia and Turkey. Not to bring Turkey under Soviet Russian control, this request was refused again by Saracoğlu who reminded Russia of the methods for revising the Convention. Immediately after he returned to Ankara, the England-France-Turkey tripartite assistance treaty was signed on 19 October 1939.<sup>362</sup>

It seemed that Soviet Russia had regained the old power which it lost after World War I. The Russian request regarding the Straits and Montreux Convention was the first break in the friendly Turkish-Russian relations established after the Bolshevik revolution in Russia. Thus, Turkey sought Russia's ambitions on the Straits and turned to western powers. It can be said that to protect the integrity of its soil and to maintain its control on the Straits area it agreed to sign an assistance treaty with western powers.<sup>363</sup>

## **2. Turkey and World War II**

World War II was the first great test of the Montreux regime in the Turkish Straits. The Turkish decision was to remain neutral until the end of the war. This meant that the Montreux Convention would be applied with the limitation for belligerents. This situation brought many difficulties for warships of the belligerent states, particularly Germany, the Soviet Union, and Italy; and these difficulties would be felt sharply in the following war years.

During the period of 1940-1941 the World War moved down through the entire Balkan Peninsula and Greece, and Yugoslavia and Romania came under the control of Germany. German ships moved into the Mediterranean and occupied the Greek islands in the Aegean and Crete. Because of German dominance in the Aegean, entry by the Western allies' ships into the Straits became impossible. Feeling that war was

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<sup>362</sup> F. C. Erkin, p.140-148. The Author, Mr. Erkin, attended above-mentioned meetings as a member of Turkish committee. Y. Inan (1995), p.101. See for more information about the tripartite assistance treaty: J. C. Hurewitz (1956), p.226.

<sup>363</sup> According to Article 2/2 of the tripartite assistance treaty: "In the event of an act of aggression by a European Power leading to war in the Mediterranean area in which Turkey is involved, France and United Kingdom will collaborate effectively with Turkey and will lend its all aid and assistance in their power." See: J. C. Hurewitz (1956), p.227.

imminent, approaching ever closer to its borders, Turkey fortified its forces on its western border and mined the approaches to the Dardanelles by taking measures against the German submarines and Italian Navy – thought to be based in the Constanta Port of Romania – by requiring all vessels to identify themselves prior to passing through the Turkish Straits. Shortly after 29 November 1939, the Reich gave assurances to Turkey by its Ambassador Von Papen at the meeting with President İnönü in Ankara that Turkey would not be the German troops' next objective. However, in further negotiations he replied to the Turkish appeal for Germany to sign the Montreux Convention by expressing that Germany wanted to postpone taking up the issue of the Turkish Straits until the end of the war.<sup>364</sup>

Meanwhile, Germany, Italy and Japan had concluded a three-power pact for mutual aid on 27 September 1939 and so when in the following period they felt England would lose the war, and in the hope of broadening this understanding to include Russia, the German Foreign Minister Ribbentrop visited Russia in August and September 1939. During these visits Turkey and the Straits were discussed between Germany and Soviet Russia. Further negotiations were continued during Molotov's visit to Berlin in November 1940 and a secret draft protocol was prepared by the German Foreign Office. The protocol foresaw the replacement of the Montreux Convention and the new regime would permit passage for the Soviet navy but would prohibit the entry of war vessels of non-Black Sea powers.<sup>365</sup> According to the draft protocol:

“Germany, Italy and the Soviet Union agree in the view that it is in their common interest to detach Turkey from her existing international commitments and ... Germany, Italy and Soviet Russia will work in common toward the replacement of the Montreux Straits Convention now in force by another convention. By this convention the Soviet Union would be granted the right of unrestricted passage of its navy through the straits at any time, whereas all other Powers except the other Black Sea countries, but including Germany and Italy, would in principle renounce the right of passage through the Straits for their naval vessels. The passage of commercial vessels through the Straits, would, of course, have to remain free in principle.”<sup>366</sup>

However, Soviet Russia was not satisfied with the German draft and proposed a new draft protocol. It had doubts about Germany's plans for Eastern Anatolia, and it was expressed in the draft protocol that the focal point of the aspirations of the Soviet Union was the south of Batum and Baku in the general direction of the Persian Gulf. Other

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<sup>364</sup> B. Oran, p.256.

<sup>365</sup> H. N. Howard (1974), p.163; Y. Inan (1995), p.103; B. Oran, p.254.

<sup>366</sup> J. C. Hurewitz (1956), p.228-229.

than this, Russia wanted many more privileges in the Straits than it was offered by German draft.<sup>367</sup> As such the Russian draft protocol proposed that:

“Provided that ...by the establishment of a base for land and naval forces of the U.S.S.R. within range of the Bosphorus and the Dardanelles by means of a long-term lease. ... Turkey should be amended so as to guarantee a base for light naval and land forces of the U.S.S.R on the Bosphorus and the Dardanelles by means of long-term lease, including – in case Turkey declares herself willing to join the four Power Pact- a guarantee of the independence and of the territory of Turkey by the three countries named. ... in case Turkey refuses to join the Four Powers Germany, Italy, and Soviet Union agree to work out and carry through the required military and diplomatic measures...”<sup>368</sup>

Soviet Russia wanted not only passage rights for its warships through the Straits but also to obtain a guarantee for its security against any attack via the Turkish Straits, and thereby to gain a foothold on the Straits region. These Russian requests convinced Hitler that there was no agreement possibility with the Russian government. Like Soviet Russia, Germany had no intention of sharing the Turkish Straits with any other nations. Moreover, Hitler did not want to see Soviet Russia gain a foothold in the Straits area because he considered Balkans and Turkey to be within the Russian sphere of influence. Furthermore, he felt that as the war progressed in favor of Germany, Turkey would join the German camp and it would thereby come within the German sphere of influence. Turkey was worried about a German-Soviet protocol and the possibility that Turkey might be made into a bargaining chip in such a protocol.<sup>369</sup> These negotiations were conducted at a time when Turkey appeared isolated in a hostile environment.

Germany made France collapse in the summer of 1940. Meanwhile, as a result of German dominance in the Aegean Sea, Russian-German hostilities broke out. By invoking the Russian clause in its alliance treaty with France and Britain, Turkey remained neutral. Furthermore, Britain and France could not fulfill the arms assistance to Turkey which they had committed to at the beginning of the war. Turkey remained neutral because it felt itself under pressure between Russia, which was its border neighbor for centuries, and the dominant position of Germany in the Mediterranean and in the Balkans. It endeavored to apply the Montreux Convention as best it could under conditions of war. With reference to the Convention, free passage for merchant vessels of all states was allowed, whether the state was a belligerent or not, and the passage of warships belonging to belligerent states was forbidden. As already mentioned, after the

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<sup>367</sup> B. Oran, p.255.

<sup>368</sup> J. C. Hurewitz (1956), p.230.

<sup>369</sup> B. Oran, p.255,261; F. C. Erkin, p.166-167.

outbreak of Russian-German hostilities, Soviet Russia was hard-pressed by German troops, and as such both England and Soviet Russia pledged to abide by the provisions of the Convention.<sup>370</sup>

Due to the difficult situation of being under German pressure in the war, Soviet Russia gave a guarantee to Turkey, with the mediation of England, about its neutrality to remove Turkish anxieties concerning a possible Russian attack if Turkey found itself involved in an armed conflict. Upon this Russian guarantee, a non-aggression declaration between Turkey and Russia was signed on 25 March 1941. This declaration was like a corroboration of the friendship treaty between the two countries which was signed in 1925.<sup>371</sup> On 22 June 1941 Germany attacked Russia and shortly thereafter, on 10 August 1941 Russia and England replied with their fidelity to the Montreux Convention and announced that they gave assurances that Soviet Russia had no aggressive intentions or claims regarding the Straits.<sup>372</sup> Furthermore, they undertook to come to Turkey's aid against any possible attack by a European state.

The disastrous experience of World War I and the following long war years, alongside their negative effect on the Turkish economy, forced the Turkish statesmen to stay out of the war. Turkey followed a policy of neutrality throughout World War II. As a result of this policy it tried to remain neutral and was open to sign any and all non-aggression and friendship agreements. As such, Germany proposed signing a non-aggression and friendship treaty by securing Turkey's neutrality on the eve of its attack on Soviet Russia. In this context on 18 June 1941, having informed its ally England, Turkey concluded a friendship agreement with Germany. The agreement suggested that Turkey's alliance with England would remain unaffected.<sup>373</sup> By concluding a friendship treaty with Turkey, Germany managed to keep Turkey out of the war, and on the other hand, Turkey guaranteed itself against any aggression by Germany. Furthermore, on 9 October 1941 Turkey and Germany concluded a trade agreement. In that agreement

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<sup>370</sup> Y. Inan (1995), p.104; F. A. Váli, p.61.

<sup>371</sup> B. Oran, p.258; Y. Inan (1995), p.104; F. C. Erkin, p.173-184. According to Oran; "... the Soviet reaffirmation of non-aggression occurred only after the collapse of the USSR's Balkan plans and after German forces approached the Straits. Until then the USSR had done nothing to dispel Turkey's apprehensions."

<sup>372</sup> H. N. Howard (1974), p.165; B. Oran, p.264.

<sup>373</sup> F. C. Erkin, p.175.



Turkey agreed to sell chrome,<sup>374</sup> which was undertaken but later given up by England and France, to Germany. However, signing a non-aggression treaty and a trade agreement with Germany was the cause of western powers' coolness toward Turkey – especially Washington's. After signing the above-mentioned agreement, on the occasion of oil transferred by German ships which were mostly sailing between Romanian port and Aegean Islands and were occupied by German troops, passing through the Straits would cause some disagreements between Turkey and the Allied powers during the rest of the war period. Protest was heard from Soviet Russia against Turkey after the war due to the fact that Turkey failed to apply the Montreux Convention's provisions to the German ships.

Turkey remained neutral until 1945, but pressure was introduced in 1943 by Allied powers, particularly after the Moscow and Tehran Conference concerning active Turkish belligerency. Because of the occupation of the Aegean Islands and Crete by Germany, Allies could not send aid to Russia. Under the difficult conditions of war, Russia insisted on Turkey's entry into the shooting war in order to gain a front line against Germany. However, Turkey was trying to stay out of the conflict because it was anxious about insufficient supplies and equipment and had no desire to undergo a possible Nazi conquest, but on the other hand it was anxious about Soviet pressure after the war. In the following period, the Allied pressure on Turkey intensified but Turkey still refused to become involved in the war. In the meantime, the destiny of the war had shifted in favor of the Allies. As a result, the German-Turkish chrome sales agreement expired on 30 April 1944 and was thus ended.<sup>375</sup>

During the negotiation period between the Allies and Turkey the question of German shipping through the Straits came up. London declared that Germany did not want to use the Straits for the passage of its warships, but it used the Straits for its cargo

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<sup>374</sup> Tennstedt, E. (1981). *Die Türkischen Meerengen im Zweiten Weltkrieg*. Frankfurt am Main: Alfred Metzner Verlag, p.16.

Chrome is indispensable raw material for the armament industry. Both before and during World War II, chrome was the most important material for the powers because of rearmament. In 1939, Turkey constituted 16% of the world chrome market. This meant that it was an important chrome supplier. For this reason in 1939, France and England agreed with Turkey to import 200,000 tons of chrome for the next three years, thus Turkey could not sell chrome to the axis powers. However, after the occupation of France by Germany chrome sales did not continue as planned. In the end, Turkey concluded a trade agreement with Germany on 9 October 1941. Karakas, N. (December 2010). İkinci Dünya Savaşı Yıllarında Türkiye'nin Krom Satışı ve Müttefik Politikaları [Turkish Chrome Sales Politics during the World War II]. *Tarih İncelemeleri Dergisi [History Review Journal]*, Vol II, S. 447-482.

<sup>375</sup> B. Oran, p.275.

ships, suspected of being warships, in order to increase its oil and strategic product supplies.<sup>376</sup> In actual fact, after German occupation of the Aegean islands some passage by the Axis power's ships through the Straits caused disagreement in terms of the interpretation of the Montreux Convention by the Allies and Turkey. The war period was the first great test of the new regime of the Straits and various interpretations of provisions of Montreux Convention would be considered by the powers.

The first important incident was the passage of the Italian tanker "Tarvisio" through the Straits into the Mediterranean in June 1941. London claimed that it should not have been granted passage on the grounds that it was an auxiliary warship. The Italian Ambassador explained that the "Tarvisio" was an auxiliary warship which had previously been deleted from the list of such warships. On this understanding, the ship was allowed to pass by Turkish authorities as a merchant vessel, despite the initiative brought by the Soviet government. However, on its return to the Black Sea in August 1941, England and Russia protested to Turkey, and Turkey declared that it could not accept a warship which had been changed into a merchant ship in war time, and refused passage.<sup>377</sup> As a consequence, Turkey was then protested against by the Italian government.

In the spring of 1941, England wanted to prevent passage through the Straits by two German merchant vessels, "Delchow" and "Larissa", who were carrying materials and supplies. However, the Foreign Office recognized that there was no provision in the Convention interdicting their passage. Furthermore, London took into consideration that Turkey had at least notified the signatories of their passage, especially as London realized there was no likelihood of Turkey's declaring an imminent threat of war.<sup>378</sup>

Another case was the passage of the German motorboat "Seefalke" in July 1941. The Soviet Union protested the passage of Seefalke, Turkey replied that such ships

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<sup>376</sup> A. R. Deluca, p.144.

<sup>377</sup> Bilsel, C. (October 1947). The Turkish Straits in the Light of Recent Turkish-Soviet Russian Correspondence. *The American Journal of International Law*, Vol.41, No.4, pp. 727-747, p.741; E. Tennstedt, p36; A. R. Deluca, p.145-146; Baxter, R. R. (1964). *The Law of International Waterways*. Cambridge, Massachusetts: Harvard University Press, p.240.

<sup>378</sup> A. R. Deluca, p.147.

displacing less than 100 tons were not under the description of a warship or auxiliary warship as defined by Annex II of the Montreux Convention.<sup>379</sup>

On 4 November 1942, Soviet Russia drew the attention of the Turkish government to the fact that 140,000 tons of German auxiliary warships camouflaged as merchant ships were about to pass the Turkish Straits. However, only ten commercial character vessels (total tonnage was 19,000 tons) passed and the rest never materialized.<sup>380</sup>

The issue of passage through the Straits emerged again toward the end of the war. In May 1944, London informed Ankara that four small merchant ships (Ems Class of Krieg Transportschiff) suspected of being warships had sailed through the Turkish Straits, and that five other ships of the same class were preparing to pass the Straits into the Aegean Sea. Investigations revealed that the vessels were too small to be considered warships within the scope of Annex II of the Convention and there were no weapons on board. Passage was allowed the ships after inspection on grounds of health by Turkish authorities. Discussions emerged around the impossibility of determining the true characteristics of the German ships. By the end of May the crisis reached its climax when a number of German ships (Ems/ Manheim Class of Krieg Transportschiff) were granted passage permission after assurances were given by the German Ambassador Von Papen to Turkey that these ships were not war vessels. The Allies protested the Turkish action and consequently Turkish officials conducted a search during passage through the Straits. Upon discovering radar equipment, weapons, and naval equipment, their passage was prevented. During a later inspection of the German vessel "Kassel" (Krieg Transportschiff) it was discovered that it was an auxiliary naval vessel with armor, a dismantled ship's guns and a camouflaged thirty-ton derrick. Turkey protested against Germany for violating the terms of the Montreux Convention and informed them that henceforth all German vessels would be inspected and that vessels of EMS and Manheim Classes would be prevented without any inspection. The event caused the

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<sup>379</sup> C. Bilsel (1947), p.740; E. Tennstedt, p.35. According to Deluca; although this ship was a merchant vessel, it could readily be converted into an armed petrol craft. Both the British and the Soviets were about the possibility that the Germans might seek in the future to have pass their E-boats (high speed torpedo boats) pass through the Straits. A. R. Deluca, p.147.

<sup>380</sup> C. Bilsel (1947), p.741; E. Tennstedt, p.37-38.

Foreign Minister of Turkey to resign.<sup>381</sup> And then, at the request of England and the U.S., Turkey severed its relations with Germany on 2 August 1944.<sup>382</sup>

Breaking relations with Germany would be a step toward an eventual declaration of war. However, London and Washington had lost interest in Turkey's becoming involved in the war because they considered that Turkey's belligerency was too late to make any difference. Similarly, Russia was eager to appear uninterested in Ankara's actions. On Churchill's visit to Moscow on 9 October 1944, Stalin received a positive reply from Churchill concerning changes to the Montreux Convention in the framework of postwar arrangements. Following this, Soviet Russia began to pursue a policy that would leave Turkey isolated so that it could negotiate modifying the Montreux Convention with the Allies.<sup>383</sup>

### **3. The Straits Question at Yalta and Potsdam Conferences**

Between 4-11 February 1945 Churchill, Roosevelt and Stalin came together at Yalta in Crimea to determine the shape of Europe after the war, and the Turkish Straits were on the agenda. On 10 February Stalin raised the Straits question and expressed that the Montreux Convention was outmoded and that it should be revised. He added that it was a product of the defunct League of Nations system and did not correspond to the new era, and that it was impossible to accept a situation in which Turkey had "a hand on Russia's throat." Both President Roosevelt and Churchill agreed to revise the Montreux Convention and it was decided that the Soviet proposals concerning the Straits should be placed on the agenda of the forthcoming foreign ministers' meeting.<sup>384</sup> In actual fact, with reference to Article 29 of the Montreux Convention, any signatory state could request the revision of the Convention because the next five-year period would expire in August 1946. However, the winners – in particular Russia – wished to revise the Straits

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<sup>381</sup> B. Oran, p.276; A. R. Deluca, p.147; F. C. Erkin, p.237.

<sup>382</sup> H. N. Howard (1974), p.207.

<sup>383</sup> B. Oran, p.279.

<sup>384</sup> Y. Inan (1995), p.105; F. A. Váli, p.62; B. Oran, p.278. In addition, it was also agreed at Yalta that only those countries which were in a state of war with Japan and Germany on 1 March 1945 would be invited to the San Francisco Conference of the United Nations. To secure an invitation, Turkey declared war on both Japan and Germany on 23 February 1945.

regime in accordance with their own interests. Besides this the U.S., which was not one of the signatory states of the Montreux Convention, involved in the revision process.<sup>385</sup>

On 19 March 1945, Soviet Foreign Minister Molotov summoned Turkish Ambassador Selim Sarper to his office and handed him a note. Turkey was being informed that the Turkish-Soviet Friendship Treaty would not be extended, giving the argument that radical changes had taken place during the war. Although Turkey replied to the Soviet note on 4 April and proposed the conclusion of a new pact, no reply came from Moscow.<sup>386</sup> Sarper was invited on 7 June again and a verbal note was given. Molotov told him that to regain Soviet friendship, a price had to be paid. He requested the return of Turkish provinces, Kars and Ardahan, which had been given back to Turkey after World War I, the revision of the Montreux Convention and the granting of bases to Russia in the Straits area to ensure the common defense of the Straits. All these demands were refused, on the grounds that they were incompatible with the territorial integrity and sovereign right of Turkey.<sup>387</sup>

Following the surrender of Germany, the Potsdam Conference was held from 17 July to 2 August 1945. The Straits question was discussed at Potsdam once again. Stalin repeated Soviet Russia's demands for the Straits and argued that the problem should be solved between Turkey and Russia. At Yalta, Stalin asked for the revision of the Montreux Convention but the aim of the request was changed. Russia was trying to gain a base on the Straits while enjoying its most powerful times. On the other hand, President Truman argued that "free and equal rights of all nations to transport on the waterways of Europe-the Rhine, Danube, Dardanelles, and the Kiel Canal – would be advantageous if not essential to the preservation of peace in Europe."<sup>388</sup> More to the point, he explained that the U.S. favored revising the Montreux Convention but believed the Turkish Straits should be guaranteed for all; he suggested the "internationalization" of the Straits and other waterways. Besides refusing Russia's proposal for free passage of all nations in the Straits, England took less interest in the American proposal.<sup>389</sup> Both

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<sup>385</sup> F. C. Erkin, p.266.

<sup>386</sup> H. N. Howard (1974), p.216; Y. Inan (1995), p.106.

<sup>387</sup> B. Oran, p.279

<sup>388</sup> H. N. Howard (1974), p.225; R. R. Baxter, p.47.

<sup>389</sup> H. N. Howard (1974), p.228; According to Erkin, the Turkish government had misgivings regarding the American position at the Potsdam meeting and the "internationalization of the Turkish Straits and other waterways." The Truman formula was ambiguous and therefore unsatisfactory, but pure and simple rejection might risk isolating Turkey in the face of the Soviet Russia. See: F. C. Erkin, p.269.

England and the U.S. opposed the Soviet approach to a bilateral agreement with Turkey and the establishment of a Soviet base in the Turkish Straits area. At the end of the Potsdam Conference, the three presidents were in favor of a revision of the Montreux Convention and they agreed that as the next step the matter should be the subject of direct conversations between Turkey and each of the three governments.<sup>390</sup>

In line with the decision taken at Potsdam, the American note dated 2 November was delivered to Turkey first. The note proposed that:

“1) The Straits to be open to the commercial vessels of all nations at all times; 2) The Straits to be open to the transit of the warships of the Black Sea Powers all time; 3) Except for an agreed limited tonnage in time of peace, passage through the Straits to be denied to the warships of non-Black Sea Powers at all times except with the specific consent of the Black Sea Powers, or except when acting under the authority of the United Nations; 4) Certain changes to modernize the Montreux system, such as the substitution of the United Nations Organization for that of the League of Nations and the elimination of Japan as a signatory”<sup>391</sup>

The freedom of passage of merchant ships was already an accepted principle under the Lausanne Convention, and moreover it was fixed as an unchangeable provision in the Montreux Convention. The principle had always been accepted by young Turkey; however, Turkey was not happy with the proposal “free passage of warships of the Black Sea states in time of war”. In particular, the second and third provisions of the proposal would turn the Black Sea into a Russian naval base and Turkey might find the entire Soviet fleet and possibly satellite fleets too in the Turkish Straits, if there were any war when Turkey was neutral. However, it replied to the note on 6 December 1945 and declared that it was willing to participate in an international conference to accept international decisions concerning the Turkish Straits, provided that Turkish sovereignty, independence and territorial integrity were respected.<sup>392</sup> On the other hand, Turkey was satisfied because the U.S. was now far from the Truman proposal, which

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<sup>390</sup> F. A. Váli, p.64; Y. Inan (1995), p.107. According to Soviet version of the protocol of Potsdam Conference; “...the governments agreed that ‘as the proper course’ the problem of revision of the Montreux Convention would be the subject of direct negotiations between each of the three powers and the Turkish Government.” See: H. N. Howard (1974), p.231.

<sup>391</sup> H. N. Howard (1947), p.70; F. A. Váli, p.67.

<sup>392</sup> Y. Inan (1995), p.109; B. Oran, p.301. According to Erkin, Turkey was in a difficult political situation. It calculated possible favorable and unfavorable conditions and in order not to oppose England and the U.S. it agreed to solve the Straits problem at an international conference attended by the U.S. i. See: F. C. Erkin, p.270.

offered the internationalization of the Straits under the guarantee of big powers.<sup>393</sup> A British note with a similar content followed the American note on 21 February 1946. As an ally with Turkey, England was anxious to keep the international character of the Turkish Straits in view, but it wanted Turkey to be an independent state, not to be converted into a satellite state.<sup>394</sup>

On 7 August 1946, Soviet Russia sent a note to the Turkish government, which led to important developments in Soviet-Turkish relations. The Russian note called for Turkish attention to several incidents which had occurred in the Turkish Straits during the war<sup>395</sup> and charged Turkey with misusing the administration of the Montreux regime. The Russian proposal was as follows:

“1) The Straits should always be open to the passage of merchant ships of all countries, 2) The Straits should always be open to the passage of warships of the Black Sea Powers, 3) Passage through the Straits for warships not belonging to the Black Sea Powers shall not be permitted except in cases especially provided for, 4) The establishment of a regime of the Straits, as the sole passage, leading from the Black Sea and into the Black Sea, should come under the competence of Turkey and other Black Sea powers. 5) Turkey and the Soviet Union, as the powers most interested and capable of guaranteeing freedom of commercial navigation and security in the Straits, shall organize joint means of the Straits for the prevention of the utilization of the Straits by other countries for aims hostile to the Black Sea Powers.”<sup>396</sup>

The first two provisions of the Russian proposal were the same as the American proposal. However, from the other provisions it was evident that Russia proposed not to revise the Montreux Convention as it was discussed at Potsdam, but to establish a “new regime” which it had desired for many centuries for the Straits. Soviet Russia, as a signatory of the Montreux Convention, had the right to initiate such a revision process with the support of one or two signatories, and the next five-year period (Article 29) for demanding a revision of the Convention was going to expire in the fall of 1946.<sup>397</sup>

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<sup>393</sup> F. C. Erkin, p.271.

<sup>394</sup> H. N. Howard (1947), p.70.

<sup>395</sup> These incidents, which were mostly German ships' passages through the Straits, were examined above. See also; R.R. Baxter, p.240-243.

<sup>396</sup> F. C. Erkin; p.414; Bilsel, C. (1948). *Türk Boğazları [The Turkish Straits]*. Istanbul: Ismail Akgün Matbaası, p. 62; H. N. Howard (1947), p.71 A copy of this note was delivered to the U.S and British government by Soviet Union.

<sup>397</sup> No revision request regarding the Montreux Convention has reached French Government yet.

Yet even before Turkey replied to the Russian note, the United State responded on 19 August and the British Government on 21 August 1946. Both states were against the regime of the Straits formulated exclusively by the riparian states of the Black Sea. They also declared that Turkey should remain primarily responsible for the defense of the Turkish Straits. In addition, the U.S. sent its naval task force to the Mediterranean, including an aircraft carrier.<sup>398</sup> On 22 August 1946, Turkey replied to the Soviet note by clarifying one-by-one the Russian claims about the incidents of German and Italian small vessels that passed through the Straits. Other than this, in its note, Turkey accepted that the Montreux Convention required adaptation to technical progress and present conditions at an international conference with the participation of the signatory states and the United States. Turkey declared that the fourth and fifth points of the Soviet note were unacceptable. According to the Turkish note; “the 4<sup>th</sup> point of the Soviet note seems to foresee a new Straits regime set up on a new basis and in the development of which only Turkey and the powers bordering the Black Sea would participate to the exclusion of all others.” Furthermore, Turkey declared the 5<sup>th</sup> point of the Russian proposal regarding the joint defense of the Straits with Soviet Russia was “not compatible with the inalienable rights of sovereignty of Turkey nor with its security, which books no restriction.”<sup>399</sup>

On 24 September 1946 Soviet Russia submitted a note with similar content.<sup>400</sup> Soviet Russia renewed its effort to establish the legitimacy of its claim for the joint defense of the Straits by referring to the incidents involving Axis vessels in the Straits during World War II and the passage through the Straits by the German ships “Breslau” and “Goeben” in World War I. Additionally, regarding the 4<sup>th</sup> point, Russia argued that because the Black Sea is an enclosed sea, it is necessary “to establish such a regime of the Straits which above all would meet the special situation and the security of the Turkey, the U.S.S.R., and the other Black Sea powers.” Moreover it defended that, under the terms of Turkish-Soviet friendship Treaty of 1921, Turkey had recognized “the necessity of confiding the drafting of the international statute of the Black Sea and Straits to a conference composed only of the representatives of riparian countries.” Russia insisted on the 5<sup>th</sup> point by stressing “the Soviet proposal should not prejudice

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<sup>398</sup> H. N. Howard (1974), p.244; Y. Inan (1995), p.113.

<sup>399</sup> B. Oran, p.301; C. Bilsel (1948), p.74; F. A. Váli, p.73 and 255; Y. Inan (1995), p.112.

<sup>400</sup> This time, Russia delivered its note only to Turkey. The U.S. and England were informed by the Turkish government regarding the second Russian note.



the sovereignty of Turkey and should at the same time, meet still better the interests of its security, since the joint measures of Turkey and the Soviet Union can assure the safeguarding of these Straits in much fuller measures than those of Turkey alone.”<sup>401</sup>

The second Soviet note was answered at once by the United States and England on 9 October 1946. They both declared that the Protocol of Potsdam foresaw an international conference for the revision of the Straits regime and that only a preliminary exchange with Turkey was expected before holding any next possible conference. Furthermore, they expressed that the exchange process had been completed.<sup>402</sup> The Turkish response was delivered to Russia on 18 October. At the same time the response was forwarded to the U.S. and all signatories of the Montreux Convention, except Japan, in order to inform them about the process. In its note, Turkey replied point-by-point to the Russian note and defended its conduct in the face of the Russian accusations. It disclaimed any responsibility for the danger to the riparian states created in the Black Sea during the war and stressed the difficulties in distinguishing between merchant ships and warships on the grounds of Annex II (definitions of the warships) of the Montreux Convention. In addition, it refused to accept the Russian notion of a “closed sea” and the arguments founded on the Friendship Treaty of 1921.<sup>403</sup> Turkey expressed that the passage of warships through the Straits was considered as an exceptional character of the closing of the Straits towards the middle of the 19<sup>th</sup> century when both the Tsarist Russia and Sublime Porte supported this rule as a general principle of European public law. When the Montreux Convention was accepted by the

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<sup>401</sup> F. C. Erkin, p.423; C. Bilsel (1948), p.76; F. A. Váli, p.73 and 266.

<sup>402</sup> A. R. Deluca, p.159; F. A. Váli, p.73 and 275-277; H. N. Howard (1974), p.250-251.

<sup>403</sup> For more information see Chapter 3. When the Friendship Agreement of 1921 was signed, the Straits were managed under the provisions of Sevres Treaty by Allies Powers. Turkey and Russia as riparian states of the Black Sea were not satisfied with the Sevres provisions. In order to conclude an appropriate passage regime that contained the security interest of Turkey and of other riparian states, both states agreed to act together by the above-mentioned friendship agreement. Furthermore, Turkey invited Soviet Russia to the Lausanne Conference with reference to Article 5 of the Friendship Agreement of 1921. In other words, because Soviet Russia withdrew from the war, it did not have the right to join the Lausanne Convention. However, because the Straits regime related to the riparian states, Russia could join the Lausanne Convention at Turkey’s invitation. On the other hand, Article 5 did not contain any “closed sea” claim of Turkey and the Friendship Agreement of 1921 constituted “*res inter alios acta*” and it cannot be extended for all other countries. See C. Bilsel (1948), p.50.

Article 5 of the Friendship Agreement of 121 states: “In order to assure the opening of the Straits to the commerce of all nations, the contracting parties agree to entrust the final elaboration of an international agreement concerning the Black Sea to the conference composed of delegates of the littoral States, on condition that the decisions of the above-mentioned conference shall not be of such nature as to diminish the full sovereignty of Turkey or the security of Constantinople, her capital.” See: J. C. Hurewitz (1956), p.96.

signatories, it was clear to all signatory states that the revision of the Convention could take place “in an international conference uniting the contracting States and in accordance with a procedure foreseen by the text of the Convention itself.” Any other process would be a violation of international law. Turkey agreed with Soviet Russia, the Montreux Convention went further than the Lausanne Convention and “established for the benefit of the riparian states of the Black Sea a sharply defined system of preference.” Furthermore, Turkey reminded Russia that the 5<sup>th</sup> point regarding the establishment of a “joint defense” system had already been discussed in the Saracoğlu-Molotov conversations in 1939. Accordingly, Turkey had already emphasized that the acceptance by Turkey of a joint defense system “would mean no less than sharing its sovereignty with a foreign power”. Turkey felt that direct conversations proposed at Potsdam had been fulfilled and doubted the usefulness of continuing to follow the same process. Therefore, Turkey, like England and the U.S., expressed that “the preliminary preparatory work desired by the Potsdam conference is now virtually completed”. Furthermore, it declared that it was “ready to attend a conference at which the Soviet Union, the United States of America, the United Kingdom, and France as well as the other states signatories of the Montreux Convention, except Japan, in order to proceed with the negotiations for the revision of the above-mentioned convention.”<sup>404</sup>

#### **4. Turkish Straits and the Great Debate, 1953-1963**

The last Turkish note never received a response from Soviet Russia and the envisioned conference never took place. After the exchange of notes the most significant development was the breakdown of the wartime alliance. The Truman Doctrine was declared against the Russian threat and shortly thereafter Turkey participated in the Marshall plan. Soviet Russia was deeply suspicious of Turkey’s effort to join the other side while the U.S. and England feared Russia’s demands on the Straits, especially the U.S., which as the leader of the Western community, considered that it could utilize the strategic and geopolitical situation of the Straits against the Russian threat that occurred following the year of 1946. The great powers were unwilling to accept any risk involved in the elimination of Turkey’s independence and

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<sup>404</sup> F. C. Erkin, p.423; F. A. Váli, p.74 and 278-297; H. N. Howard (1974), p.254; Y. Inan (1995), p.115.

integrity.<sup>405</sup> Furthermore, in cases hostility, Turkey would continue to exercise control over the passage of ships through the Straits and would also close the Straits to Russian warships. Accordingly, a revision of the Montreux Convention was never prioritized.<sup>406</sup> At the same time, Turkey perceived the Soviet threat after the war and became a trusted ally of the western powers. It was effectively in control of the Straits and a revision of the Montreux Convention after 1946 during the Cold War was risky. World War I, the Sevres, and the period under the Lausanne Convention were relatively fresh for Turkey and after many conflicts it had become the guardian of its own Straits area. The control of the Straits, which was guaranteed by the Montreux Convention, was synonymous with its security in the Straits area. In the Soviet notes after the Potsdam meeting it was faced with the Russian threats and claims. To block Russia's influence in the Mediterranean, Turkey, who was the guardian of the Straits, was involved in the Truman Doctrine. The doctrine overlapped with Turkish security interests against the Soviet threat. As a result of this, Turkey took its place at the side of western powers and joined NATO in February 1952.

The Soviet Union had refused to renew the non-aggression treaty which it had concluded with Turkey in 1925. Furthermore, Soviet Russia requested in its notes much more than the amendment of the Montreux Convention. Despite the fact that Stalin agreed to convene an international conference for the revision the Montreux Convention at the Potsdam meeting, Soviet Russia did not insist on revising the Straits regime any longer. After the beginning of the Cold War, Russia refrained from urging the convocation of an international conference because it took into consideration that restricted provisions of the Montreux Convention would guard the Straits for its own security interests against NATO forces. Furthermore, under the conditions of the day, it considered that it might not obtain an advantageous provision for its security – which the Montreux regime provided – if an international conference were to be convened. In this regard, it was no longer interested in a revision of the Convention at the beginning of the Cold War.

After World War II, relations between Turkey and Russia worsened and the Soviet claims on Turkish territory and its demand for a base on the Straits caused their relations to break down. During the post-war era Turkey became one of the most

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<sup>405</sup> A. R. Deluca, p.160.

<sup>406</sup> F. A. Váli, p.76.

militant antagonists of Russia. This tension continued until Stalin's death on 5<sup>th</sup> March 1953. The process of normalization of Turkish-Soviet relations began on 30 May 1953, when Russia delivered a note informing Turkey that its demands had been withdrawn. According to the note:

“To further good neighborly relations and reinforce peace and security, the governments of Armenia and Georgia now deem it possible to renounce their territorial claims against Turkey. The Soviet Government has reviewed its previous position regarding the question of the Straits and considers that it possible to ensure the security of the Soviet Union in the region of the Straits in conditions acceptable to the Soviet Union as well Turkey. The Soviet Government hereby declares that the Soviet Union harbors no territorial claims on Turkey.”<sup>407</sup>

Turkey replied to the Soviet note on 18 July 1953 by stating that “as the Soviet Union is aware, the question of the Straits falls within the terms of the Montreux Convention, a fact that the Government of Turkey wishes to underline.”<sup>408</sup> The Soviet note dated 30 May and the Turkish reply reflected the foreign policies of the two countries and caused diplomatic relations to begin again. Only two days after the receipt of the Turkish response, Russia handed a note to Turkey on 20 July, complaining about the visits of American and British warships to Istanbul. On 24 July, Turkey responded by expressing that “such courtesy visits are fully in compliance with the Montreux Convention and do not call for prior notification.”<sup>409</sup> This was really an attempt by Russia to get information for which it had legitimate interest under the terms of the Montreux Convention. Turkey continued to convey passage information to the signatories with reference to the provision of the Montreux Convention.

The problem of the Straits, especially regarding possible revisions to the Montreux Convention which had been discussed since World War II remained unchanged under the pressure of political change. With the beginning of the Cold War, the interests and alliance of the powers changed again and demands to revise the Turkish Straits regime disappeared. Although the powers agreed only a few years before then that the provisions of the Montreux Convention were outmoded in terms of technical progress and present conditions and that it should be renewed, the geographical location of the Straits in newly-designed world order was playing a great

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<sup>407</sup> B. Oran, p. 304.

<sup>408</sup> Ibid, p.305.

<sup>409</sup> J. C. Hurewitz (1956), p.343-344; B. Oran, p.305; See Article 14 and 17 of the Montreux Convention.

role for their security interests. As a result, all rivals gave up their demands for the revision of the Straits regime after the beginning of the Cold War. On the other hand, despite the fact that the U.S. was not a signatory of the Montreux Convention it was involved in discussions about revising the Montreux Convention and against the Russian threat, and Turkey agreed that the U.S. could join in the next possible international conference.

Independently from the revision discussion which occurred after World War II and was negotiated at Yalta and Potsdam, the Montreux Convention already had its own provisions regarding revision and renunciation. The Montreux Convention had a duration of twenty years and although the five-year period for notice of revision began in July 1951 (Article 29) and the two-year period for notice of renunciation of the Convention began in July 1954 (Article 28),<sup>410</sup> no signatory state gave any notice concerning the renunciation or revision of the Montreux Convention. In other words, the powers preferred not to revise the Straits regime as it was stated in the Montreux Convention. Furthermore, shortly after adopting this attitude they also gave up their demands to revise the Convention. The “passage of freedom for all merchant vessels” as a principle of international law was already guaranteed by Montreux Convention without a time limit. To give up their demands for revision meant that the Montreux regime offered a sufficient passage regime for vessels of all states. The requests for revision that occurred after World War II can be regarded as purely politically motivated, as is evident in the fact that despite the renunciation period finishing in 1954, no signatory of the Montreux Convention gave a note to the French Government. In fact, up until today, no diplomatic note regarding the revision of the Montreux Convention has been conveyed to the French Government in any of the expired five-year periods.

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<sup>410</sup> Article 28 of the Montreux Convention: „If two years prior to the expiry of the said period of twenty years, no High Contracting Party shall have given notice of denunciation to the French Government the present Convention shall continue in force until two years after such notice shall have been given.”

## **PART II: Legal Status of International Straits and Modification of the Montreux Convention**

The changing of the passage regime of the Turkish Straits was examined in Part I in order to understand both the roots of the clauses of the Montreux Convention and others factors that resulted in the current passage regime, such as political interests of powers and geostrategic importance of the Straits and the Black Sea region. Thus, Part I gave the opportunity to make a comparison between the Montreux passage regime and the clauses of the old treaties which were concluded in the long history of the Turkish Straits.

However, because the Turkish Straits are international straits used for international navigation, it is necessary to determine the place of the Montreux regime within the international law of the sea. The second part of this work will focus on the evolution of the law of the sea and legal status of international straits' in international law. Thus, Part II will provide comparison opportunities between the Turkish Straits' passage regime and other international straits. Furthermore, the legal basis for adopting some maritime traffic regulations in the Turkish Straits and possible revisions of the Montreux Convention will also be discussed in light of legal status of international straits in international law.

### **CHAPTER 6 The Legal Regime of International Straits**

#### **1. The Status of Straits in International Law**

The legal position of international straits has been one of the problems of international law for many centuries. In international law, the basic focus of interest is navigation by ships and over-flight by planes. The use of straits has always involved a tension between the international community who make free passage requests and the riparian states of the straits who have security interests in the straits. Straits are important because of qualities such as their geographical locations, economic and political status and naval functions. However, the question of the legal position of international straits was not made the subject of a comprehensive analysis until the 20<sup>th</sup>

century. Furthermore, the definition of “international straits” is closely related to the definition of straits, the international character of straits, high sea, territorial sea and other instruments of the international law of the sea. Therefore, a comprehensive analysis of the legal status of the international straits cannot be completed before determining other instruments of the sea in international law. In this context, states’ practices play a great role in the history of the law of the sea. Up until the mid-twentieth century, the history of the international law of the sea was dominated by European practice because of the development of maritime technologies and the development of the trade routes by European states.<sup>411</sup> At the beginning, the oceans were seen as maritime highways for all states to use for trade and commerce. However, there was a gradual realization that naval forces supplied the capacity to control and regulate access to the oceans and trade routes, and so naval forces were developed. This situation started to create an awareness of the threat to trading states, and especially to coastal states. Consequently, the international community had to find solutions to the security concerns of the coastal states and the issue of the use of oceans by other states. Because of the different characteristics of straits and their geographical and political importance for riparian states, the legal position of straits in international law occupies the international community more than other instruments of the law of the sea.

## **1.1. Evolution of the International Law on the Sea until the Montreux Convention**

### **1.1.1 Mare Liberum and Mare Clausum**

According to international law, high seas are neither possession, nor property of any state. Therefore, legally the “high sea is not susceptible of appropriation and no state can obtain such possession of it as would legally be necessary to entitle it to claim of property over it.”<sup>412</sup> However, this principle did not apply in the past when the desire for domination of the seas caused sharp disputes and bloody wars. In the Middle Ages, Venice and Genoa declared the Ligurian Sea their property; Portugal and Spain

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<sup>411</sup> Rothwell, D. R., & Stephens, T. (2010). *The International Law of the Sea*. Oxford: The Hart Publishing Ltd., p.2.

<sup>412</sup> C. J. Colombos (1967), *The International Law of the Sea*. London: Longman Green & CO.LTD, p.47.

regarded themselves as the owners of the seas which were divided between them under papal decree. Additionally, England led by Queen Elizabeth laid claim to all the waters that touched both coasts of England and those of the states under the crown of Great Britain, and it extended its property rights over the ocean to the coast of America.<sup>413</sup>

This extensive use of oceans for trade by riparian or non-riparian states caused the emergence of two principles of the international law of the sea, “the freedom of seas” and “territorial waters”. The conflicting practices by states with regards to the sea prompted authors to establish new theoretical constructs to use in the debate over using seas. One of the earliest, most significant contributions was made by Hugo Grotius. In seeking to establish foundational principles for the law of the sea, he likened the sea to the air and argued in his work *Mare Liberum* that the seas should be available to all users. Furthermore, he expressed the economic importance of the high seas and argued that if global transportation by ships became subject to state control this would not facilitate international trade:

“For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or fisheries.”<sup>414</sup>

Even though *Mare Liberum* was influenced by Dutch concerns, because of the threat of the growing East Indian trade by Portuguese maritime power, the notion of “the freedom of the seas” gained considerable momentum. However, his work provoked responses from numerous other authors in other nations. The major response to Grotius came from the English publicist John Selden. In his work *Mare Clausum* (The Closed Sea), which was published in 1635, Selden sought to prove that there was a long-standing practice of domination over the oceans and the sovereignty of the crown of Great Britain in British seas. Ultimately, in the nineteenth and twentieth centuries, Grotius’ view prevailed and “freedom of seas” became a doctrine for ships sailing in high seas.<sup>415</sup>

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<sup>413</sup> C. Kumrow, p.59.

<sup>414</sup> Grotius, H. (1608). *Mare Liberum [The Freedom of Seas]*. New York -1916: Oxford University Press. (Translated by Ralf Van Deman Magoffin), p.28.

<sup>415</sup> Münch, W. (1982). *Die Regime internationaler Meerengen vor dem Hintergrund der Dritten UN-Seerechtskonferenz*. Berlin: Duncker&Humblot, p.16; D. R. Rothwell & T. Stephens (2010), p.3.



### 1.1.2 Territorial Sea in Customary Law and Codifications

With the acceptance of the notion of “the freedom of the seas” by the international community, the legal regime of oceans enjoyed a stable period from the 17<sup>th</sup> to the 19<sup>th</sup> century. Thus, the demand of many states in which “no state may hinder the other in shipping in high seas and in the extraction of marine products” was recognized in states’ practice and became a principle of European International Law in the 17<sup>th</sup> century.<sup>416</sup> However, the potential for the uncontrolled use of naval forces and the threat of hostile actions in the seas remained an unresolved problem for the international community. The ability of naval forces to control certain waters and their capacity to bombard coastal cities was a main issue on the agenda of many nations. At this point, the notion of “absolute freedom of the seas” would have allowed hostile navies to easily launch attacks by sailing close to foreign coastline; correspondingly coastal states needed to defend themselves from any hostile acts by foreign powers. The freedom of the seas at first resulted in security concerns for coastal states. In order to defend their security interests, coastal states began to assert their right to control waters adjoining their coasts. Over time, this claim caused the emergence of the notions of “territorial water” and the “limitation of territorial waters”.<sup>417</sup>

The idea of the “expansion of state sovereignty on parts of the adjacent sea” was claimed for the first time by the Venetians on the Sea of Adriatic in the late Middle Ages. The Venetian designated their sea boundary as 100 miles (two days’ journey) from the coast. However, the doctrine of territorial waters was initially based on the principle of effective domination by Grotius. According to him, “the empire of a portion of the sea is, it would seem, acquired in the same as other lordship, that is, as belonging to a person, or as belonging to territory; belonging to a person, when he has a fleet which commands that a part of the sea; belonging to a territory in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land.”<sup>418</sup> Subsequently however, delimitation of maritime boundaries was discussed at a Belgian Confederation in 1671 and the “cannon-shot theory”, the distance which cannon could

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<sup>416</sup> Scholz, W. (1936). *Die Rechtsverhältnisse der Meerengen und interozeanischen Kanäle im Kriege*. Göttingen: Universität Göttingen, p.1.

<sup>417</sup> D. R. Rothwell & T. Stephens (2010), p.4.

<sup>418</sup> C. J. Colombos, p. 92; Brüel, E. (1947). *International Straits: A Treatise on International Law, Vol I*. Copenhagen: NYT Nordisk Forlag, p.49; D. R. Rothwell & T. Stephens (2010), p.59.

shoot a ball, was declared. In early 18<sup>th</sup> century, Cornelis van Bynkershoek, who was a follower of Grotius, developed Grotius' view and expressed that a state could manage its coast within the range that cannon could reach in the sea.<sup>419</sup> He formulated Grotius' effective domination theory in his work "Domination of the Sea" in 1703 and stated that "the domination of the land ends where the power of arm ends."<sup>420</sup> The theory was supported by many other authors in 18<sup>th</sup> century such as Christian Wolf, Emmerich de Vattel, Ferrante Galiani, Georg Friedrich von Martens and Alberto Azuni and "cannon-shot theory" was put into practice by most states for the purpose of securing coastal states in 17<sup>th</sup> and 18<sup>th</sup> century.<sup>421</sup>

However, the predominant concern of coastal states was their capacity to control the security of not only their coastal waters but also the water of bays, fjords, gulfs, straits, harbors, ports and seas adjoining their coasts as well. Besides the security concerns over their territorial waters and other adjoining sea areas, security concerns over trade for non-coastal states in the high seas led to the development of naval technology. These developments resulted in larger and more capable warships with cannons that had the potential to destroy coastal cities. Therefore, the boundaries of territorial waters became the key issue in the international community once again. In this context, Ferrante Galiani put forward a suggestion for a "three-mile zone" for territorial waters that was taken up and applied by many states in the period that followed. The most important representatives of the three-mile limit were the USA and England. The USA adopted this new theory in 1793, and England recognized the three-mile limit and applied it mainly in customs and excise regulations between 1736 and 1833.<sup>422</sup> For the first time, as contractually, the USA and England agreed on the three-mile limit in their trade and shipping agreement of 1806, but this was never ratified. In subsequent years, the limitation of territorial waters by about three miles from the coast was recognized in practice by many states but it was never universally recognized and the discussion regarding the distance of territorial waters continued.<sup>423</sup>

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<sup>419</sup> W. Münch, p.17.

<sup>420</sup> C. J. Colombos, p.92; D. R. Rothwell & T. Stephens (2010), p.59.

<sup>421</sup> W. Münch, p.17.

<sup>422</sup> C. J. Colombos, p.94-96.

<sup>423</sup> W. Münch, p.21. Norway and Sweden adopted 4 mile for the boundary of their territorial waters and until the 20<sup>th</sup> century some South American states declined the three mile limit. See: W. Münch, p.21-22.

Besides the limitation of territorial waters, the nature of coastal states' right over their territorial waters was also discussed by publicists. In 16<sup>th</sup> century Bartolus argued for an absolute sovereignty of coastal states over their territorial waters, and he was strongly supported by Gentilis in the latter part of the 16<sup>th</sup> century. Gentilis stated that "coastal waters are a part of the territory of the State whose shores they wash. It follows that the territorial rights of sovereignty which exist in the Head of a State are extended *in toto* over the sea adjacent to his coast."<sup>424</sup> Professor A. de la Pradelle held an opposing view and expressed the belief that the coastal state was neither the sovereign nor the owner over the territorial waters, but only possessed "a bundle of servitudes" over them. However in the 18<sup>th</sup> and 19<sup>th</sup> centuries, many other publicists and authors such as Westlake, Hall and Oppenheim were in favor of the existence of a territorial sea subject to sovereignty. In terms of the security interests of coastal states, different opinions were expressed regarding the right of passage of ships through foreign territorial waters. Whilst Hall stated that the right of passage could not extend to warships in foreign territorial waters, Westlake pointed out that the territorial sovereign could well protect itself from abuse and that a dominant state would subject a belligerent warship to intolerable interruption.<sup>425</sup>

With respect to territorial waters; because of different state practices, it was difficult to pinpoint a certain distance for territorial waters on the grounds of the customary international law. Different states' practices reflected in the various theoretical approaches regarding the territorial sea in the 19<sup>th</sup> century but the principle of *mare liberum* remained dominant. The theories which developed at the time were identified by O'Connell. His first theory was the property theory of the territorial sea based on the notion that the territorial sea was part of the property of the coastal state. The second theory was the police theory, in which the territorial sea was a special area from which all foreign ships could be excluded; and his third theory was the competence theory, in which the coastal state had the competence to argue either control or sovereignty jurisdiction over their territorial waters.<sup>426</sup> Towards the end of the 19<sup>th</sup> century and in the early part of 20<sup>th</sup> century, a number of associations began to study a

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<sup>424</sup> C. J. Colombos, p.89.

<sup>425</sup> *Ibid.*

<sup>426</sup> D. R. Rothwell & T. Stephens (2010), p.61; I. A. Shearer (1982). *The International Law of the Sea, Vol I.* Oxford: Clarendon Press, p.60-67.

variety of laws of the sea for clarification and codification of the above-mentioned uncertainty.

The existence of a territorial sea was not denied by any international associations, however, there was no consensus on the extent of the coastal state and the breadth of the territorial sea. In 1892, a report regarding territorial waters was proposed by the Institute of International Law. According to the report, a coastal state would have absolute sovereignty within its territorial waters other than for a right of innocent passage.<sup>427</sup> Moreover, in its 1894 session, the breadth of the territorial sea was adopted as six nominal miles from the low-water mark.<sup>428</sup> Shortly after the First World War, the American Institute of International Law, the German Society of International Law, Harvard Law School and the Japanese Associations of International Law studied territorial waters and with reference to their draft articles, they asserted that the territorial waters were a maritime zone over which coastal states had sovereignty.<sup>429</sup> Moreover, at its 1924 session the International Law Association proposed a “right of jurisdiction” over territorial waters, however the notion was adjusted as “territorial jurisdiction” and the three-mile limit was adopted in 1926.<sup>430</sup> Furthermore, while the three-mile limit was adopted by the German Society of International Law and the International Law Association of Japan in their draft articles, the American Institute of International Law could not agree on any definite limit on the extent of a territorial state.<sup>431</sup>

In addition, the League of Nations through its Committee endeavored to negotiate an international convention on the subject of territorial waters. Many attempts were made to codify the international law due to a lack of common rules on the regulation of rights on the sea. The most significant early attempt at codification was the Hague Codification Conference of 1930, which was convened by the Council of the League of Nations. The Conference eventually endorsed the sovereignty of a state over its territorial sea, but was unable to reach agreement on (i) the breadth of the territorial sea with proposals ranging from three, four and six nautical miles; (ii) the definition of the nature of the rights which States are entitled to exercise over the territorial waters;

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<sup>427</sup> D. R. Rothwell & T. Stephens (2010), p.61.

<sup>428</sup> C. J. Colombos, p. 102.

<sup>429</sup> O'Connell, D. P. (1982). *The International Law of the Sea, Vol I*. New York: Oxford University Press, p. 75; D. R. Rothwell & T. Stephens (2010), p.62.

<sup>430</sup> D. P. O'Connell, p.75.

<sup>431</sup> C. J. Colombos, p.103.

and (iii) the right of a State to take measures outside the breadth of territorial sea.<sup>432</sup> As a result, no treaty was agreed at the Conference and the struggle to codify the law of the sea failed at this time. Moreover, the attempts at codification broke down for a while due to the outbreak of the Second World War and were postponed to after the war.

### **1.1.3 Innocent Passage in the Territorial Sea**

The determination of the passage in the territorial sea could not be completed successfully until the 1840s, when several circumstances made it an important issue in the maritime community. Until 19<sup>th</sup> century, merchant ships mostly used coastal waters when convenient, took the shortest route between two points and kept their distance from shore unless they made port visits. In 1844 for the first time, the author Massé argued a modern doctrine of innocent passage that “the rights of coastal state did not extend to interfere with commercial navigation, because it possessed only jurisdiction, not property, in the territorial sea.”<sup>433</sup> This argument was not immediately accepted, but it was the beginning of a doctrine of international law in late 1870s. Innocent passage was admitted as applicable in English Jurisdiction and the U.S. acknowledged the principle of innocent passage in 1896. Furthermore, the U.S asserted the right of innocent passage against Spain when an American ship was fired on while off the coast of Cuba in 1895.<sup>434</sup>

However, one of the most controversial problems was the passage right of warships through territorial waters because of their potential to threaten the security of the coastal states. In terms of their sovereignty over territorial waters, coastal states’ main argument was that the passage of warships had an importance different from merchant vessels, as warships could disturb the national security of the coastal state if the details of warships were unknown in advance. In this context, coastal states claimed that a previous notification was required for the passage of warships through their territorial waters. This application has been recognized by nations and it has been

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<sup>432</sup> C. J. Colombos, p.104; D. R. Rothwell & T. Stephens (2010), p.62; W. Münch, p.18.

<sup>433</sup> D. P. O’Connell, p.263; Jia B. B. (1998), *The Regime of Straits in International Law*. Oxford: Clarendon Press, p.82.

<sup>434</sup> B. B. Jia, p.83; D. P. O’Connell, p.265.

exercised by coastal states for a long time.<sup>435</sup> Moreover, in times of war some territorial waters were completely closed by treaties in 19<sup>th</sup> century, for instance, during the Danish war of 1850, Lübeck declared a neutrality decree closing its territorial waters to warships of belligerent states; and by the Treaty of Berlin of 13 July 1878 waters of Montenegro were closed to warships of all nations.<sup>436</sup> In addition, by the Treaty of Paris of 1856 the Black Sea and its coastal waters were closed to warships of all nations – even to riparian states’ warships – and then by the Treaty of London of 1871 it was also closed to warships of non-riparian states.<sup>437</sup>

The question of the passage right of foreign vessels in territorial waters was also discussed during the codification period. Both the International Law Association and the Institute of International Law agreed in principle on the passage right through territorial waters for merchant vessels but disagreed on the question of warships’ passages. It put forward that sea navigation should be free and trade communication should not be interrupted or prevented between two points of the world. This argument was not applied to the case of warships which could prove to be a serious threat in the territorial waters of a foreign country.<sup>438</sup> However, freedom of passage through territorial waters was a subject of the Treaties which were signed at the end of the First World War. Freedom of passage for Allied powers’ vessels in territorial waters of Axis powers was accepted.<sup>439</sup> In 1924 on grounds of the codification, Alvarez submitted a proposal to the International Law Association that ships of all nations may transit freely through the territorial waters and coastal states may not prevent or interfere with their passage, but that these ships would nonetheless be subjected to the laws and regulations of the coastal states. However, at its session of 1926 only the first part, “ships of all nations may transit freely through the territorial waters”, was adopted in the draft Convention. A similar definition was adopted by the German Society of International Law. Karl Strupp defined “freie Durchfahrt” for merchant vessels in his proposal. At the session of 1928 of the Institute of International Law, the innocent/inoffensive passage right for merchant vessels was repeated, while Harvard Research declared that “a state must permit innocent passage through its marginal seas by the vessels of other

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<sup>435</sup> D. P. O’Connell, p.274.

<sup>436</sup> Ibid 277.

<sup>437</sup> For more information see Chapter 2.

<sup>438</sup> C. J. Colombos, p.261; D. P. O’Connell, p.266.

<sup>439</sup> D. P. O’Connell, p. 265; One of the treaties was the Treaty of Sevres and for more information see Chapter 3.

states.”<sup>440</sup> Additionally, Schücking, the Rapporteur for the Preparatory Committee of the Hague Codification Committee stated in his report in 1926 that “so far as concerns the right of free passage, no distinction whatever should be drawn between vessels coming from another territorial sea, or from the high seas, or proceeding from an international river to the high seas in the course of their voyage.”<sup>441</sup> His draft article emphasized freedom of passage, without initially considering coastal states. However, the Preparatory Committee later reformulated the draft and acknowledged navigation and police regulations of coastal states in territorial waters on the condition that these regulations respected the right of passage and applied for all nations equally.<sup>442</sup>

At the Hague Codification Conference of 1930, the meaning of passage was considered in the context of innocent passage. According to the Second Committee’s Report:

“Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters. Passage is not *innocent* when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.”<sup>443</sup> (Annex I, Article 3)

This definition was subsequently adopted in the Geneva Convention of 1958. Additionally, as a general rule the Second Committee declared that a “Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification. The Coastal State has the right to regulate the conditions of such passage. Submarines shall navigate on the surface.”<sup>444</sup> However, the Hague Conference was unable to adopt any convention on the topic of either territorial water or state responsibility and passage right.

## **1.2 Evolution of International Law on Straits until the Montreux Convention and States Practices**

A strait, as a simple geographical definition, is “a narrow body of water that

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<sup>440</sup> Ibid, p.266.

<sup>441</sup> B. B. Jia, p.79.

<sup>442</sup> B. B. Jia, p.79; D. P. O’Connell, p.267.

<sup>443</sup> See Acts of the Conference for the Codification of International Law (Held at The Hague from March 13th to April 12th, 1930), Official No: C. 351, m.145, (August 19, 1930).

<sup>444</sup> Ibid. Article 12 of Annex I.

connects two larger bodies of water.”<sup>445</sup> With regard to the definition, a precise delimitation cannot be made about the length and width which is required for the passage in the straits. For instance, as a great strait, the English Channel has a width ranging from 100 miles to 22 miles in the Strait of Dover. By contrast, another important strait, the Bosphorus, is nearly 700 meters at its narrowest point. The different characteristics of straits and their geographical position can cause disagreements. The questions of “whether straits are internal waters, territorial waters or high seas” and “what type of passage is required in the straits” have since occupied international community. During discussions and negotiations, other important arguments include whether a strait divides a part of the territory of a single state or the territories of more than one state, or whether a strait is a unique waterway connecting two parts of seas and serves for international navigation. Because of the geographical and characteristic differences of straits no real guidance could be offered for legal purpose for many centuries. The consideration of the legal status of straits was focused on the geographical and physical position of straits as well as on the use of straits. Especially after the emergence of the limitation of the territorial sea and the legal concept of innocent passage, the existence of a separate regime for straits came under close scrutiny and discussion.<sup>446</sup>

Passage right through the territorial sea, especially in the straits, was a topic discussed by international law scholars and authors for several centuries. The legal status of straits is considered a much more complex issue than both the freedom of the seas and the issue of territorial waters. In early 17<sup>th</sup> century, Grotius focused on freedom of the seas in his work *Mare Liberum*, in the sense of freedom of navigation to all nations, but he did not touch on the question of straits. His opponent Selden did not recognize any passage right in high seas.<sup>447</sup> A decisive view regarding the straits was given for the first time by Bynkershoek in the early 18<sup>th</sup> century. He suggested the extension of territorial waters to straits. In this respect, he acknowledged that “a coastal state has the right to forbid even innocent passage, in the same way as an owner may forbid passage across his grounds.”<sup>448</sup> In this period, the passage through the Bosphorus

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<sup>445</sup> See: *National Geographic*, <<https://www.nationalgeographic.org/encyclopedia/strait/>> (accessed November 28, 2017).

<sup>446</sup> B. B. Jia, p.90.

<sup>447</sup> E. Brüel, Vol. I (1947), p.49.

<sup>448</sup> E. Brüel, Vol. I (1947), p.53; W. Münch, p.29.



was entirely forbidden to all vessels other than Turkish vessels. According to Bynkershoek's argument, all coasts of the Black Sea belonged to the Ottoman, and thus the Black Sea became an inland sea of the Ottomans until Russia became another coastal state of the Black Sea in the Treaty of the Küçük Kaynarca of 1774.<sup>449</sup>

However, in parallel with technical and economic developments, from the second half of the 18<sup>th</sup> century and especially in the 19<sup>th</sup> century a number of criteria on the content and scope of the passage right through the territorial waters crystallized. Thus, a more liberal notion of passage right in straits was strongly expressed by user states despite the arguments of security interests of coastal states. In addition to this, many different opinions and questions arose concerning the question of legal status of straits, such as whether or not there is an international shipping route, whether the passage right is only for merchant ships or if it covers warships too. Other important criteria were whether peacetime or wartime prevails and whether the coastal state is a belligerent state or not.<sup>450</sup> In this period, many authors such as Bluntschli, Ortolan, Pradier-Fodere, Heffter, Fiore, Wheaton, Hall, Rivier, Calvo, Perels and Godey shared a common view: they acknowledged the freedom of passage of merchant ships through international straits in time of peace. However, the majority of them defended the view that this right was impossible to extend to warships, in other words, no general interest was attached to the passage right of warships through straits.<sup>451</sup> In light of the authors' opinions and under the political circumstances of the time, from the middle of the 19<sup>th</sup> century powers began to conclude several very significant individual agreements regarding the passage regime of the straits and the waterways. These treaties by large regulated international trade in certain straits but they made no reference to innocent passage. Moreover, these treaties did not contain any generalizations regarding the legal position of other straits or waterways; they regulated the passage in an individual strait where various legal issues had arisen.<sup>452</sup> Furthermore, the existence of such treaties prevented the application of innocent passage in straits. For instance, agreements were signed in 1857 for the Danish Straits, for the Magellan Strait in 1881 and in 1888 for Suez Canal.<sup>453</sup> In

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<sup>449</sup> For more information see Chapter 2.

<sup>450</sup> W. Münch, p.29.

<sup>451</sup> E. Brüel, Vol. I (1947), p.55-60; W. Münch, p.30.

<sup>452</sup> B. B. Jia, p.91.

<sup>453</sup> Toluner, S. (1989). *Milletlerarası Hukuk Dersleri [International Law Courses]*. Istanbul: Beta Basım Dagitim A.S, p.148-154.

this period, the passage regime of the Turkish Straits was regulated by a series of treaties. After the Treaty of the Küçük Kaynarca of 1774, the Ottomans signed mutual agreements with England, the Treaty of Kale-i Sultaniye (Çanakkale) of 1809, and with Russia the Treaty of Hünkar Iskelesi of 1833. In addition, the Ottomans agreed to open the Black Sea to the merchant ships of all nations by the Treaty of Edirne (Adrianople) of 1829. In the second half of the 19<sup>th</sup> century, in parallel with the interests of powers and the political changes in the Black Sea region some other multilateral agreements were signed; respectively the Treaties of London of 1840 and 1841, the Treaty of Paris of 1856, the Treaty of London of 1871 and 1878 Berlin Treaty. The Turkish Straits and other waterways became subject to European International Law by the above-mentioned treaties.<sup>454</sup> The treaties established a special passage regime for the Turkish Straits. In these treaties, while the passage right of merchant vessels through the Turkish straits was recognized, the passage of warships was restricted in relation to the political developments of the 19<sup>th</sup> century.<sup>455</sup>

From the late 19<sup>th</sup> century the freedom of passage for merchant ships was accepted as a principle and some authors such as Oppenheim, Fauchille, Spiropoulos, Lundquist, Castberg und Charles de Visscher also argued for the freedom of passage of warships in the straits.<sup>456</sup> In addition to the authors' opinions on the international law, various scientific associations gave attention to the legal status of the international straits and they began to formulate principles *de lege ferenda* for straits in the codification process. In 1894, the Institute for International Law stated that straits "which serve as a passage from one open sea to another open sea can never be closed," and in addition, "a right of innocent passage for all ships applied to straits narrower than twelve nautical miles, which distance was double the proposed extent of the territorial sea."<sup>457</sup> For the first time the exceptional situation of straits regulated by treaties was

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<sup>454</sup> According to Oppenheim's International Law, "... the predominant strain of modern international law was in its origin largely a product of Western European Christian civilization during the 16<sup>th</sup> and 17<sup>th</sup> centuries.... within which international law grew up gradually through custom and treaty. ... But gradually the international community expanded by the inclusion of Christian states outside Europe ... Particularly significant was the express acknowledgement of Turkey's membership of the international community in Article 7 of the Peace of the Treaty of Paris of 1856." See: Jennings, R., & Watts, A. (1992). Oppenheim L. International Law, Volume I, 9<sup>th</sup> Edition. (1992). Harlow: Longman Group UK Limited [R. Jennings and A. Watts (ed)], p.87-88.

<sup>455</sup> For more information see Chapter 2.

<sup>456</sup> E. Brüel, Vol. I (1947), p.123-134; W. Münch, p.30.

<sup>457</sup> B. B. Jia, p.91.

recognized.<sup>458</sup> At the Hague Conference of 1907, the question of straits also arose but in the report only a proposal was made regarding the prevention of states from minelaying in times of war. It was expressed that a neutral state could prohibit innocent passage through its territorial sea, but this prohibition may not extend to straits uniting two open seas.<sup>459</sup> The report offered no regulations concerning the passage regime of the straits and this process then failed when the First World War broke out.

After the First World War, a discussion about the internationalization of international Straits and waterways emerged with the 14 points of President Wilson. The idea of internationalization was supported by some institutions and politicians. For the organization of the future of the League of Nations, similar opinions were stated in the proposals of “Deutsche Gesellschaft für Völkerrecht” and by German politician Matthias Erzberger. In the proposal of Deutsche Gesellschaft für Völkerrecht, it was expressed that “die Meere, die meerverbindenden Kanäle und Meerengen stehen dem Verkehr der Schiffe aller Völkerbunds Staaten gleichmäßig offen” and in the Erzberger’s proposal “die Meerengen und meerverbindende Kanäle, soweit nicht beide Ufer im Besitz desselben Bundesstaates sind, werden internationalisiert.”<sup>460</sup> However, the League of Nations did not implement these ideas. Article 16 of its contract provided that “... [the members of the League] will mutually support one another... they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.”<sup>461</sup> During this period, the Turkish Straits were regulated by the Treaty of Sevres of 1920, which was never ratified, and then by The Lausanne Convention of 1923.<sup>462</sup> The Lausanne Convention of 1923 established the freedom of passage for merchant ships through the Turkish Straits and this rule became “a principle” of the international law. Other than this, some restrictions were laid down regarding the passage of warships and their total tonnage, and the Straits were demilitarized and began to be governed by an international commission, in that the Straits were

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<sup>458</sup> Ibid. “In English these [provisions] should read ‘this an exceptional situation based on a tacit agreement, which cannot narrow the scope of the general rule’ and ‘The regime of those straits subjected in fact to treaties or special customs remains reserved’ “ See footnote of B. B. Jia, p.91 and 92.

<sup>459</sup> D. P. O’Connell, p.303; B. B. Jia , p.92.

<sup>460</sup> W. Münch, p.30-31; E. Brüel, Vol. I (1947), p.152.

<sup>461</sup> See: *The Covenant of the League of Nations*, 1924.

<sup>462</sup> For more information see Chapter 3.

internationalized by an intervention of the Allied powers. Furthermore, the demilitarization regime covered not only the Straits but also extended to the territorial waters of Turkey around the Straits, and in this way Turkey lost its sovereignty over the Straits area and a part of its territory.

In terms of codification process, the International Law Association's Committee touched on the straits question in 1924, when it proposed that "the power of the coastal state to make transit regulations for straits should be uniform and not interfere with the freedom of navigation."<sup>463</sup> In 1928, at the 5<sup>th</sup> Committee of the International Law Institute only the measurement of straits was considered. In 1929, in its report the Harvard Research stated that a "strait connecting high seas shall remain open to navigation by the private and public vessels of all states, including vessels of war."<sup>464</sup> However, it was not clarified whether the word 'navigation' meant innocent passage and whether this proposal covered the straits regulated by treaties such as the Turkish, the Magellan and the Danish Straits. At the 1930 Hague Conference, passage right through the straits was dealt with the context of passage right of warships in the territorial sea. The Second Committee proposed no regulation for the straits, which were governed by treaties. The Committee considered the distinction between straits which only give access to internal waters and straits which serve between two parts of high seas. In its draft Convention it was observed that, "Under no pretext; however may there be any interference with the passage of warships through straits constituting a route for international maritime traffic between two parts of the high seas."<sup>465</sup> Yet the codification exercises between 1894 and 1930 were unsatisfactory and the straits question remained vague. After the Hague Conference of 1930, as world politics approached a dangerous period due to an imminent threat of war, the passage regime of the Turkish Straits – the Montreux Convention of 1936, was signed.<sup>466</sup>

### **1.3 Development of International Law on Straits after the Montreux Convention**

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<sup>463</sup> D. P. O'Connell, p.303.

<sup>464</sup> B. B. Jia, p.92.

<sup>465</sup> Acts of the Conference for the Codification of International Law, Official No: C. 351, m.145, (August 19, 1930), p.128.

<sup>466</sup> For more information see Chapter 4.

Foreign warships have long faced difficulties regarding the passage in territorial seas and through straits. Their passage has been considered a threat to the security of coastal states. Although coastal states have the right to take necessary measurements against any hostile action in their coastal waters, the perception has been that these precautions might be inadequate in the case of an armed attack during the passage of warships and of submerged submarines. For security reasons a common passage regime through straits could not be defined for many centuries. After the codification process the straits question also remained unclear on whether innocent passage through straits was an exceptional right or only an application of the rule concerning territorial waters. Except for some straits which had been regulated by treaties, the passage of warships was generally conceded: “although States in practice allowed the passage of foreign warships through their territorial waters, the ships did not have a right of passage, as coastal States reserved the right to regulate or forbid passage in exceptional circumstances.”<sup>467</sup>

### **1.3.1 Corfu Channel Case, 1949**

The question of passage right through straits was examined by the International Court of Justice in the Corfu Channel Case. The decision was important for many other straits, because the Corfu Channel is located in the territorial sea of two states, connects two open seas, has not been used heavily by foreign ships, and there was no treaty regulating passages of it.

Following instructions by Greek and other unidentified warships, in May 1946 Albania announced that a prior notice or consent was required for the innocent passage of foreign warships in its territorial waters.<sup>468</sup> On 15 May 1946, two English warships, Orion and Superb, came under fire from the Albanian army without suffering damage while passing the Corfu Channel. England protested against Albania and claimed that in time of peace and in time of war there is passage right for both merchant ships and warships through straits used for international maritime traffic.<sup>469</sup> Other than this, on 22

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<sup>467</sup> B. B. Jia, p.86.

<sup>468</sup> Ibid. “The measure was deemed compatible with the result of the 1930 Hague Conference and the principle of innocent passage.” See: B. B. Jia, p.86.

<sup>469</sup> D. P. O’Connell, p.306.

October 1946, two other British warships, Saumarez and Volage, sustained damage from mines during their passage through the Corfu Channel and 44 personnel lost their lives and 42 personnel were injured. Albania had given no notification regarding the existence of the mines in the channel. In response to this event the British Navy undertook a minesweeping operation in Albanian coastal waters in November 1946.<sup>470</sup> On 18 February 1947 the Security Council recommended that the two governments should immediately apply to the International Court of Justice. England turned to the Court to find a solution, but Albania contested the British attitude and claimed that the decision of the Council was only a recommendation and that to submit the issue to the Court an agreement was required between two parties.<sup>471</sup>

With respect to the right of warships to enjoy innocent passage Albania and England also took different positions. England claimed that before the Hague Conference of 1930, the majority of states through their practice acknowledged the passage right of both merchant ships and warships through territorial waters. In addition, England argued that during times of peace and wartime, warships habitually passed through territorial waters without notice or authorization and asserted that Albania had never announced regulative restrictions regarding its territorial waters. Albania argued that because the North Corfu Channel was used almost exclusively for local traffic it was only of secondary importance<sup>472</sup> and that the British passage was provocative, and in any event neither doctrine nor practice recognized a passage right to ships which were loaded with troops, without permission in the territorial waters of a foreign country. Furthermore, Albania expressed that the minesweeping operation was an invasion of Albanian territory.<sup>473</sup> As a result, the Court concluded that:

“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

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<sup>470</sup> D. R. Rothwell & T. Stephens (2010), p.209; D. P. O’Connell, p.306

<sup>471</sup> D. P. O’Connell, p. 306.

<sup>472</sup> Nandan, S. N. (2002, November 16-17). Legal Regime for Straits used for International Navigation. *The Proceedings of the Symposium on the Straits Used For International Navigation*, pp. 1-12.

<sup>473</sup> Ibid, p. 284-285; S. Toluner (1989), p.118-121.

otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace”<sup>474</sup>

Thus, for the first time an international court had clearly articulated the existence of a right of innocent passage. However, the Court limited its observation to the case of straits and avoided expressing an opinion regarding the passage right in the territorial sea.<sup>475</sup> For its statement in this case the Court considered only two criteria of the strait: geographical position and its importance for international navigation. Thus, the Court confirmed the innocent passage of warships through straits in time of peace without previous notice or consent, if a strait connects two parts of high seas and is used for international navigation. Another important point of the legal decision is that it emphasized the treaties which have regulated the passage regimes of some straits. The judgement stated that its decision did not cover the straits regulated by treaties if the treaties prescribe other provisions. It meant the provisions of the treaties which have regulated some straits were independent from the Court’s legal decision.

### **1.3.2 Geneva Convention on the Law of the Sea, 1958**

The United Nations appointed by Article 13 of its Charter that “the General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification.”<sup>476</sup> In pursuance of this provision an International Law Commission was established by General Assembly on 21 November 1947 and the codification process of the legal regime of high seas and of territorial seas became Commission’s work.

The 1930 Hague Conference’s recommendations and the Corfu Channel case decision influenced the Commission’s negotiations. At its session in 1955, the straits question arose in connection with “innocent passage generally” and in connection with “delimitation of the territorial waters of two opposite states”. It was discussed that if

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<sup>474</sup> *Corfu Channel Case, Judgement of April 9<sup>th</sup> 1949: I.C.J. Reports 1949, p.4.* See also: B. B. Jia, p.97; D. R. Rothwell & T. Stephens (2010), p.209; S. N. Nandan, p.2.

<sup>475</sup> S. Toluner (1989), p.122.

<sup>476</sup> See: Article 13 of the *Charter of the United Nations*.

straits were to be subject to a unique rule of innocent passage, this would affect straits categorized under three categories depending on their different geographical character: “straits which were the subject of international regulation; straits which, although not covered by international conventions, were important to international navigation; and straits which were not used for international navigation.”<sup>477</sup> Other than this, at its eighth session in 1956, the Commission took into account the views of the states which had commented upon draft articles. The Turkish Straits issue arose at this session following the Turkish government’s comment regarding the preservation of status of the Bosphorus and the Dardanelles as fixed by international convention. The special Rapporteur of the Commission, Mr. Francois, proposed to give assurances that “the Commission’s article was not intended to affect straits whose status was governed by convention.”<sup>478</sup> This suggestion was adopted in the final draft, which was the basis of the negotiations at the Conference of the Law of the Sea (UNCLOS I) at Geneva. The Commission proposed that coastal states may demand a previous authorization or notification for the passage of warships through their territorial waters. In this context, in Article 24 of the above-mentioned final draft it was adopted by the Commission that “the coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18 and moreover in its commentary it was expressed that “the article does not affect the rights of States under a convention governing passage through the straits to which it refers.”<sup>479</sup>

The conference convened by the United Nations met in Geneva in 1958 and eighty-six delegations participated. The Commission’s final draft was subject to debates at the conference. At the conference a “Final Act”, incorporating four conventions was adopted to deal with the territorial sea and the contiguous zone, the high seas, fisheries and the preservation of biological resources of the high seas and the continental shelf. The Final Act was opened to signature on 29 April 1958. The conference could not reach an agreement on the breadth of the territorial sea.<sup>480</sup> The British, American and

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<sup>477</sup> *Yearbook of the International Law Commission of 1955, Vol I*, p. 149; D. P. O’Connell, p.314.

<sup>478</sup> *Yearbook of the International Law Commission of 1956, Vol I*, p. 202; D. R. Rothwell & T. Stephens (2010), p.210.

<sup>479</sup> *Yearbook of the International Law Commission of 1956, Vol.II*, p.277.

<sup>480</sup> Pazarıcı, H. (2013). *Uluslararası Hukuk Dersleri [International Law Courses]*. Ankara: Turhan Kitabevi Yayınları, p.317; C. J. Colombos, p.23. The limitation of territorial waters was stated by Article 3 so that



Canadian proposals were for a maximum breadth of six miles of territorial waters. However, the proposal for a six miles limit of territorial waters failed to obtain a two-thirds majority of representatives.<sup>481</sup> The Territorial Sea Convention of 1958 addressed the issue of navigation through the territorial waters. Its Articles 14 to 23 were categorized as the rules applicable to all ships, warships, merchant ships, and government ships which are other than warships. Because of the disappearance from the text of provisions on innocent passage of warships, it has given widely different interpretations.

At the conference, the draft Article 24 of the Commission regarding the previous authorization for innocent passage right of warships was rejected by a vote of 45 against 27.<sup>482</sup> In the Territorial Sea Convention of 1958 there was no article providing for the right of foreign warships to pass through international straits. The rejection of the Article can be interpreted to mean that the intention of the conference was to shelve the controversial issue of the passage right of warships through straits, which had until then been regulated by customary law.<sup>483</sup> However, the draft Article 17 of the Commission was adopted in Article 16(4) of the Territorial Sea Convention, which provided that, “There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.” The passage right of foreign warships through straits used for international navigation between two parts of high seas was agreed at the conference in line with the judgement of the Corfu Channel Case, except regarding the issue of previous authorization. This meant that the Convention accepted that straits can be evaluated as an international strait if they are used for international navigation. In parallel with the judgement of Corfu Channel Case,

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“except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State” and regarding the contiguous zone Article 24(2/3) said that, “The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.” See: *Convention on the Territorial Sea and the Contiguous Zone of 1958*.

<sup>481</sup> C. J. Colombos, p.108.

<sup>482</sup> H. Pazarci (2013), p.323; B. B. Jia, p.101.

<sup>483</sup> D. P. O’Connell, p.291; B. B. Jia, p.100.

the Geneva Convention also excluded the straits regulated by international agreements from its provisions. In Article 25 it was emphasized that “the provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.”<sup>484</sup>

Regarding passage rights in territorial seas, it was stated in Article 14 that all ships of all nations shall enjoy innocent passage in the territorial waters and the passage was deemed to be innocent so long as it was not prejudicial to the peace, good order or security of the coastal state. Furthermore, it was expressed that such passage must take place in conformity with the articles of this Convention and with other rules of international law. In addition, coastal states may not hamper the innocent passage and must give appropriate publicity to any dangers to navigation within its territorial sea of which it has knowledge (Article 15). On the other hand, with respect to the security interests of coastal states, the Convention gave coastal states rights to regulate the passage in their territorial sea and to take necessary measures for safe passage in Articles 16 and 17. In this context, it was stated that the coastal state has the right to suspend passage temporarily in a specific area in its territorial waters if such a suspension is essential for its security. However, coastal states are duly obliged to publish the suspension of passage (Article 16). During their innocent passage, foreign ships must comply with the laws and regulations enacted by the coastal states in conformity with these articles and other rules of international law (Article 17). For the passage of merchant vessels through territorial sea, the collection of charges by coastal states was banned, however, coastal states may take charges only for specific services rendered to the ship and must apply it to all nations without any discrimination (Article 18). Besides this, criminal jurisdictions of coastal states were determined in Article 19 and 20 by excluding warships. Nevertheless, a coastal state may request warships to leave its territorial waters with reference to Article 23, in which it stated that, “If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.”<sup>485</sup> Thus, in terms of security interests the Convention determined the rights of territorial states and their jurisdiction in their territorial waters while at the same time defining the innocent

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<sup>484</sup> See Article 25 of the Convention on the Territorial Sea and the Contiguous Zone of 1958.

<sup>485</sup> *Ibid.*

passage of merchant vessels and their passage rights in territorial seas. Other than this, it should also be noted that because of their narrow width, many international straits were the subject of the overlapping of territorial waters, although the Convention did not conclude the breadth of territorial waters.

### **1.3.3 The United Nations Convention on the Law of the Sea, 1982 (UNCLOS III)**

In the years following the UNCLOS I the increasing demands on the twelve-mile territorial waters began to cause disagreements over straits which are less than twenty-four miles wide. Especially in the early years of the Cold War, American vessels had difficulties passing through Northeast Passage which is formed as a strait between many islands. In 1964, regarding a survey voyage of the USS *Burton Island* in the East Siberian Sea, Soviet Russia expressed that “over the waters of these straits the statute for the protection of the state borders of the USSR fully applies, in accordance with which foreign military ships will pass through territorial seas and enter internal waters of the USSR after advance permission of the Government of the USSR.”<sup>486</sup> With regard to the straits falling within the Soviet territorial waters, the US government replied that “it must be pointed out that there is a right of innocent passage of all ships through straits used for international navigation between two parts of the high seas and that this right cannot be suspended.”<sup>487</sup> Other than this, in 1967 the Soviet Union rejected the passage request of the American icebreaker ships, *Edisto* and *East Wind* through the *Vilkitsky Strait* in the Arctic Ocean on the grounds that the US failed to deliver the notice thirty days in advance. Following the rejection, the US argued against the Soviet Government and on the basis of the law of straits as embodied in Article 16(4) of the Territorial Convention of 1958 it argued that the right of innocent passage through international straits between two parts of the high seas was breached.<sup>488</sup>

In the same period, when foreign ships were subjected to the prior notification for the passage through the Straits of Malacca or other straits, many other maritime powers became involved in the debate of passage rights through straits. In the Security

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<sup>486</sup> See *Limits in the Seas*, No: 112, p.71; B. B. Jia, p.102.

<sup>487</sup> (*Limit in Seas*, No: 112), p.71.

<sup>488</sup> *Ibid*, p. 72-73; B. B. Jia, p.103; D. P. O’Connell, p.317.

Council, the British representative called to mind that “under international law there is no obligation to seek the prior authorization of a coastal State for the passage of warships of another State through an international strait” and added, however, that “the United Kingdom, and other Governments also, have as a matter of courtesy and on the basis of information, made a practice of notifying the passage of warships through international straits.”<sup>489</sup> On the other hand, the right of innocent passage in many important straits used for international navigation such as the Straits of Hormuz, and the Bab-el Mandeb had been recognized by coastal states. Additionally, in 1971 Spain declared that the innocent passage of warships was regulated by Articles 14 to 17 of the Territorial Convention of 1958 and that it had no intention of taking *controle legal* of the Strait of Gibraltar.<sup>490</sup>

These differences of states practices concerning the passage regime of international straits were discussed at the Conference of the Law of the Sea sessions, in which 160 states participated, between 1973 and 1982. On 10 December 1982, the Conference adopted the United Nations Convention on the Law of the Sea (The LOS Convention) and it entered into force on 16 November 1994.<sup>491</sup> Whilst the Territorial Convention of 1958 defined “innocent passage” as the passage regime of international straits under the definition of “territorial waters”, the LOS Convention produced a new definition called “transit passage”<sup>492</sup> regarding the passage right of ships through international straits. That is, the LOS Convention separated the passage regime of territorial seas and the passage regime of straits.

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<sup>489</sup> D. P. O’Connell, p.318; B. B. Jia, p.103 and 131.

<sup>490</sup> B. B. Jia, p.104.

<sup>491</sup> See: *Third United Nations Conference on the Sea (1973-1982), Diplomatic Conferences, Codification Division Publications*, <[http://legal.un.org/diplomaticconferences/1973\\_los/](http://legal.un.org/diplomaticconferences/1973_los/)> (accessed December 08, 2017). On 10 December 1982, 117 States and two entities signed the Convention. Turkey, together with United States, Israel, Venezuela voted against the draft LOS Convention on 30 April 1982. See: H. Pazarcı (2013) , p.295; B. B. Jia, p.168.

Second United Nations Conference on the Law of the Sea was held in 1960 and considered the topics of the breadth of the territorial sea and fishery limits. However, the Conference failed to reach an agreement. See: *Third United Nations Conference on the Sea (1973-1982), Diplomatic Conferences, Codification Division Publications*.

<sup>492</sup> Freedom of transit was the main view of US Policy concerning the law of the sea in 1970s. President Nixon pointed out that a new convention on the law of the sea “would establish a twelve-mile limit for territorial seas and provide for free transit through international straits.” See: S. N. Nandan, p.4; B. B. Jia, p.131.

With regard to territorial waters, the LOS Convention stated that every state has the right to extend the breadth of its territorial sea up to twelve miles (Article 3)<sup>493</sup> and it has sovereign rights over its territorial waters (Article 1). All ships of all nations, whether coastal or land-locked, have the right of innocent passage in the territorial sea (Article 17). Additionally, compared to the Territorial Convention of 1958, the LOS Convention comprehensively determined the meaning of passage and meaning of innocent. According to Article 18, “passage” through territorial waters was defined as navigation in that sea “without entering internal waters or calling at a roadstead or port facility outside internal waters” or “proceeding to or from internal waters or call at such roadstead or port facility.” In addition, the passage shall be continuous and expeditious except any force majeure. The Article 19 provided that “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State,” and that the innocent passage must take place in conformity not only with this Convention but also with other rules of international law. Furthermore, in the same Article, during their passages through territorial sea foreign ships were obliged not to threaten the sovereignty, territorial integrity or political independence of coastal states. In territorial seas, any fishing activities, carrying out research or survey activity, any act of willful and serious pollution, any act aimed at collecting information to the prejudice of the defense or security of coastal states etc. was forbidden.<sup>494</sup>

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<sup>493</sup> With reference to the Territorial Convention of 1958, only a few straits used for international navigation were within the territorial sea of coastal states on grounds of a territorial sea of 3 miles. However, extension of the territorial sea up to 12 miles meant that straits up to 24 miles in width could fall entirely within the territorial waters of coastal states. Thus, it has been estimated that approximately 126 straits used for international navigation would come within the territorial sea with the extension of territorial sea from 3 up to 12 miles. As a result, at UNCLOS III the negotiations concerning passage through straits were conducted based on a 12-mile territorial sea. See: S. N. Nandan, p.4.

<sup>494</sup> Article 19: Meaning of innocent passage;

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State; (d) any act of propaganda aimed at affecting the defense or security of the coastal State; (e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device; (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (h) any act of willful and serious pollution contrary to this Convention; (i) any fishing activities; (j) the carrying out of research or survey

With reference to the coastal states' responsibility, the Convention provided that coastal states may adopt laws and regulations in conformity with this Convention and other international laws in order to make maritime traffic safe, to protect navigational facilities, the environment and living resources of the sea, cable and pipelines established in the territorial sea or to conduct a scientific research and hydrographic survey. However, coastal states are obliged to announce their regulations (Article 21). Furthermore, for the navigational safety of foreign ships exercising innocent passage through a territorial sea, the coastal state may establish sea lanes and traffic separation schemes. Tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such lanes. However, in the designation of sea lanes and prescription of traffic separation schemes, coastal states must take into account (i) the recommendations of the competent international organization, (ii) any channels customarily used for international navigation, (iii) the special characteristics of particular ships and channels and (iv) the density of traffic. The coastal state must clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity must be given (Article 22). The coastal state may take the necessary steps in its territorial waters to prevent passage which is not innocent (Article 25), however if the passage is compatible with the provisions of this Convention, the coastal state shall not hamper the innocent passage and shall not make any discrimination. Other than this, coastal states were obliged to give appropriate publicity to any danger to navigation within its territorial sea of which it had knowledge (Article 24). The provision concerning charges remained the same as in the Territorial Convention of 1958, namely that coastal states may take charges only for specific services rendered to the ship and had to apply it to all nations without any discrimination (Article 26). With respect to jurisdiction of coastal states, it was stated that the coastal states should not stop or divert foreign ships in territorial sea with purpose of exercising civil jurisdiction in relation to a person on board the ship (Article 28). Furthermore, the criminal jurisdiction of the coastal state should not be exercised on board foreign ships passing through territorial sea, if the consequences of the crime do not extend to the coastal state or do not disturb the peace of the country and the good order of the territorial waters. However, any diplomatic request by the flag state and any

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activities; (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (l) any other activity not having a direct bearing on passage.

necessary measure for the suppression of illicit traffic in narcotic drugs and psychotropic substances were excluded (Article 26). With regard to warships, the coastal state may require warships to leave the territorial sea immediately if a warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea (Article 30).

The provisions regarding the passage regime through straits used for international navigation were regulated by Articles 34 to 45 in Part III of the LOS Convention. The Convention defined a new passage regime, “transit passage”, for the straits used for international navigation “between one part of the high seas or an exclusive economic zone and another part of the high seas or an economic zone”.<sup>495</sup> Transit passage means the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit through the straits between the above-mentioned parts of the sea, and all ships and aircraft enjoy the right of transit passage through the international straits (Article 38). However, transit passage shall not be applied, “if the strait is formed by an island of a State bordering the strait and its mainland” and “if there exist seaward of the island a route through high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.”<sup>496</sup> In such straits and “between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State” the regime of “innocent passage” should be applied (Article 45). The Convention determined two types of straits regimes and offered the regime of “transit passage” and “innocent passage”, which regulated the passage regime of the territorial sea. In addition, the Convention guaranteed the sovereignty and jurisdiction of coastal states over straits by expressing the passage regime of straits used for international navigation established in this Convention, “shall not in other respects affect the legal status of the waters forming such straits or the exercise by States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil” but “the sovereignty or jurisdiction of States bordering the straits is exercised subject to this [Convention] and to other rules of international law.”<sup>497</sup>

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<sup>495</sup> Ibid Article 37.

<sup>496</sup> Ibid Article 38(1).

<sup>497</sup> Ibid Article 34 (1 and 2).

Article 39 regulated the duties of ships and aircraft during their transit passage through international straits. Both ships and aircraft shall proceed without delay through or over a strait except in the case of force majeure, and they shall refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of coastal states. Ships shall comply with generally accepted international regulations, procedures and practices for safety at sea, including the international regulations for preventing collisions at sea and for the prevention, reduction and control of pollution from ships.<sup>498</sup> Furthermore, foreign ships may not carry out any research including marine scientific research and hydrographic survey without a prior authorization of the States bordering straits (Article 40).

With regard to the coastal states' responsibility, the LOS Convention provided that States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships and when circumstances require, and after giving due publicity they may substitute other sea lanes and traffic separation schemes for previously designated ones. However, such sea lanes and traffic separation schemes shall comply with generally accepted international regulations and before designation coastal states shall refer proposals to the competent international organization with the view of their adoption. Furthermore, they must clearly indicate all sea lanes and traffic separation schemes on charts and give publicity; on the other hand, ships in their transit passage must respect applicable sea lanes and traffic separation schemes (Article 41). Other than this, coastal states may adopt laws and regulations in the straits with respect to (i) the safety of navigation and regulation of maritime traffic, as provided in Article 41, (ii) the prevention, reduction and control of pollution, (iii) the prevention of fishing and (iv) the loading or unloading of any commodity, currency or person in contravention of customs, fiscal, immigration or sanitary laws and regulations of coastal states. However, such regulations shall not discriminate among foreign ships (Article 42) and coastal states shall not hamper transit passage and there shall be no suspension of transit passage (Article 44). Additionally, for safety of navigation and control of pollution, the Convention offered cooperation between user states and coastal states. They should by agreement cooperate for the prevention, reduction and control of pollution from ships and for the establishment and

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<sup>498</sup> Ibid Article 39.



maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation (Article 43).

However, in general provisions of third Part of the Convention, Article 35 provided that the above-mentioned provisions do not affect:

- (a) “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 water areas which had not previously been considered as such;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
- (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.”<sup>499</sup>

## **2. The Legal Regime of International Straits**

### **2.1 The Legal Regime of Straits used for International Navigation**

The LOS Convention classified straits according to whether they are “used for international navigation”, as in the Corfu Channel Case and the Territorial Convention of 1958. There is no doubt the geographical and functional features of straits cause difficulties determining their legal status, considering that 52 international straits have a width of less than 6 miles, 153 international straits have a width of 6-24 miles, and 60 other international straits have a width of more than 24 miles.<sup>500</sup> In this context, the LOS Convention also classified the straits with respect to their functions, namely that it considered whether or not they serve international navigation. The recognition of a body of water as a strait and their legal passage regime, which was described as “transit passage” in the LOS Convention, was an important step for straits used for international

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<sup>499</sup> In 1974, at 13<sup>th</sup> Meeting of the UNCLOS III Turkey stated that “most of the proposals made recognized the validity of treaty law. The convention being drafted should recognize the legal regime applied in all previous relevant convention.” See: B. B. Jia, p.144. In addition, at the 11<sup>th</sup> Meeting, Denmark stated that “some straits, such as Danish Straits leading to the Baltic Sea, had never been subject to the right of free passage but had been under special regime serving the interests of both the coastal State and the International community; such a type of arrangement should remain in effect.” Furthermore, in 1980 at 164<sup>th</sup> Meeting, Chile expressed that, “In accordance with international law and the provisions of the draft Convention itself, only the Strait of Magellan meets the qualifications, requirements and conditions to be considered as a strait used for international navigation, the regime of which was established in the above-mentioned Treaty of 1881.” See: B. B. Jia , p.144

<sup>500</sup> D. R. Rothwell & T. Stephens (2010), p.236.

navigation. Thus, for the first time, general standard rules concerning the regulation of international straits were established by the LOS Convention.

The Convention also recognized a broad category of straits to which the regime of “transit passage” may not be applied. These exceptions are: (i) straits where there exists a route through the high seas or through an economic zone of similar convenience (Article 36); (ii) straits which are formed between the mainland and an island where there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience (Article 38/1); (iii) straits used for international navigation between the territorial sea of a foreign State and one part of the high seas or economic zone (Article 45 (1/b)); and (iv) straits which are regulated in whole or in part by long-standing international conventions (Article 35 (c)).<sup>501</sup> In accordance with the purpose of this study, although there is no definitive list of such straits which are subject to a long-standing international convention,<sup>502</sup> the Danish Straits, the Strait of Magellan, the Strait of Gibraltar, the Åland Strait and the Turkish Straits will hereafter form the focus of the discussion.

## **2.2 The Legal Regime of Straits Regulated by International Agreements**

### **a) The Danish Straits**

The Sound, the Little Belt and the Great Belt constitute the Danish Straits and connect with the Baltic Sea and the North Sea. The Sound, whose narrowest point is 2,5 nautical miles, separates the Zealand Island from the Swedish. The Little Belt, whose narrowest point is 800 meters, is located between Jutland and Fyn Island, and afterwards, this Strait is enclosed within Danish internal waters. The Great Belt, which is located between Fyn Island and Zealand Island, is the widest strait of the Danish Straits (4 nautical miles at its narrowest point) and serves as the main channel for navigation between the North Sea and the Baltic Sea.<sup>503</sup>

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<sup>501</sup> H. Caminos, p.41-71; D. R. Rothwell & T. Stephens (2010), p.238-39.

<sup>502</sup> Dyke, J. M. (2009). Transit Passage Through International Straits. *The Future of Ocean Regime-Building*, pp. 175-232.

<sup>503</sup> H. Caminos, p.89; B. B. Jia, p.115.

Apart from a short period in the 14<sup>th</sup> century, all three Straits had been a part of Danish territory for a period of about 700 years until the Treaty of Roskilde of 1658 between Denmark and Sweden. The Kingdom of Denmark had full authority on both shores of all three Straits. This meant that the Straits could only be used for passage, fishing or any other purpose with the permission of the King. Furthermore, from about the year of 1430 the Kingdom began to collect a certain due for every merchant vessel passing through the Sound. The due was called “Sound dues” and later it was extended to include the Little Belt and the Great Belt.<sup>504</sup> Thus, its sovereignty over the Straits was fully recognized, and even when it closed the Straits to all foreign ships during the English war with Spain in the 16<sup>th</sup> century, no-one challenged its sovereignty over the Straits.<sup>505</sup>

However, by the Treaty of Roskilde on 26 February 1658 Denmark ceded all its possessions in the east of the Sound to Sweden, but long-standing Danish Sound dues were left untouched,<sup>506</sup> and notification was required through the Sound for the passage of warships of third states.<sup>507</sup> In the 19<sup>th</sup> century, the United States in particular expressed its opinion regarding the abolition of the Sound dues and European Countries protested against Denmark. They aimed to persuade Denmark regarding the levying of dues on the grounds that “the navigation of the two seas connected by this Strait is free to all nations, therefore the navigation of channel by which they are connected ought also to be free.”<sup>508</sup> In this regard, on 4 January 1856 formal negotiations were convened amongst European countries at first, Russia, Belgium, Spain, Austria, and Sweden-Norway.<sup>509</sup> The last meeting was held on 14 March 1857 in Copenhagen and the Treaty of Roskilde for the redemption of the Sound dues was concluded amongst Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway and Denmark.<sup>510</sup> Article

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<sup>504</sup> E. Brüel, Vol. II (1947), p.33.

<sup>505</sup> E. Brüel, Vol. II (1947), p.18-20.

<sup>506</sup> Ibid, p.21; B. B. Jia, p.115.

<sup>507</sup> B. B. Jia, p.115.

<sup>508</sup> H. Caminos, p.91; B. B. Jia, p.116. Denmark collected a transit duty on ships passing its straits more than four centuries (1429-1857). These fees at their peak contributed about two-thirds of Denmark's budget. See Dyke, J. M. (2002, November 16-17). The Legal Regime Governing the Gibraltar Straits. *The Proceedings of the Symposium on the Straits Used For International Navigation*, pp. 72-85.

<sup>509</sup> E. Brüel, Vol. II (1947), p.38-39; B. B. Jia, p.116.

<sup>510</sup> H. Caminos, p.90; W. Münch, p.50; Sommers, E. (2002, November 16-17). The Legal Regime of the Danish Straits. *The Proceedings of the Symposium on the Straits Used for International Navigation*, pp. 12-19.

1 of the Treaty provided that “no vessel shall henceforth, under any pretext whatsoever, be subjected during its passage in the Sound or the Belts, to any detention or hindrance.”<sup>511</sup> A similar treaty was also concluded between Denmark and the United States on 11 April 1857. As a result of the Treaty, Denmark obtained more than 60 million Danish crowns and the dues ceased to exist on 1 April 1857.<sup>512</sup> With respect to the passage of warships, the Treaties of 1857 were not applicable to them because the Treaties were subject to abolition of dues for merchant ships. In other words, a prior consent of the Danish Crown for the passage of foreign warships through the Great Belt remained in force.<sup>513</sup>

During the First World War, the Straits were closed to the warships of belligerent powers, and merchant vessels could only pass through the Straits, which were mined, in daytime and with the support of pilotage. However, Sweden opened its side of the Sound to foreign aircraft and ships.<sup>514</sup> In 1932, the two states, Denmark and Sweden agreed to delimit their territorial sea with a midline in the Sound.<sup>515</sup> In the meantime, the 1927 Danish Regulations Regarding the Admission of Foreign to Danish Waters and Harbors in Time of Peace provided that “warships of foreign powers are permitted, without prior notice, to enter or navigate Danish waters which are not classed as inner waters, the Copenhagen Roads or closed waters.” However, the Sound and the two Belts were excluded from the category of Danish inner waters.<sup>516</sup> Furthermore, in 1966, Denmark included the Little Belt within its internal waters by its Regulation and it preserved the regulation of prior notice for foreign warships.<sup>517</sup> The Danish Regulations were also replaced by the Ordinance of 27 February 1976 covering the admission of foreign warships and military aircraft to Danish territory in times of peace. In this context, such passages have been regulated by the Ordinance of 16 April 1999.<sup>518</sup>

According to Denmark’s current legislation, the term of “passage” is defined as “innocent passage within the meaning of international law” (Article 1(3)) and

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<sup>511</sup> H. Caminos, p.91

<sup>512</sup> E. Brüel, Vol. II (1947), p39.

<sup>513</sup> J. M. Dyke (2002), p.74; B. B. Jia, p.117; H. Caminos, p.91-92.

<sup>514</sup> J. M. Dyke (2002), p.74; B. B. Jia, p.117.

<sup>515</sup> W. Münch, p.50; E. Brüel, Vol. II (1947), p.72-81; B. B. Jia, p.117; E. Sommers, p.18.

<sup>516</sup> B. B. Jia, p.118.

<sup>517</sup> Ibid.

<sup>518</sup> See: *Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace*, <[http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK\\_1999\\_Ordinance.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1999_Ordinance.pdf)> (accessed December 12, 2017); H. Caminos, p.92.

“simultaneous passage of the Great Belt, Samsøe Belt or the Sound of more than three warships of the same nationality shall be allowed, however, but be subject to prior notification through diplomatic channels” (Article 3(2)). Furthermore, the prior notification should be given not less than three weekdays in advance of the proposed passage (Article 1(4)) and the above-mentioned prior notification is not required for public vessels other than warships. Warships may pass through or stay in internal waters when prior permission for such passage or stay has been obtained through diplomatic channels (Article 4(1)), and they may not conduct scientific or military activities within Danish territorial waters without special permission (Article 6(1)). Additionally, submarines are required to navigate on the surface (Article 6(2)). Other than these stipulations, the Ordinance contains other regulations for aircraft, too.

After signing the LOS Convention, Sweden declared that “it is the understanding of the Government of Sweden that the exception from the ‘transit passage’ regime in straits, provided for in Article 35(c) of the Convention is applicable to the strait between Sweden and Denmark.”<sup>519</sup> When Denmark ratified the LOS Convention on 16 November 2004, it also declared that:

“It is the position of the Government of the Kingdom of Denmark that the exception from the transit passage regime provided for in article 35 (c) of the Convention applies to the specific regime in the Danish straits (the Great Belt, the Little Belt and the Danish part of the Sound), which has developed on the basis of the Copenhagen Treaty of 1857. The present legal regime of the Danish straits will therefore remain unchanged.”<sup>520</sup>

On the other hand, on grounds of safety of passage through the Danish Straits, Denmark established various navigation directions in the Danish Straits, which are generally implementations of the International Maritime Organization (IMO) regulations. Having established the maritime traffic route (Route T) through the Straits in 1960s, Denmark established the Great Belt Vessel Traffic Service (VTS) in order to secure safe passage under the new West Bridge in 1991. Furthermore, the IMO’s Maritime Safety Committee (MSC) adopted a mandatory Ship Reporting Systems (SRS) for the VTS Great Belt traffic in 1996 and another mandatory SRS was adopted in the Sound in 2010. In this context, ships are required to participate in the reporting

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<sup>519</sup> H. Caminos, p.90.

<sup>520</sup> For declaration of Denmark see:

<[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Denmark%20Upon%20ratification](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%20ratification)> (accessed December 12, 2017).

system, “the Storebælt (Great Belt) Traffic Area” (BELTREP) if their tonnage exceeds 50 GT or if their air draught is 15 meters or more.<sup>521</sup> Furthermore, the Baltic Sea, including the Sound and the Great Belt, was approved by the IMO as a Particularly Sensitive Sea Area (PSSA) in 2004.<sup>522</sup>

PSSA is defined in the IMO Resolutions as an area which needs special protection by the IMO “against damage from maritime activities.” In order to protect ecological, biological, historical or economic character of an area, PSSA give coastal state the right to adopt stronger measures such as compulsory pilotage, speed restrictions, special constructions etc. against environmental damage from ships.<sup>523</sup> For environmental purposes, some restricted measures which are considered contrary to accepted principles of international law, might be exceptionally sanctioned by the international community in Particularly Sensitive Sea Areas.<sup>524</sup> Thus, the Sound and the Great Belt, which are subject to long-standing agreements, gained special protection by the IMO based on environmental reasons with the declaration of PSSA.

## **b) The Strait of Magellan**

The Strait of Magellan is the waterway between Argentina and Chile. The Strait connects the Pacific and the Atlantic Oceans. The length of the Strait is nearly 330 nautical miles and its narrowest point’s width is 0,9 nautical miles at the Tortuoso. Navigation in the Straits is affected by current and wind, especially at the oceanic route

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<sup>521</sup> *IMO Resolution MSC 63(67)(3 December 1996)*; H. Caminos, p.97; Lagoni, R. (2002, November 16-17). Straits Used for International Navigation: Environmental Protection and Maritime Safety in the Danish Straits. *The Proceedings of the Symposium on the Straits Used for International Navigation*, pp. 159-173; J. M. Dyke (2009), p.202; See also: *Navy, Great Belt Traffic Service*, <<http://forsvaret.dk/VTSSTB/ENG/Pages/default.aspx>> (accessed December 12, 2017).

<sup>522</sup> *IMO Document MEPC 51/8/1*. See also: J. M. Dyke (2009), p.202;

<sup>523</sup> See: IMO Resolution A.720(17) (6 November 1991). Other than the Baltic Sea Area, the Great Barrier Reef in 1990, Western European Waters (2004), the Torres Strait in 2005, Canary Islands in 2005 and The Strait of Bonifacio in 2011 were designated as PSSA by IMO. For List of adopted *Particularly Sensitive Sea Areas* see: < <http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx>> (accessed January 29, 2018).

<sup>524</sup> A. N. Ünlü, p.200-201.

of Drake Passage, where wind speed reaches more than 60 Knots and waves of 10 to 12 meters of height are very common.<sup>525</sup>

Passage in the Strait has been regulated by the Treaty of 1881 between Argentina Republic and Chile. Besides the conclusion of the passage regime, the Treaty concluded a long territorial dispute between the two states.<sup>526</sup> Article 5 of the Treaty provided that:

“The Straits of the Magellan are neutralized forever, and free navigation is guaranteed to the flags of all nations. To insure this liberty and neutrality no fortifications or military defense shall be erected that could interfere with this object.”<sup>527</sup>

Thus, the Strait of Magellan was neutralized<sup>528</sup> and ships of all nations gained passage right through the Straits under the definition “free navigation.” It was not obvious whether “free navigation” meant unimpeded innocent passage or freedom of navigation. In 1882, the Argentinian Foreign Minister expressed that navigation through the Magellan Strait was “circumscribed by rules of innocent passage.”<sup>529</sup> On the other hand, in 1873, the Chilean Foreign Minister also announced freedom of navigation and declared that, “navigation through the Strait would remain free and open to ships of all nations, with no fees or taxes other than those necessary to maintain lighthouse and inspections necessary for the safety and security of the navigators.”<sup>530</sup> In addition to this, Brüel interpreted ‘free navigation’ to mean “freedom of navigation, which already existed by virtue of the ordinary rules of international law, i.e. its object was to provide for freedom of navigation in time of peace, not merely for merchant vessels but also for

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<sup>525</sup> See: *Straits of Magellan, Regulations and Information for Piloting Routes*,

<<http://web.directemar.cl/pilotaje/pageB.html>> (accessed December 13, 2017).

<sup>526</sup> Infante, M. T. (1995). Straits in Latin America: The Case of the Strait of Magellan. *Ocean Development & International Law*, Vol. 26, pp. 175-187; for the text of *the Treaty between Argentine Republic and Chile, Establishing the Neutrality of Straits of Magellan* (1881, July 23) see *The American Journal of International Law*, Vol.3, No.2, Supplement: Official Documents (Apr., 1909), pp. 121-122.

<sup>527</sup> *Ibid.* The Treaty contained no provision concerning denunciation or amendment except for Article 6 providing “...Any question unfortunately arising between the two countries, whether relative to this transaction or from any other cause, shall be submitted to the decision of a friendly power; the boundary limits of the present arrangement remaining unchangeable in any case.”

<sup>528</sup> The idea of neutralization was found in an 1881 Argentinean proposal inspired by the Treaty of Paris of 1856 on the Black Sea. According to the Treaty, warships of all nations would be prohibited entrance to the Straits of the Dardanelles and the Black Sea, with limited exceptions. See: M. T. Infante, p. 182. For more information about the Treaty of Paris see Chapter 2.

<sup>529</sup> M. T. Infante, p.181; B. B. Jia, p.122.

<sup>530</sup> M. T. Infante, p.181; H. Caminos, p.98.

warships, with the exception of warships belonging to powers at war with the coastal state.<sup>531</sup>

In addition to the Treaty of 1881 between Argentina and Chile, after the Beagle Channel arbitration, a peace and friendship treaty was also signed between the two states in 1984. Article 10 declared that:

“The boundary agreed on here in no way alters the provisions of the 1881 Boundary Treaty, whereby the Strait of Magellan is neutralized forever with free navigation assured for the flags of all nations under the terms laid down in article V. The Argentine Republic undertakes to maintain, at any time and in whatever circumstances, the right of ships of all flags to navigate expeditiously and without obstacles through its jurisdictional waters to and from the Strait of Magellan.”<sup>532</sup>

The Treaty of 1984 referred to neither “innocent passage” nor “transit passage” despite the fact that both passage regimes were known when the Treaty was concluded. However, the new Treaty clarified ‘free passage’ as meaning freedom of navigation.<sup>533</sup> Thus, ‘freedom of navigation’ through the Strait of Magellan remained in force. Nonetheless, the regime was not applicable to aircraft.<sup>534</sup> Upon the ratification of the LOS Convention, Chile and Argentina declared that “both States reaffirmed the validity of Article V of the Boundary Treaty of 1881 whereby the Strait of Magellan (Estrecho de Magallanes) is neutralized forever with free navigation assured for the flags of all nations.”<sup>535</sup>

With reference to a Chilean Decree of 15 December 1914, the Strait of Magellan would be considered its territorial waters. In the view of the Chilean authorities, the purpose of the above-mentioned decree was to prevent the Strait from becoming a place of belligerent activity of third states. In this context, Chile also argued that the neutralization of the Strait obliged it to adopt necessary measures to prevent belligerent

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<sup>531</sup> E. Brüel, Vol. II (1947), p.237; M. T. Infante, p.181, H. Caminos, p.99.

<sup>532</sup> See: *Treaty of peace and friendship between Chile and Argentina signed at Vatican City on 29 November 1984*, *United Nations Treaty Series No.23392*

<sup>533</sup> B. B. Jia, p.124; M. T. Infante, p.18

<sup>534</sup> M. T. Infante, p.183; H. Caminos, p.100.

<sup>535</sup> For declaration of Argentina see:

<[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Argentina%20U pon%20signature](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Argentina%20U pon%20signature)>, (accessed December 13, 2017). See also: H. Caminos, p.100; B. B. Jia, p.123.



activities. In 1985, Chile declared compulsory pilotage in the Strait of Magellan, and ships were obliged to comply with equipment standards of the International Convention for the Safety of Life at Sea (SOLAS) 1974.<sup>536</sup> According to the current Chilean application, ships passing through the Magellan Strait must comply with all Chilean and international regulations, and they must fulfill all requirements of SOLAS, COLREG, MARPOL, including the IMO's regulations, and all those specially related to protection of sea and maritime environment.<sup>537</sup>

### c) The Strait of Gibraltar

The Strait of Gibraltar lies between the African and European continents and connects the Mediterranean and the Atlantic. The strait is nearly 36 miles long and slims down to about 8 miles at its narrowest point.<sup>538</sup>

The Strait was predominantly controlled by Spain from 18<sup>th</sup> century up until the late 19<sup>th</sup> century. In 1780, Spain issued the Ordinance Relating to Neutral Navigation which allowed neutral merchant vessels through the Strait of Gibraltar. With reference to the Ordinance, neutral merchant ships could pass through the Strait, "if they had their papers and cargoes in good order, kept to prescribed sea-lanes, and avoided the Gibraltar area."<sup>539</sup> Furthermore, Spain required merchant vessels to hoist their flags in order to identify themselves during their passage through the Gibraltar Strait. This practice continued until 1864 when the British vessel 'Mermaid' was subject to cannon fire due to the failure of its flag. Spain abolished its practice in the Declaration of 1865 with Great Britain.<sup>540</sup> However, passage through the Gibraltar Straits remained a

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<sup>536</sup> H. Caminos, p.99.

<sup>537</sup> See: *Straits of Magellan, Regulations and Information for Piloting Routes*, <<http://web.directemar.cl/pilotaje/pageB.html>> (accessed December 13, 2017).

<sup>538</sup> J. M. Dyke (2002), p.75; Rothwell, D. R. (March 2009). *The Strait of Gibraltar, Max Planck Encyclopedia of Public International Law [MPEPIL] Oxford Public International Law*, <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1172?rskey=TlppqQ&result=1&prd=EPIL>> (accessed December 14, 2017).

<sup>539</sup> J. M. Dyke (2002), p.77. "These requirements have been described by one commentator 'as completely legal measures under the customary rules of naval war at the time,' and that 'even in the middle of the twentieth century, such action may be required by extreme circumstances and still remain within the bounds of legality'." See: J. M. Dyke (2009), p.210.

<sup>540</sup> D. R. Rothwell & T. Stephens (2010), p.245; J. M. Dyke (2002), p.77.

sensitive issue until the Anglo-French Declaration of 1904 when France controlled the North African coast.<sup>541</sup> Article 7 provided that:

“In order to secure the free passage of the Strait of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou. This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean.”<sup>542</sup>

Subsequently, Article 6 of the Treaty of 1912 between France and Spain regarding Morocco accepted the above-mentioned provision.<sup>543</sup> Thus, the Strait was internationalized<sup>544</sup> and freedom of navigation was guaranteed, according to some authors.<sup>545</sup> However, others have argued that the nature of ‘free passage’ was as vague as the Treaty of 1881 in the Strait of Magellan.<sup>546</sup> At the UN Sea-Bed Committee in 1972, Spain denied that the strait had been open to free navigation and it pointed to its seizure of sixty vessels from other nations on grounds of violations of rules of innocent passage in the Gibraltar Strait. Morocco supported Spain’s view, and went on to declare that Morocco was not bound by the treaties of 1904 and 1912. Spain and Morocco’s position was not challenged by France and England who are the other parties of the above-mentioned treaties.<sup>547</sup> On the other hand, during UNCLOS III negotiations between the Soviet Union and Italy, it was asserted that the Strait of Gibraltar was a strait which had been governed by a long-standing international treaty and it should not be subject to the “transit passage.” However, both Morocco and Spain rejected this interpretation during the conference.<sup>548</sup> Both countries argued that the rule of innocent passage should govern navigation through straits. Furthermore, they argued that warships and submarines should be subject to the regulations of coastal states and that

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<sup>541</sup> D. R. Rothwell & T. Stephens (2010), p.246; E. Brüel, Vol. II (1947), p.138-139.

<sup>542</sup> See: *The Declaration between the United Kingdom and France Respecting Egypt and Morocco, 1904, Great Britain, Parliamentary Papers London, 1911, Vol. CIII, Cmd. 5969*; D. R. Rothwell & T. Stephens (2010), p.246; B. B. Jia, p.125.

<sup>543</sup> For *The Treaty of 1912 between France and Spain regarding Morocco* see *The American Journal of International Law, Vol.7, No.2, Supplement:Official Documents (Apr., 1913), pp.81-89*. See also; E. Brüel, Vol. II (1947), p.157; B. B. Jia, p.125.

<sup>544</sup> W. Münch, p.52.

<sup>545</sup> J. M. Dyke (2009), p.211.

<sup>546</sup> B. B. Jia, p.126; J. M. Dyke (2009), p.211; J. M. Dyke (2002), p.77.

<sup>547</sup> B. B. Jia, p.126.

<sup>548</sup> D. R. Rothwell & T. Stephens (2010), p.246.

innocent passage should apply only to merchant vessels.<sup>549</sup> With regard to aircraft, although Spain argued that the Declaration of 1904 did not include freedom of overflight, the United States claimed that the ‘transit passage’ regime was established in the Strait of Gibraltar by the LOS Convention when it flew its planes from England over the Strait of Gibraltar in order to bomb Libya in April 1986.<sup>550</sup>

The question of whether the Strait of Gibraltar is subject to Article 35 (c) of the LOS Convention has always been controversial among international lawyers. Especially during the most recent periods of history, navigation through the Strait of Gibraltar has been free and unimpeded for all nations and vessels. Since the signing of the LOS Convention, no serious attempts regarding the limitation of passage through this strait have been made by Morocco or Spain.<sup>551</sup> Although the early treaties did regulate the Strait of Gibraltar in the past, treaty regimes were no longer the case in the early 1970s. Since then, the general regime of passage through international straits has been applied in the Strait of Gibraltar.<sup>552</sup>

On the other hand, in order to ensure passage safety and to prevent collisions at sea, necessary measures have been applied in the Strait of Gibraltar on grounds of technical traffic regulations. In 1996, the IMO approved a mandatory Ship Reporting Systems (SRS) in the Gibraltar Strait.<sup>553</sup> VTS and Vessel Traffic Service (VTS) were adopted in the Straits. Ships must take care of traffic separation schemes and they are required to participate in the reporting system if they have a length of 50 meters or more. Furthermore, ships are obliged to report their hazardous cargo prior to entering the Strait<sup>554</sup> besides fulfilling other rules and standards developed by the IMO.

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<sup>549</sup> J. M. Dyke (2009), p.214. According to Dyke, Morocco and Spain’s proposals illustrate their unhappiness about the transit passage regime which emerged in the UNCLOS III. See Ibid. p.215.

<sup>550</sup> J. M. Dyke (2009), p.211.

<sup>551</sup> J. M. Dyke (2002), p.81.

<sup>552</sup> B. B. Jia, p.127; According to Münch: “... weil man mit gutem Grund annehmen kann, daß diese Verträge in zwischen obsolete geworden sind und nicht mehr als fortgeltend angesehen werden. Da somit ein speziell vertragliches Regime nicht existiert wird die künftige Konvention hier voll zur Anwendung kommen.” See: W. Münch, p.52.

<sup>553</sup> *IMO Resolution MSC 63(67)(3 December 1996)*.

<sup>554</sup> Ibid.

## d) The Åland Strait

The Åland Islands, which are a Finnish autonomous region, are located between Sweden and Finland at the entrance of the Gulf of Bothnia in the northern Baltic Sea. The coast of Sweden and the western part of the Åland Islands in the Archipelago Sea constitute the the Åland Strait (Ahvenanrauma Strait)<sup>555</sup> which connects the Gulf of Bothnia and the Baltic Sea.<sup>556</sup> The self-governing province of the Åland Islands consists of more than 6,700 islands, but the current population of 28,000 live on only 65 islands.<sup>557</sup>

The Åland Islands were part of Sweden until 1809 after which they belonged to Russia from 1809 until 1917. When Finland gained its independence, the representatives of Åland's municipalities decided to seek reunion with Sweden. This demand was rejected by Finland and the Parliament solved the problem by adopting the Autonomy Act for Åland in 1920.<sup>558</sup> However, the above-mentioned decision was refused by the Åland and the debate became tense between Sweden and Finland. The increasing tension of the conflict was transferred to the League of Nations, and on 20 October 1921, the Convention on the Non-Fortification and Neutralization of the Åland Islands was signed by ten States.<sup>559</sup>

The Convention confirmed the sovereignty of the Islands in Finland's favor and provided that the territorial waters of Islands are considered to be a distance of three miles (Article 2(II)). Under Article 3 the Islands were demilitarized and it was provided that no military naval or air force of any power shall enter or remain in the zone described in the Convention (Article 4). However, the prohibition of warships entering and remaining in the described zone "does not restrict the freedom of innocent passage through the territorial seas. Such passage shall remain subject to existing international

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<sup>555</sup> The Strait between Åland Islands Sweden.

<sup>556</sup> H. Caminos, p.104. Hannikainen, L. (1994). The Continuation of the Demilitarised and Neutralised Status of the Åland Islands. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 54, pp. 614-651.

<sup>557</sup> See *Ministry of foreign Affairs of Finland*, <<http://www.formin.finland.fi/public/default.aspx?nodeid=49889&culture=en-US&contentlan=2#demilitarisation>> (accessed December 15, 2017).

<sup>558</sup> Gardberg, A. (1995). *Åland Islands, A Strategic Survey*. Helsinki: National Defence College, p.10.

<sup>559</sup> A. Gardberg, p.10. The Convention of 1856 on the Demilitarization of the Åland Islands, which was imposed by France and Britain on Russia following the Crimean War, was annexed to the Peace Treaty of Paris of 1856. See: L. Hannikainen, p.614.

law and usages” (Article 5). Thus, Article 5 guaranteed innocent passage, including that of warships, through territorial waters of Åland Islands except for the zone which was bounded by the coordinates in the Convention.

In 1979 Sweden extended its territorial waters up to 12 miles and Finland did the same in 1995, and as such the Åland Strait (Ahvenanrauma Strait)<sup>560</sup> which is about 17 nautical miles wide is completely overlapped by their territorial seas.<sup>561</sup> However, the Convention of 1921 remained in force. Both States made declarations upon their signature of the LOS Convention that the Strait falls under Article 35(c) as an exception. When Finland signed the LOS Convention on 10 December 1982 and Sweden upon its ratification on 25 June 1996, it declared that:

“It is the understanding of the Government of Finland that the exception from the transit passage régime in straits provided for in article 35 (c) of the Convention is applicable to the strait between Finland (the Åland Islands) and Sweden. Since in that strait the passage is regulated in part by a long-standing international convention in force, the present legal régime in that strait will remain unchanged after the entry into force of the Convention.”<sup>562</sup>

### **e) The Turkish Straits**

Since the Küçük Kaynarca Treaty of 1774 the legal regime of the Turkish Straits has been subjected to treaties. The current passage regime of the Turkish Straits has been regulated by the Montreux Convention since 1936,<sup>563</sup> and navigation through the Straits is currently controlled by Turkey in accordance with the provisions of the Montreux Convention. In compliance with the definition of ‘transit passage regime’, the Turkish Straits connect two high seas; however, the Montreux Convention of 1936 excludes passage regime of the Turkish Straits from transit passage regime which was established in the LOS Convention. The Turkish Straits which have been regulated by a long-standing convention are one of the straits subjected to Article 35 (c) of the LOS

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<sup>560</sup> It is the Strait between Åland Islands Sweden. See: H. Caminos, p.105.

<sup>561</sup> H. Caminos, p.106.

<sup>562</sup> For declaration of Finland see:

<[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Finland%20Upon%20signature](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Finland%20Upon%20signature)> (accessed December 15, 2017). See also: H. Caminos, p.104.

<sup>563</sup> For more information see Chapter 2, 3 and 4.

Convention,<sup>564</sup> and this has never been contested.<sup>565</sup> In addition to this, because Turkey has neither signed the LOS Convention nor been a party thereof, it does not have any legal obligation toward it.<sup>566</sup>

The provisions of Montreux Convention have been implemented to regulate the passage regime in the Straits for over eighty years, and non-party states to the Convention have also followed the provisions since 1936. In other words, the Convention has offered passage right not only to ships of contracting parties but also to ships of all nations without discrimination. Although only nine states signed the Convention, it “has been recognized as creating rights and duties that have been accepted *erga omnes*.”<sup>567</sup>

As is stipulated in the preamble of the Convention, the waterway between the Black Sea and the Aegean Sea, namely the Strait of Dardanelles, the Sea of Marmara and the Bosphorus constitute the Turkish Straits. With regard to regulation of territorial waters, because Turkey is not a party of the Territorial Convention of 1958 and the LOS Convention, it adopted its own regulations regarding passage regime of foreign ships through its territorial waters and visiting rules of foreign ships to its ports in 1965 and it renewed them in 1982.<sup>568</sup> In the above-mentioned regulation Turkey defined the boundary of the Istanbul Port and the Port of Çanakkale. The two ports enclose the whole Bosphorus which is only about 700 meters wide at its narrowest point and likewise a big part of the Strait of Dardanelles.<sup>569</sup> In other words, the Sea of Marmara is an internal sea,<sup>570</sup> and the Bosphorus and the Strait of Dardanelles fall into Turkish territorial waters. It could be claimed that the Sea of Marmara and both Straits are subject to Turkey’s territorial waters legislation. However, the status of the waters is not

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<sup>564</sup> Fornari, M. (2005, May 11). Conflicting Interests in the Turkish Straits: Is the Free Passage of Merchant Vessels still Applicable? *The International Journal of Marine and Coastal Law*, Vol 20, No 2, p. 226; J. M. Dyke (2009), p.203; Tarhanlı, T. (1995, January 1), Innocent Passage Regime and Illicit Arms Trafficking through the Turkish Straits. *Turkish straits: new problems; new solutions*, pp. 33-49.

<sup>565</sup> H. Caminos, p.77.

<sup>566</sup> T. Tarhanlı, p.234.

<sup>567</sup> H. Caminos, p.79.

<sup>568</sup> See *Turkish Territorial Waters Legislation of 1964*,

<[https://www.tbmm.gov.tr/tutanaklar/KANUNLAR\\_KARARLAR/kanuntbmmc047/kanuntbmmc047/kanuntbmmc04700476.pdf](https://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc047/kanuntbmmc047/kanuntbmmc04700476.pdf)> (accessed December 20, 2017) and for the *Turkish Territorial Waters Legislation of 1982* see <<http://www.mevzuat.gov.tr/MevzuatMetin/1.5.2674.pdf>> (accessed December 20, 2017).

<sup>569</sup> See *Resmi Gazete [Official Gazette of Turkey]*, No: 12186. (1965, December 25); and *Resmi Gazete [Official Gazette of Turkey]*, No: 17671 (1982, April 21).

<sup>570</sup> S. Toluner (1989), p.155.

relevant to the “passage right” of ships, because the “passage right” of merchant ships of all nations through international straits became a customary law and was also guaranteed by Article 1 of the Montreux Convention between the Black Sea and the Aegean Sea via the Bosphorus, the Sea of Marmara and the Strait of Dardanelles.<sup>571</sup>

In relation to the passage regime of the Montreux Convention, besides dividing the regulation of the passage of ships into three categories – in time of peace, in time of war and if Turkey considers itself threatened with imminent danger of war – the levy of light dues and the lack of provisions for safety of passage and environmental protection distinguish its passage regime from the innocent or transit passage regime. Thereby, it can be said that the Montreux Convention established a *sui generis* passage regime for the Turkish Straits.<sup>572</sup>

Article 1 of the Montreux Convention embodies the freedom of passage of merchant ships in times of peace. Under Article 2 merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities. Turkey cannot levy taxes from vessels passing through the Straits. It can however levy charges in order to carry out sanitary control and maintenance expenses for channel buoys, lighthouse and other life-saving services (Annex I). However, in the Convention, there is no provision regarding the navigational safety, environmental protection or responsibilities of flag nations of ships or Turkey in the event of an accident in the Straits.

On the other hand, the provisions regulating the passage of warships through the Turkish Straits are more detailed than those regulating merchant vessels. In particular, the total numbers of warships, their total tonnages and types, and the permission process are quite detailed in the Convention. Moreover, different conditions are provided for Black Sea states and non-Black Sea states. Other than this, in the preamble of the Convention it was expressed that the Convention was concluded in order to “regulate

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<sup>571</sup> H. Caminos, p.79; See Chapter 4. In the English version of the Montreux Convention, Article 1 provided that “The High Contracting Parties recognize and affirm the principle of freedom of transit and navigation by sea in the Straits.” In the original French text of the Convention it was stated as “la liberté de passage”. The principle of “the freedom of transit” meant “passing in transit without calling at port in the Turkish Straits”. It is not possible to interpret the term “transit” used in the English version of the 1936 Montreux Convention as referring to “transit passage regime” which was established by the LOS Convention of 1982. See: T. Tarhanlı, p.34-35.

<sup>572</sup> T. Tarhanlı, p.34; G. Aybay & N. Oral (1998), p.98; S. Günes, p.225 and 236.

transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus comprised under the general term "Straits" in such manner as to ensure the security of Turkey and other riparian states of the Black Sea." Furthermore, international relations were also based exclusively on military power and 'gunboat politics' in the time when the Montreux Convention was adopted. That is, with regard to the political circumstances of the time, the complicated and detailed provisions regarding warships (Article 14,18, Annex II), the expression concerning the security of Turkey and riparian states and the duty of Turkey to collect statistics of warships and control the tonnage of warships (Article 24) prove that the Montreux Convention basically has a military character.<sup>573</sup> The Convention nonetheless provided partial regulation<sup>574</sup> for merchant vessels and established very liberal rules for merchant vessels and guaranteed the principle of "freedom of passage and navigation by sea in the Straits" as an unchanged principle for the Straits without detailed regulations concerning the protection of the marine environment, safety of passage and any other solutions for the prevention of damages caused by accidents in the Straits. In actual fact, when the Montreux Convention was adopted the number of merchant vessels in the Straits was not sufficiently high to cause serious problems such as pollution or dangerous accidents, such as the collisions of oil tankers.

After the 1990s, passages began to present an increasing potential problem for navigation, the environment and safety in the Turkish Straits. Following some fatal accidents in the Straits and in order to carry out safe passage through the Straits, Turkey adopted a new set of rules called "Maritime Traffic Regulations for the Turkish Straits and the Marmara Region" in 1994 and it renewed these in 1998.<sup>575</sup> These regulations caused some disagreements as to whether they were compatible with the Montreux Convention, and states, especially Russia, Romania, Ukraine, Bulgaria, Greece and Cyprus strongly objected to the Turkish regulations. They argued that the right of

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<sup>573</sup> M. Fornari, p.228. The Convention transferred duty of the International Straits Commission, which was established by the Lausanne Convention of 1923, to Turkey. Turkey was delivered the duties to supervise the implementation of the provisions of the Convention regarding warships, and collect and convey the statistics of war vessels passing through the Straits (Article 24).

<sup>574</sup> T. Tarhanlı, p.35.

<sup>575</sup> For the *Maritime Traffic Regulations for the Turkish Straits* (1994, July 1) see <[http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR\\_1994\\_Regulations.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1994_Regulations.pdf)> and the *Maritime Traffic Regulations for the Turkish Straits* (1998, October 8). <<http://www.mevzuat.gov.tr/MevzuatMetin/2.5.9811860.pdf>> >(accessed December 21, 2017).



freedom of innocent passage which was guaranteed by the Montreux Convention was being violated.<sup>576</sup>

### **3. Maritime Traffic Regulations for the Turkish Straits and the Montreux Convention**

Considering the last decades, because of both their geographical character and increasing passages of hazardous cargo, serious accidents have become unavoidable in the narrow Turkish Straits. The total navigational distance between two seas that is, the Black Sea and the Aegean Sea, is approximately 160 nautical miles (300 kilometers), and a vessel can conclude its passage in about 16-18 hours. The Bosphorus is 31 kilometers long with an average width of 1,5 kilometers and an average depth of 35 meters. It is one of the narrowest straits in the world as its narrowest measurement is about 700 meters. Moreover, due to its morphological structure shaped with several sharp turns, ships are bound to alter course in this Strait at least 12 times up to 80 degrees. Navigation is particularly deceptive at the narrowest point of the Strait as tankers and huge vessels approaching from opposite directions cannot see each other around the bends. With its length of about 70 kilometers and an average width of 1,5 to 2 kilometers the Dardanelles has similar geographic characteristic to the Bosphorus.<sup>577</sup> Besides the unpredictable climatic conditions, such as strong wind, snow or fog, the greatest danger for the navigation of vessels in the Turkish Straits are the oceanographic characteristics with its typical streams, such as surface currents and underwater currents, and also with exceptional counter currents called “orkoz”, which can reach 6-7 knots per hour in a contrary direction to the normal course of flow. In addition to these circumstances, even if there has been built a VTS system, fog can also cause suspension of navigation in the Straits.<sup>578</sup>

On the other hand, as far as maritime traffic is concerned, it could be said that the Turkish Straits are one of the busiest outlets among straits and waterways in the

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<sup>576</sup> Joyner, C. C., & Mitchell, J. M. (2002). Regulating Navigation through the Turkish Straits: A Challenge for Modern International Law. *The International Journal of Marine Coastal Law*, Vol. 17, No.4, pp. 521-559.

<sup>577</sup> For more information see Chapter 1.

<sup>578</sup> C. Istikbal, p.78; S. Oguzülgen, p. 105-126.

world.<sup>579</sup> In 1934 approximately 4,500 ships navigated annually in the Straits. Compared to 1934, the number of ships reached 46,914 in 1995 and 56,606 in 2007<sup>580</sup> marking about a twelve-fold rise in more than 70 years. Local vessels such as boats, inter-city ferries, fishing boats or touristic cruises are not included in this calculation. Between the Asian and European parts of Istanbul boats and inter-city ferries cross the Straits diagonally about 2000 times daily and transport more than one million people. If the population of Istanbul is taken into account, which was 918,700 in 1936<sup>581</sup> and 14,804,116 in 2016<sup>582</sup>, it can be obviously noticed how much traffic has increased in the Straits.

In particular, after the disbanding of the Soviet Union in 1991, the Caspian region oil of new independent States such as Kazakhstan, Azerbaijan, and Turkmenistan gained greater importance for satisfying the energy requirements of western states. The Turkish Straits have been used as the most important transport way of oil and oil products of the Caspian area, as they are the only connection of the Black Sea to oceans via the Aegean Sea. Today, although there are many pipelines for energy transport between East and West, the Turkish Straits are also used for transport of oil and other hazardous products. Besides a huge amount of oil, other hazardous cargo such as LNG, LPG and petrochemical products are carried from the Black Sea to the Aegean Sea; and in return the needs of Black Sea states are carried in the opposite direction via the Turkish Straits. In 2016, 8,703 of 42,553 ships that passed through the Bosphorus were tankers and they carried a total capacity of 565,282,287 gross tons of cargos – including hazardous products – through the Straits.<sup>583</sup> Nowadays, an average of 120 tankers a day is carrying more than 150 million tons of oil and hazardous products through the Straits every year.<sup>584</sup> Compared with 2007, in 2016 the number of ships that passed through the

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<sup>579</sup> M. Dyoulgerov, p.63; M. Fornari, p.229.

<sup>580</sup> According to statistics of Directorate General of Merchant Marine of Turkey in 2007 total capacities of 484,867,696 gross tons cargos were carried through the Bosphorus. See: < [https://atlantis.udhb.gov.tr/istatistik/gemi\\_gecis.aspx](https://atlantis.udhb.gov.tr/istatistik/gemi_gecis.aspx) > (accessed December 22, 2017).

<sup>581</sup> See: *The Population of Istanbul According to the Census Years (1927-1967)*, Istanbul Metropolitan Municipality, <<http://www.ibb.gov.tr/tr-TR/bilgihizmetleri/Istatistikler/Documents/demografi/t211.pdf>> (accessed December 21, 2017).

<sup>582</sup> See Chapter 1.

<sup>583</sup> See Table 1, in Chapter 1.

<sup>584</sup> According to data of the Ministry of Foreign Affairs of Turkey: In 1995 about 60 million tons, in 2000 about 91 million tons and in 2010 about 147 million tons of oil and hazardous products were carried through the Bosphorus. See: *Note on the Turkish Straits: Characteristics of the Straits and Navigational Risks. The Ministry of Foreign Affairs of the Republic of Turkey* < <http://www.mfa.gov.tr/turk-bogazlari.tr.mfa> > (accessed December 22, 2017).

Bosporus decreased from 56,606 to 42,553; however, the amount of both cargos and hazardous products has always clearly increased. The amount of cargo was 484,867,696 gross tons in 2007, which increased by nearly a hundred million gross tons to 565,282,287 gross tons in 2016. These amounts prove that ships' size and capacity have increased in parallel with the shipping technology in the last decades. Therefore, it should be noted that greatly increasing length and size of ships are a new threat to the narrow and crowded Straits.<sup>585</sup>

The Montreux Convention was concluded based on the security interests of Turkey and the Black Sea riparian states. However, the perception of "security" has diversified, namely the size or amount of ships passing through the Turkish Straits and the dangerous cargos became new threat factors to human life and environment which were not regulated in the Montreux Convention. If it is taken into account that pilotage is not compulsory in the Montreux Convention (Article 2), safety of passage through the Turkish Straits that is a biological corridor between two seas<sup>586</sup> and around where nearly 25 million people live,<sup>587</sup> gains special attention in view of protecting human life and the environment from damage by the large number of tankers and the size of cargo ships.

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<sup>585</sup> As an example of the size of ships that passed through the Straits: On 5 December 2017, a 292-meter long LNG tanker called "Abalamabie" passed through the Straits and during its passage the Dardanelles was closed for other ships. On 12 December 2017, a 368-meter long cargo ship called "M/V Ym Wish" with its 144,651 gross tons of cargo passed through the Straits. On 30 November 2017, a 291-meter long "M/T Ougarta" LNG tanker carrying 112,867 gross tons LNG passed through the Straits. See *Deniz Haber Ajansi [Maritime News Agency]: Çanakkale Bogazi'ndan "M/T Ougarta" adli tanker gecti [ Passage of the ship "M/T Ougarta" through the Dardanelles] ( 2017, November 30 )*. If the narrowest point of the Bosporus, which is only about 700 meters, considered, the threat of extremely long ships can be easily understood .

<sup>586</sup> The Turkish Straits are a biological corridor, a biological barrier, and an acclimatization zone, and thus play a major ecological role. This biological corridor serves for the penetration of Atlanto-Mediterranean originated fishes into the Black Sea. In spring the migration originates from the Mediterranean to the Black Sea and returns in opposite direction in autumn. Not only are collision and oil spills into Straits water a threat to the sensitive ecosystem in this region, but also noise pollution by passing ships is. See: Öztürk, B., Öztürk, A. A., & Algan, N. (2001, May 12-14). Ship Originated Pollution in the Turkish Straits System. *Problem of Regional Seas 2001: Proceedings of the International Symposium on the Problems of Regional Seas*, pp. 86-95

<sup>587</sup> For the population of the „Marmara region" see *The Statistics Summary of Cities According to the Census Years (2000-2017)*. *Türkiye İstatistik Kurumu [Turkish Statistical Institute]*.

### 3.1 The Maritime Traffic Regulations of 1994 and 1998

Due to the geographical character of the Straits and their dense traffic, accidents are unavoidable. Indeed, between 1 May 1982 on which the territorial legislation came into force and 1994, 205 accidents happened in the Bosphorus. Compared with 1982, the number of the accidents increased four times in 1991<sup>588</sup> when the transport of Caspian oil began. According to another statistic, in 1982 there were only three collisions in the Straits, a number which increased 13-fold and reached 39 in 1993. Most of these caused the deaths of many sailors, and tons of oil spilled into the Straits water. Furthermore, the vessels involved in these accidents containing fire hazards caused damage to the environment too. Additionally, in order to avoid further damage, passage through the Straits had to be halted temporarily.<sup>589</sup>

One of the most serious accidents happened in 1960. Two tankers, “M/T World Harmony” and “M/T Zaronic” collided in the Straits. Twenty sailors including both Masters lost their lives, and about 200,000 tons of oil spilled in the Straits water. Besides sea pollution, fire which lasted for some weeks suspended traffic.<sup>590</sup> In 1979, the Romanian tanker “M/T Independenta” and Greek ship “M/V Evriyali” collided in the Straits and 95,000 tons of oil spilled as well as causing a fire. Furthermore, the accident caused the deaths of 43 personnel and grounded tankers’ wreck affected the area for some years.<sup>591</sup> In 1991, at the accident of the Philippines ship “M/VMadonna Lily” and the Lebanese livestock carrier “M/V Rabunion-18”, the Lebanese vessel sank with its cargo of 21,000 sheep.<sup>592</sup> Another dangerous accident was the collision of the tanker “M/T Nassia” and the ship “M/V Shipbroker” in 1994, both bearing the Cypriot flag. 29 personnel lost their lives, and about 20,000 tons of oil was spilled. Furthermore, after an explosion a huge amount of toxic gas mixed in the air and a 12 kilometer long and 1 kilometer wide oil slick covered about 60% of the Straits. This accident caused a fire which also lasted for four and half days and consequently suspended traffic in the

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<sup>588</sup> S. Oguzülgen, p.107.

<sup>589</sup> Aybay, G. (1995, July). On the Power of Turkey to Regulate Free Passage Through the Straits. *Turkish Straits: New Problems, New Solutions*, pp. 53-104.

<sup>590</sup> M. Fornari, p. 230; S. Oguzülgen, p.108.

<sup>591</sup> S. Oguzülgen, p.108; Toluner, S. (3 December 1979). The Regulation of Passage Through the Turkish Straits and the Montreux Convention. *Milliyet*, pp.79-95.

<sup>592</sup> *Ibid*, p.79.

Straits for six days, and more than 700 ships had to wait at the Bosphorus.<sup>593</sup> Furthermore, the oil spilled in the Strait covered the sea and cost the lives of many sea creatures because of a lack of oxygen.<sup>594</sup> Two of the main reasons for these accidents are acceptance of non-piloted vessels for passage through the narrow Straits and a lack of experience of Masters in leading the ships through the risky narrow and curved character of the Straits. During the above-mentioned period, in 74% of the accidents both vessels had no pilots.<sup>595</sup>

As mentioned above, the fact that accidents increased especially in the early 1990s showed the inadequacy of the Montreux Convention in terms of the safe navigation in the Straits. In order to prevent accidents and to ensure safe passage, Turkey presented the Maritime Safety Committee (MSC) with its proposal for a Traffic Separation Scheme for the Turkish Straits at the 62<sup>th</sup> Session of MSC in 1993. At the same Session, Turkey also presented associated routing measures and a set of draft rules for ships navigating through the Turkish Straits.<sup>596</sup> Turkey based its regulation on the rules of the International Regulations for Preventing Collisions at Sea 1972 (COLREGs)<sup>597</sup> which provided that “traffic separation schemes may be adopted by the Organization for the purpose of these Rules” (Rule 1(d)) and “this Rule applies to traffic separation schemes adopted by the Organization and does not relieve any vessel of its obligation under any other Rule” (Rule 10(a)). Turkey’s demands were negotiated at the 39<sup>th</sup> session of the Sub-Committee on Safety of Navigation (NAV) in 1993 and at the 63<sup>th</sup> Session of MSC in 1994. The MSC adopted the Rules and Recommendations on Navigation through the Straits and Sea of Marmara concerning the implementation of Traffic Separation Schemes (TSS) and approved five Traffic Separation Schemes for the Turkish Straits.<sup>598</sup> Moreover, the use of pilotage service was strongly recommended, especially by large-sized vessels and vessels carrying dangerous and hazardous

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<sup>593</sup> G. Aybay (1995), p.55; M. Fornari, p.231; S. Oguzülgen, p.108; M. Dyoulgerov, p.63.

<sup>594</sup> B. Öztürk, A.A. Öztürk & N. Algan (2001), p.86; M. Fornari, p.231.

<sup>595</sup> M. Fornari, p.230; S. Oguzülgen, p.109.

<sup>596</sup> Plant, G. (1996). Navigation Regime in the Turkish Straits for Merchant Ships in Peacetime. *Marine Policy*, Vol.20, No:1, pp. 15-27; M. Dyoulgerov, p.79.

<sup>597</sup> Turkey has been a party to the COLREG 72 since 1978. See: *Resmi Gazete [Official Gazette of Turkey]*, No:16273. (1978, April 29).

<sup>598</sup> A. N. Ünlü, p.151; Fournatzopoulou, E. (2004, December). The Legal Status of the Straits of Istanbul, the Straits of Çanakkale and the Marmara Sea, 1945-2004. *International Journal of Maritime History*, XVI, No:2, pp. 247-264.

cargo.<sup>599</sup> The IMO General Assembly furthermore approved the IMO Rules and Recommendations regarding TSS of the Turkish straits with the Resolution A.827 (19) in 1995.<sup>600</sup>

“The Maritime Traffic Regulations for the Turkish Straits and Marmara Region” and radar-based traffic monitoring system for the Bosphorus were approved by the Turkish Council of Ministers at the domestic level and came into force on 1 July 1994.<sup>601</sup> However, the Turkish regulation met with strong opposition especially from the Russian representative, who was supported by Romanian, Ukrainian, Bulgarian, Greek and Cypriot representatives in the IMO. Legal and technical objections were raised regarding the differences between IMO Recommendations and Turkish Regulation of 1994. Their objections were that the Turkish Regulations violate customary principles of international law, IMO Rules and Recommendations and the Montreux Convention of 1936.<sup>602</sup> With respect to the Rule 2 (a and b) of the IMO, its rules and recommendations are advisory rather than mandatory, and the disagreements were mainly based on the mandatory character of the Turkish regulations. Whilst Turkey argued that its regulations and IMO recommendations were consistent with each other, Russia requested that the IMO Legal Committee should give its opinion on whether the Turkish regulations complied with international law. In actual fact, the obligatory character of the Regulation of 1994 was not compatible with IMO Rules and Recommendations, and some other clauses such as compulsory pilotage service for vessels 150 meters or more in length, and the definition of “all ships” which covered warships and passage permission required for nuclear cargo ships, were also not in

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<sup>599</sup> G. Plant (1996), p.20; M. Dyoulgerov, p.80. In addition, regarding the adaptation of Regulations Dyoulgerov argued that “... in such cases, the coastal state is also asked to respect a six-month adaptation period, following Assembly approval, before implementing any new rules. However, Turkey unilaterally enacted the Regulations on 11 January 1994” See M. Dyoulgerov, p.80.

<sup>600</sup> See: IMO Resolution A.827(19). The purpose of the IMO is “to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.” (Article 1(a)). See also: C. Istikbal, p.80.

<sup>601</sup> See *Maritime Traffic Regulations for the Turkish Straits* (1994, July 1).

<sup>602</sup> M. Dyoulgerov, p.59; G. Plant (1996), p.19; A. N. Ünlü, p.153; Dremlüga, R. (2015). The Development of the Black Sea Straits Regulation of International Navigation. *Asian Social Science*, Vol. 11, No. 12, pp. 269-273; Canca, S. (2012). *Uluslararası Hukukta Türk Boğazları [Turkish Straits in International Law]*. Ankara: Seckin Yayıncılık San. ve Tic. A.S., p.106-110.

accord with the Montreux Convention.<sup>603</sup> At the Legal Committee Meeting in October 1994, it was noted that the Turkish regulations were inconsistent with the Montreux Convention and IMO Rules and Recommendations. It was suggested that a special working group should be set up under the Maritime Safety Committee and the issue should be dealt with by the IMO.<sup>604</sup>

Following criticism from the IMO, Turkey changed its position and having informed diplomatic missions in Ankara, did not apply some of the provisions of the Regulations of 1994.<sup>605</sup> However, the objections continued not related to the legal status of the Regulations but to a technical one. Turkey was criticized by user states for the delays following the establishment of the TSS. In December 1994, at the 64<sup>th</sup> Session of the MSC, the Bulgarian and Russian representatives complained about the delays of their merchant vessels passing through the Straits. During the negotiations in the IMO, Turkey continued with the implementation of the rules regarding routing system, and the Russian Foreign Ministry instructed the Russian captains to ignore all Articles of the Regulations of 1994 and to follow the IMO's decisions.<sup>606</sup> The conflict escalated both in the IMO Assembly and at MSC Sessions, furthermore, in 1996, Russia and the Oil Companies International Marine Forum (OCIMF) submitted to the IMO their papers

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<sup>603</sup> The "obligatory" character of the Turkish Regulations of 1994 was not compatible with the IMO rules and recommendations. For example, whilst it was strongly advised to give prior information on the size of the vessel about their blast or loaded condition and their hazardous cargo in IMO recommendation, in the Turkish Regulation of 1994 it was stated that "Masters, owners or agents of the vessels carrying dangerous cargo and which are 500 gross tons and more, 24 hours before entering the entrance of the Strait of Istanbul and the Strait of Çanakkale, shall give Sailing Plan I (SP I) as determined by the Administration ...". Another example with respect to the Montreux Convention is passage permission through the Straits that is required only for warships, but Article 30 of the 1994 Regulation provide that, "to navigate through the Straits and the Marmara region, nuclear-powered vessels or vessels carrying nuclear cargo or waste which intend to pass through the Straits and the Marmara region must obtain permission, in accordance with relevant regulations from the Under-Secretariat for Maritime Affairs at the planning stage of the passage. Vessels carrying dangerous or noxious waste must obtain permission from the Ministry for Environment at the planning stage of the passage." Other than this, while pilotage and towage service for all ships in the Montreux Convention is optional (Article 2), the 1994 Regulations provided that "Turkish vessels 150 meters or more in length passing through the Straits shall take a pilot for the safety of navigation, life, property and the environment. Foreign vessels are advised for safety purposes to take a pilot. The Administration may establish compulsory pilotage requirements in certain areas in the Straits and the Marmara region for vessels other than transiting vessels (Article 31)" and that "A vessel or any other object may only pass through the Straits when being towed by a suitable tugboat of sufficient power. A vessel may not pass in the tow of another vessel..." See *Maritime Traffic Regulations for the Turkish Straits* (1994, July 1).

<sup>604</sup> A. N. Ünlü, p.153

<sup>605</sup> Ibid, p.154; M. Dyoulgerov, p.80.

<sup>606</sup> M. Dyoulgerov, p.81.

which recommended amendments to the routing system in the Turkish Regulations.<sup>607</sup> However, no change has been achieved in the recommendations and rules. This is because, on the grounds of paragraph 3.4 of the General Provisions on Ships Routing, it is not possible for the IMO to amend any routing system without the agreement of the coastal state. In this context, at the 71<sup>st</sup> Session of the MSC in 1999, a decision was taken to end the talks on the revision of the routing system in Turkish Straits.<sup>608</sup>

In view of the four years of implementation of the Regulations of 1994 which reduced accidents in the Straits,<sup>609</sup> the Turkish government revised them in order to eliminate some technical deficiencies and to clarify some discussion points. In this regard, Turkey adopted a new revised set of regulations for safe navigation through the Turkish Straits in 1998.<sup>610</sup> The purpose of the Regulations of 1998 was also “to ensure safety of navigation, safety of life, property and marine environment by improving the safety of vessel traffic in the Straits”. It provided that “the regulations shall apply to all vessels entering or navigating within the limits of Turkish Straits” (Article 1). Compared to the Regulations of 1994 the aim has stayed the same in the renewed version, however, most of the articles which were inconsistent with the provisions of the Montreux Convention and other rules of international law and IMO Recommendations have also been changed.

*i.* The 1998 Regulations apply to "all ships" navigating in the Turkish Straits (Article 1) as in the 1994 Regulations. However, unlike from the Regulations of 1994, in the 1998 Regulations warships are exempt from observing certain Regulations to protect the marine environment. The passage of warships through the Strait has been

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<sup>607</sup> Ibid.

<sup>608</sup> A. N. Ünlü, p.154; S. Günes, p. 241; S. Canca, p.115. At the 71. Session of the MSC of the IMO, while the US, England, France, Germany, Japan, Nederland and Panama voted positively, Russia, Ukraine, Greece and Cyprus objected the Regulations. See: S. Günes, p.241. See also: IMO Doc. NAV 44/14 (4 September 1998).

<sup>609</sup> S. Günes, p. 219. The average amount of accidents in the Straits was 20 before adopting the 1994 Regulations. During the first six months of 1994 in total 22 accidents occurred. In the second half of 1994, namely after the entry in force of 1994 Regulation, only 2 accidents happened. See: M. Fornari, p.246. According to historical data in per million transit miles; in the Bosphorus 6, in Suez Canal 3 and in the Mississippi River 0,2 accidents were seen. According to a study of BP [British Petrol] concerning the accident risk of ships: “If we could implement the three measures: a) all vessels to take a pilot, b) install and maximize the value of the VTS and c) improve vessel quality and reliability, then we could potentially reduce the risk of an accident by 66%.” See: Bilbo, M. (2001, May 12-14). Oil Transport in the Turkish Straits. *Problems of Regional Seas 2001: Proceedings of the International Symposium on the Problems of Regional Seas*, pp. 95-99.

<sup>610</sup> See *Maritime Traffic Regulations for the Turkish Straits* (1998, October 8).



regulated by the Montreux Convention. Thus, the 1998 Regulations clarified the discussion on the term "all ships" in accordance with the Montreux Convention (Article 49).<sup>611</sup>

*ii.* In Part I of the 1998 Regulation, the definition of large ships by the 1994 Regulation was amended.<sup>612</sup> The new Regulation defined that ships having an overall length of 200 meters or more with a 15 meters draught or greater are large ships (Article 2 (j, k)).<sup>613</sup> To determine this limitation, the properties and the environment, the physical, morphological and seasonal condition of the Straits were taken into consideration, with the aim of preventing accidents in the Straits. In this context, because of strong current and poor visibility in the narrow Straits, the 1998 Regulations laid down some other restrictive rules for large vessels.<sup>614</sup> According to the provisions

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<sup>611</sup> 1994 Regulations did not contain any safeguard clauses for warships. According to Article 49 of 1998 Regulations: "Articles 5, 9, 10, 11, 12, 15, 21, 25, 26, 27, 31, 38, 39, 46, 47, 51 and Para. a) of Reg. 6 shall not apply to the vessels of war, auxiliary vessels and state owned vessels which are not in use for trading." See: *Maritime Traffic Regulations for the Turkish Straits* (1998, October 8).

<sup>612</sup> In 1994 Regulations, vessels which are more than 150 meters long and have a draught of more than 10 meter were described as large vessels (Article 2 (i.j)).

<sup>613</sup> Appropriate limitation of size of ships (200 m length and 15 m draught) for Turkish Straits was also accepted by IMO General Assembly. See: Recommendation for Daylight Transit in Annex II. See: IMO Resolution A.827(19).

<sup>614</sup> With regard to the passage through the Bosphorus:

Article 35- a) When the main surface current exceeds 4 knots or when southern winds reverse the main current in Istanbul Strait, all vessels with dangerous cargo, large vessels and deep draught vessels with a speed of 10 knots or less shall not enter the Straits.

Such vessels shall wait, until the speed of the current drops to 4 knots or less or the reverse currents disappear. However, vessels other than above may pass through the Straits by taking tugs as advised by the Traffic Control Centre.

b) When the main surface current exceeds 6 knots or strong northerly currents and eddies are caused by southerly winds, all vessels with dangerous cargo, large and deep draught regardless of their speed shall not enter the Istanbul Strait and wait until the current speed is less than 6 knots or strong reverse currents disappear.

Article 36- b) When visibility in an area within the Istanbul Strait drops to 1 mile or less, vessel traffic shall be permitted in one direction only. During this time, vessels with dangerous / hazardous cargo, large vessels and deep draft vessels shall not enter to the Istanbul Strait.

With regards to the passage through the Dardanelles:

Article 43- a) When the main surface current exceeds 4 knots within the Çanakkale Strait, all vessels carrying hazardous cargo with a manoeuvring speed of less than 10 knots, large vessels and deep draft vessels shall not enter to the Strait. Such vessels shall wait until the speed of the current drops to 4 knots or less.

All other vessels may pass through the Strait if they use the tug/s recommended for their vessel type by the Traffic Control Centre.

b) When the main current exceeds 6 knots, all vessels which are carrying hazardous cargo, large and deep draft, regardless of their speed, shall wait until the current speed drops less than 6 knots.

Article 44- b) When visibility in an area within the Çanakkale Strait drops to 1 mile or less, vessel traffic shall be permitted in one direction only. During this time, vessels with dangerous / hazardous cargo, large vessels and deep draft vessels shall not enter to the Istanbul Strait.

concerned, vessels with dangerous cargo, large vessels and deep draught vessels with a speed of 10 knots or less shall not enter the Straits if currents exceed 4 knots in the Bosphorus or the Dardanelles. Furthermore, if the current exceeds 6 knots or the visibility within in the Bosphorus or the Dardanelles drops to 1 mile or less; large vessels or dangerous cargo vessels shall not enter the Strait concerned. Although the Regulation of 1998 solved the problems of delays<sup>615</sup> of large vessels from 150 meters to 200 meters; it has caused delays for ships longer than 200 meters under bad weather conditions. These provisions were adopted to provide safety of passage and to make the navigation suitable under special weather conditions. They were approved by the IMO and do not deny the passage right of ships in accordance with Article 2 of the Montreux Convention, which guaranteed the freedom of passage through the Straits. It is hard to say that the “freedom” of passage under conditions such as high currents and less visibility would be possible. On the contrary, it can be argued that applying safety measures for passage maintain the freedom of passage. As noted above, accidents in the strait caused the Straits to close for a few days, that is, the damage caused by accidents does not allow for navigation in the Straits. At the same time, according to the international law, a coastal state “is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea”<sup>616</sup> and coastal states can take measures for safe passage as long as they are in good faith and the measures are in conformity with the international law.<sup>617</sup>

iii. Part II of the 1998 Regulation from Articles 3 to 10 dealt with the Traffic Separation Schemes (TSS) and reporting system. These provisions have been adopted in

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<sup>615</sup> Because of its narrow winding features, large vessels are often unable to remain completely within the traffic lane, so these vessels are required to report this to the Turkish authorities (IMO Rule 1(2)). In this instance, authority can temporarily suspend two-way traffic and regulate one-way traffic to maintain a safe distance between vessels (IMO Rule 1(3)). As a result of the implementation of these rules about 3,7% of passages caused delays of about two hours for other transiting vessels. See: Plant, G. (2001, May 12-14). Passage Regimes and Regulatory Traffic Measures for Oil Tanker Access to Enclosed or Semi-enclosed Seas: Caspian Sea Oil and the Turkish and Danish Straits. *Problems of Regional Seas 2001: Proceedings of the International Symposium on the Problems of Regional Seas*, pp. 118-139; A. N. Ünlü, p.174.

<sup>616</sup> See Article 15 (2) of the 1958 Territorial Convention and Article 24 (2) of the LOS Convention.

<sup>617</sup> See Article 16 (1) and 17 of the 1958 Territorial Convention and Article of 42 of the LOS Convention. Article 42 of the LOS Convention provided that “... States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic ...”.

conformity with SOLAS<sup>618</sup> and COLREG. Article 3 provided that in the Straits and Marmara region TSS was adopted in compliance with The International Convention for Preventing Collision at Sea (COLREGS 72) Reg. (10)<sup>619</sup>, and it was approved by the IMO General Assembly in November 1995.<sup>620</sup> The TSS system provides two way traffic opportunities in the narrow waterways. However, in some areas of the Turkish Straits where sharp turns and unforeseen currents exist, ship captains prefer to navigate as close to the middle as possible in order to avoid collisions which were experienced in the past. In some parts of the TSS where the width of the navigable waterway is narrow, especially large vessels have problems of keeping to the traffic lane. In this case, the 1998 Regulations advise ships to comply with COLREG Reg. (9) when they are not able to comply with the requirements of COLREG Reg. (10) (Article 16).<sup>621</sup> Thus, passages of large vessels sometimes caused occasional suspensions especially in bad weather conditions. As a result, the founding of TSS in the Straits was objected to mainly by Russia, Bulgaria, Greece and Cyprus because of the delay of the shipping through the Strait.<sup>622</sup> The Montreux Convention has no provisions for establishing such a system in the Straits. Furthermore, under its Article 2, in times of peace the Montreux Convention guaranteed complete freedom of navigation of merchant vessels through the Straits “by day and by night, under any flag and with any kind of cargo, without any formalities.” Thus, it can be argued that the above-mentioned occasional suspensions are not compatible with Article 2 of the Montreux Convention. As noted above, the Montreux Convention has basically a military nature due to the political circumstances in that period, and it concluded the principle of freedom of navigation for merchant ships through the Straits for unlimited duration. In other words, the Montreux Convention resolved and guaranteed freedom of passage, which had caused many conflicts and wars between user states and the coastal state in the past. Thus, not only has the Convention allowed free navigation for the user states through the Straits, but the coastal state has also been obliged to retain the freedom of navigation for an

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<sup>618</sup> Turkey has been a party to the SOLAS 74 since 1980. See: *Resmi Gazete [Official Gazette of Turkey]*, No:16985. (1980, May 25).

<sup>619</sup> Article 10 of the COLREG regulates the Traffic Separation Scheme. In Article 10(a) it was stated that “this Rule applies to traffic separation schemes adopted by the Organization and does not relieve any vessel of her obligation under any other rule.” In addition, Article 9 regulates passages in the narrow channels or waterways. See: Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs).

<sup>620</sup> See Annex II of the IMO Resolution A.827(19).

<sup>621</sup> Article 16. See also: M. Fornari, p.237.

<sup>622</sup> G. Plant (1996), p.19; A. N. Ünlü, p.172.

unlimited period. Occasional suspension of navigation on grounds of the TSS system under geographical and bad weather conditions does not mean denying the “freedom of navigation” through the Straits. On the contrary, the TSS system maintains freedom of navigation by preventing accidents which have caused the closing of the Straits for many days. Moreover, Article 2 of the Convention was consistent with the international law required during that period, and the TSS system and routing rules were not an application in states’ practice and in international law when the Montreux Convention was signed. Since then, in parallel with the improvements of ship technology there have been considerable changes in the rules of international law concerning the safety at sea, protection of the environment and pollution control. According to Regulation 10 (1) of SOLAS Convention of 1974:

“Ships’ routing systems contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment. Ships’ routing systems are recommended for use by, and may be made mandatory for, all ships, certain categories of ships or ships carrying certain cargoes, when adopted and implemented in accordance with the guidelines and criteria developed by the Organization.”<sup>623</sup>

Furthermore, Article 41 of the LOS Convention provided that:

“1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships. 2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes for traffic separation schemes for any sea lanes for traffic separation schemes previously designated or prescribed by them. 3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.”

As seen above, the legal basis of the routing system is a regulation in current international law and Article 3 of the Regulation of 1998 expressed that in the Straits and Marmara region, TSS should be adopted in compliance with the COLREGS 72 Rule of 10 and other IMO Rules and Recommendations. On the other hand, although there is no obligation for Turkey to do so, because it is not a part of the LOS Convention, it submitted TSS to the IMO for adoption. Besides all the above, there are at least 90 international ship routing systems that were established partially or wholly outside the territorial waters of states, too. Additionally, besides the Gibraltar, the Strait

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<sup>623</sup> See: SOLAS Guidance on Chapter V – Safety of Navigation.

of Magellan, the Aland Strait and the Danish Straits<sup>624</sup> which have been regulated by an international treaty like the Turkish Straits, the TSS system has also been adopted in many other international straits such as Dover and Malacca.<sup>625</sup>

In addition, at the 69<sup>th</sup> Session of MSC in 1998 Turkey presented details of its radar-based vessel monitoring system, Vessel Traffic Services (VTS),<sup>626</sup> which is welcomed by the user states because the VTS<sup>627</sup> system provides safety and efficiency of navigation and reduces delays by providing navigational information and assistance. In parallel with international maritime standards, in 2003, the Turkish Straits Vessel Traffic Service (Turkish Straits VTS) – prepared by considering IMO Resolutions A.827 (19) and A.857 (20) – came into force in order to assist safe navigation and to service efficient navigation without delays.<sup>628</sup>

iv. In the Regulation of 1998, the vessel movements reporting system (TUBRAP) was adopted in order to implement the use of TSS's and to control vessel movements in the Straits (Article 4). According to the Regulation, via the reporting system, masters, agents or owners of the vessels carrying dangerous cargo or the vessels that are 500 GT and above should submit a written Sailing Plan-1 to the Traffic Control Centre in the IMO standard format at least 24 hours prior to entry into the Turkish Straits (Article 6).<sup>629</sup> However, a written Sailing Plan-1 should be submitted at least 48 hours prior to entrance for vessels between 200-300 meters in length and/or vessels with

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<sup>624</sup> For more information see Section 6.2.2. See also: *The list of traffic separation schemes (TSS) in the World*,

<[https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik\\_dok/ruttsystem.pdf](https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik_dok/ruttsystem.pdf)> (accessed February 8, 2018)

<sup>625</sup> See for the Dover Strait IMO Resolution A 475 (XII), 19 November 1981; for the Malacca Strait IMO Resolution 375(X), 14 November 1977.

<sup>626</sup> IMO Document MSC 69<sup>th</sup> Session (May 10-11 1998).

<sup>627</sup> IMO Resolution A.857(20).

The benefits of VTS System for coastal states are described by the Regulation 2.1.3 of the Resolution: "The benefits of implementing a VTS are that it allows identification and monitoring of vessels, strategic planning of vessel movements and provision of navigational information and assistance. It can also assist in prevention of pollution and co-ordination of pollution response. The efficiency of a VTS will depend on the reliability and continuity of communications and on the ability to provide good and unambiguous information. The quality of accident prevention measures will depend on the system's capability of detecting a developing dangerous situation and on the ability to give timely warning of such dangers."

<sup>628</sup> See *Turkish Straits Vessel Traffic Service*, <[http://www.turkishstraits.com/f/ug\\_en.pdf](http://www.turkishstraits.com/f/ug_en.pdf)> (accessed January 1, 2018).

<sup>629</sup> In the same Article it was stated that two hours or 20 miles before the entrance of the Turkish Straits, the Master shall submit Sailing Plan 2 (similar to Sailing Plan 1) in the IMO standard format as defined by the Turkish authorities.

a draught over 15 meters (Article 25),<sup>630</sup> and for Nuclear Powered vessels or vessels carrying nuclear cargo or nuclear wastes at least 72 hours prior to entrance (Article 26).<sup>631</sup> Sailing Plan-1 includes the following information: the flag of vessels, the name of vessel, tonnage, the call sign, port of departure, port of arrival, whether a pilot is required, the type of cargo, a description of dangerous, nuclear and pollutant goods, deficiencies of the vessels or any other information determined necessary for the safe passage. The fundamental relevance of Article 25 which focuses on Vessel' restricted ability to maneuver in the traffic separation scheme is the preservation of safe navigation and protection of the marine environment. Compared to the Regulations of 1994, Article 26 of the 1998 Regulations resolved the nonconformity of the regulation with the Montreux Convention regarding the passage permission request of nuclear vessels. Although only war vessels were subjected to the passage permission in the

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<sup>630</sup> Article 25- a) Vessels with a length overall in between 150-200 meters and/or having a draught in between 10-15 meters shall submit SP 1 report in writing 24 hours before entering the Straits, Vessels with a length overall in between 200-300 meters and/or having a draught more than 15 meters will submit SP 1 report in writing at least 48 hours before entering the Straits, to the Traffic Control Center. b) The owner or the operator of a large vessel with an overall length of 300 meters and upwards, before fixing a voyage through the Straits must contact the Administration and advise all necessary particulars, characteristics and the type of cargo planned to carry. The Traffic Control Center and the Administration will make a study for the safe passage of the vessel with the information received by taking into consideration the safety of life, property and the environment, the physical, morphological and seasonal condition of the Straits and will inform the owner, operator or the Master about the requirements and safety measures to be taken during this passage. Such vessels in compliance with the requirements and necessary safety measures of the Administration, shall submit SP 1 report in writing at least 72 hours before their arrival to the entrance of the Straits. c) Traffic Control Center shall take necessary measures for the maintenance of safe passage for the vessels with dangerous cargo as prescribed in this Regulation and may exempt these vessels from complying with Reg.21. a. d) When a southbound vessel with dangerous cargo as prescribed in this Regulation enters from the north of Istanbul Strait, no northbound vessel is permitted with the same particulars until the southbound reaches Istanbul Bogazi Bridge, When a northbound vessel with dangerous cargo as prescribed in this Regulation enters from the south of Istanbul Strait no southbound vessel is permitted with the same particulars, until the southbound reaches the line joining Hamsi Burnu and Fil Burnu points. In Çanakkale Strait; no vessel is permitted in the same direction with the same particulars until the vessel ahead with dangerous cargo as prescribed in this Regulation, clears the Nara Burnu area.

<sup>631</sup> Article 26: The owner or the operator of the;

- a. Nuclear-powered vessels,
- b. Vessels carrying nuclear cargo or nuclear wastes, and
- c. Vessels carrying dangerous and/or hazardous cargo or wastes,

at least 72 hours before fixing a voyage through the Straits, must contact the Administration and inform about the type of cargo planned to carry with all necessary certificates which confirm the vessel is in compliance with the IMO and related International Conventions together with the certificates confirming that the said cargo is carried in compliance with its Flag State Administration Regulations. For the safety of the passage within the Straits, Nuclear powered vessels shall take all measures informed by the Administration.

Montreux Convention, Article 30 of the 1994 Regulation provided that “nuclear-powered vessels or vessels carrying nuclear cargo or waste which intend to pass through the Straits and the Marmara region must obtain permission, in accordance with relevant regulations from the Under-Secretariat for Maritime Affairs.” This provision was revised in the Regulation of 1998 in accordance with international law. Article 26 of 1998 Regulations is compatible with Article 6 (1) of the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes. Article 6 (1) of the Basel Convention provided that in order to reduce risk of damage to human health and the environment caused by hazardous wastes and other wastes, exporter states shall notify the competent authority of the states concerned regarding the hazardous cargo by the designated notification in the Convention.<sup>632</sup>

In addition, the aim of 1998 Regulations and the ship reporting system was safety and efficiency of navigation in the narrow Turkish Straits (Article 1). Although there is no such technical reporting system in the Montreux Convention, it is also clear that the Convention also has no provision which prevents the reporting system regarding safe passage through the Straits. In contrast, the Montreux Convention has provision based on reporting, even though its task was different from the Regulations of 1998. The second paragraph of Article 2 of the Convention provided that “in order to facilitate the collection of these taxes or charges merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 [for the purpose of sanitary controls] their name, nationality, tonnage, destination and last port of call (provenance).” One of the purposes of this provision was to make sanitary control easy and quick and to prevent delays.<sup>633</sup> Additionally, the aim of the sanitary control was to protect the population living around the narrow Straits from infectious diseases such as plague, cholera, yellow fever exanthema typhus or smallpox (Article

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<sup>632</sup> Article 6 (1) the Basel Convention provided that “The State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. Such notification shall contain the declarations and information specified in Annex V A, written in a language acceptable to the State of import. Only one notification needs to be sent to each State concerned.” Turkey has been a party to the Basel Convention of 1989 since 1994. See: *Resmi Gazete [Official Gazette of Turkey]*, No:21935 (1994, May 15).

<sup>633</sup> See Article 2 of the Turkish draft text; S. I. Meray & O. Olcay, p. 437.

3)<sup>634</sup>. In other words, the provision aimed for the security of population, because, in that period the above-mentioned infectious diseases were considered important threats, rather than dense traffic of large vessels carrying hazardous cargo through the Strait. In this context, it can be said that both the provisions of the Montreux Convention and the reporting system of 1998 Regulation aimed for safety and efficiency of navigation in the narrow Straits. The reporting system has been used by many states for many years. Moreover, although there were mandatory rules of reporting system in states' practices, there was no provision regarding the mandatory nature of rules concerning reporting system in the SOLAS until 1996.<sup>635</sup> According to the newly adopted Regulation 11 (1) of SOLAS:

“Ship reporting systems contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment. A ship reporting system, when adopted and implemented in accordance with the guidelines and criteria developed by the Organization pursuant to this regulation, shall be used by all ships, or certain categories of ships or ships carrying certain cargoes in accordance with the provisions of each system so adopted.”

Consequently, it is not possible to say that the reporting system adopted by the Regulations of 1998 in the Turkish Straits was not compatible with the Montreux Convention and other instruments of international law.

v. Article 20 of the 1998 Regulations give Turkey the right to suspend passage temporarily due to force majeure situations such as collision, surface and underwater construction works or the existence of navigational dangers in the Straits and to take necessary measures in order to ensure safe passage. It was also stated that the suspending and resuming of traffic shall be announced to the vessels and parties concerned by the Port Authority and the Traffic Control Stations. This Article clarified the disagreements Article 24 of the 1994 Regulation. The 1994 Regulation had given right to the authority to suspend the passage temporarily due to sports activities or

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<sup>634</sup> According to the second paragraph of Article 3 of the Montreux Convention: “Vessels which have on board cases of plague, cholera, yellow fever exanthemic typhus or smallpox, or which have had such cases on board during the previous seven days, and vessels which have left an infected port within less than five times twenty-four hours shall stop at the sanitary stations indicated in the preceding paragraph in order to embark such sanitary guards as the Turkish authorities may direct...”

<sup>635</sup> US, Spain, Canada, Italy, Germany, Russia and France etc. established reporting system in their territorial waters especially after 1980s. See: A. N. Ünlü, p.185.



salvage and rescue operations in the Straits alongside force majeure situations. Article 16 (3) of the Territorial Convention of 1958 and Article 25 (2-3) of the LOS Convention gives the right to coastal states to take necessary measures to prevent passage which is not innocent and to temporarily suspend the innocent passage of foreign ships in the specified areas of their territorial sea if such suspension is essential for the protection of its security, including for military exercises. However, it is hard to say that sport activities are an essential reason to suspend passages. In the 1998 Regulation this vague notion was changed in accordance with the relevant rules of the law of sea.

vi. With respect to the pilotage and towage service, which were optional in the Montreux Convention (Article 2) the 1998 Regulation has remained faithful to this provision. Article 27 of the Regulation provided that the “Traffic Control Centre strongly recommends to all "Direct Passing Vessels" to take pilot for the maintenance of safety of life, property, environment and navigation within the Straits.” Taking pilotage in the Turkish Straits was also strongly recommended by the IMO General Assembly (IMO Resolution A.827(19)). Furthermore, if the statistic is taken into consideration, on which between 1982 and 1994 in 74% of the accidents both vessels had no pilots,<sup>636</sup> it can easily be understood how important a role taking “pilotage” service has in terms of preventing accidents in the Straits. However, the provision concerning pilotage is rather clear in the Montreux Convention, and the provision is retained in the 1998 Regulations. Additionally, Article 21 of the 1994 Regulations regulating towing operations<sup>637</sup> conflicted with the Montreux Convention. The provision was changed in Article 17 of the 1998 Regulations by providing compliance with the Montreux Convention.<sup>638</sup>

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<sup>636</sup> S. Oguzülgen, p.109. Although there is strong recommendation of the IMO, only 40% of vessels use pilots for their passage through the straits. C. Istikbal, p.81.

<sup>637</sup> Article 21 of 1994 Regulation was: „A vessel or any other object may only pass through the Straits when being towed by a suitable tugboat of sufficient power. A vessel may not pass in the tow of another vessel...” See *Maritime Traffic Regulations for the Turkish Straits* (1994, July 1).

<sup>638</sup> Article 17 of 1998 Regulation: For the navigational safety in the Straits towing of a vessel or any other floating objects can only be made by a tug or tugs which have sufficient engine power and towage equipment for handling the tow through the Straits. Said tug or tugs must be classed for towing service and to be certified in compliance with the IMO rules. a) Prior to entering the Straits, the towing hawser shall be shortened as much as necessary. b) Whenever the total towing length is more than 150 meters the Administration may require additional measures to improve the ability of manoeuvring and to keep both vessels on safe course. c) Vessel or floating object are being towed shall keep a spare towing lines of adequate strength in readiness with sufficient number of standby crew for use in accidental breaking of the towing lines. d) If possible, the tow shall keep her engines and steering gears in readiness. See *Maritime Traffic Regulations for the Turkish Straits* (1998, October 8).

Towage remained optional, but ships must have the relevant equipment for possible incidents.

vii. Additionally, in order to prevent pollution, the 1998 Regulations provided that ships shall be compliant with the Annexes in force of International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL),<sup>639</sup> and Masters shall ensure that all necessary measures are taken to prevent any incidental pollution (Article 29). Although there is no provision in the Montreux Convention concerning pollution of sea, considering generally accepted international standards in view of preventing pollution of seas Turkey also adopted regulations in order to prevent pollution and protect the environment in the Straits region.

### **3.2 Turkey's Rights to Regulate the Passage and its Jurisdiction over the Straits**

The issue of the regulation of navigation through the Turkish Straits became a sensitive question of the international law of the sea especially after the establishment of the Turkish Maritime Regulations. Article 2 of the Montreux Convention which provides, “merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities” is interpreted as disallowing the rights of Turkey to regulate the passage and to exercise territorial jurisdiction over the Straits. Does the Montreux Convention genuinely refuse Turkey's right to regulate passages? Has the Montreux Convention abolished Turkish jurisdiction and its sovereign rights over the Straits?

As long as treaties have been concluded between powers as subjects of international law, the problem of interpreting treaties has been a part of international law.<sup>640</sup> The idea of “a treaty on treaties” was first expressed after the Second World War, when the International Law Commission was tasked to “promote the progressive development of international law and its codification”.<sup>641</sup> In the context of codification

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<sup>639</sup> Turkey has been a party to the Protocol I, II and V of MARPOL 73/78 since 1990. See: *Resmi Gazete [Official Gazette of Turkey]*, No:20558. (1990, June 24).

<sup>640</sup> Dörr O., & Schmalenbach, K. (2012). *A Commentary: Vienna Convention on the Law of Treaties*. Heidelberg: Springer – Verlag Berlin, p.526.

<sup>641</sup> Linderfalk, U. (2007). *On the Interpretation of Treaties*. Dordrecht: Springer, p.6.

of treaty law, the principles of interpretation of treaties were embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 by the Commission.<sup>642</sup> Considering that the Montreux Convention was signed before the codification process and the existence of different interpretations of some of its clauses between Turkey and user states, it is necessary to interpret the wording of the Convention. Although Turkey was not a party of the Vienna Convention of 1969, because the Convention itself is a good example of representing the customary rules<sup>643</sup> and some of other signatories of the Montreux Convention have been a party to it,<sup>644</sup> it is not wrong to use the interpretation methods of the Vienna Convention of 1969 in order to interpret the clauses of the Montreux Convention and to determine its purpose.

*i.* Article 31 (1) of the Vienna Convention on the Law of Treaties of 1969 provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” This article develops some primary criteria for interpreting a treaty and it focuses on good faith and the ordinary meaning of the text in light of the purpose of the treaty, not a fresh investigation as to the supposed intentions of the parties.<sup>645</sup> Other than this, for the purpose of arriving at the ordinary meaning of the text of a treaty the second paragraph of the same article leads to consideration of the other parts of the treaty.<sup>646</sup> With respect to Article 31(2), all the text including the preamble and annexes should be considered in the interpretation of a treaty. Taking this approach of interpretation, it is necessary to first determine of the aim of the Montreux Convention. As was expressed in the preamble of the Montreux Convention, it was concluded in order to ensure “the security of Turkey and the riparian states of the Black Sea” under the circumstances prior to the Second World War.<sup>647</sup> This definition in the preamble proves that the Convention was concluded because of Turkey and the riparian states’ anxiety in terms of “military security”. In addition, the clauses about warships which were detailed in the

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<sup>642</sup> Aust, A. (2000). *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press, p.186; Lowe, V. (2007). *International Law*. New York: Oxford University Press, p.73; U. Linderfalk, p. 6-9.

<sup>643</sup> A. Aust, p.211.

<sup>644</sup> Russia (29 Apr 1986), Bulgaria (21 Apr 1987), Italy (25 Jul 1974), Greece (30 Oct 1974) and Ukraine (14 May 1986). For the complete list see United Nations Treaty Collection at <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en)> (accessed June 2018, 27).

<sup>645</sup> Gardiner, R. K. (2015). *Treaty Interpretation*. New York: Oxford University Press, p.171-173; A. Aust, p.187; O. Dörr & K. Schmalenbach, p.541.

<sup>646</sup> O. Dörr & K. Schmalenbach, p.549.

<sup>647</sup> For more information see Section 6.2.2(e) and Chapter 4.

Convention and Annex II, in which warships were categorized and classified in detail, also affirm the military nature of it.

On the other hand, not only warships but also merchant ships faced difficulties during their passages through the Turkish Straits in the Ottoman times.<sup>648</sup> In this regard, to solve the passage problem of merchant vessels “the freedom of passage” of merchant vessels was adopted as a principle in the Lausanne Convention of 1923. In this context, the Montreux Convention reaffirmed and guaranteed the freedom of passage of merchant ships by expressing that signatory states recognize and affirm “the principle of freedom of navigation in the Straits”. Therefore, the purpose of the Montreux Convention can be defined as: to resolve the security problem of Turkey and the Black Sea states and to guarantee "freedom of navigation" through the Turkish Straits for merchant vessels without time limit, which was accepted as a principle in international law. That is to say, while the Convention considered the complicated issues surrounding naval forces, it did not touch on any issues such as collision, pollution, responsibilities of coastal states and ship owners etc. which arise due to passage of merchant ships.

Interpretation is a part of the performance of the treaty; hence an assessment of the relevant materials must be done in good faith.<sup>649</sup> In light of the above-mentioned purpose of the Convention, it can be interpreted that the highest priority issues for the representatives of the Conference was the security of the Straits region and the Black Sea and ensuring passage right of merchant vessels by leaving other issues to the generally accepted rules of the international law on the sea.

Taking all the above into consideration, it is difficult to say the Convention prevents Turkey from regulating passage by merchant ships. Article 2 could long ago be considered well-founded when merchant ships transported grain between the Black Sea and the oceans. However, since 1936 the capacity of ships has increased and the materials being transferred diversified, carrying a far greater potential for harm and danger to both human life and the environment. Today, the problem is how Turkey can prevent accidents by ships carrying oil, or radioactive or chemical cargo, threatening the highly-populated region and the regional ecosystem. Therefore, ensuring safe

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<sup>648</sup> For more information see Chapters 2 and 3.

<sup>649</sup> A. Aust, p.187

navigation in the narrow Straits has become a necessity.<sup>650</sup> There are no detailed provisions concerning the regulation of merchant vessels in the Montreux Convention but on the other hand it is not possible to say that the Convention has a provision which denies Turkey the right to regulate passage of merchant ships either. Unlike the second paragraph of Article 1, the exercise of this freedom should be regulated by provisions of the present Convention, which confirms that the “freedom of navigation” in the Straits is subjected to regulation. Other than this, obligatory applications for merchant ships reflect that the passage is subjected to some regulations, such as stopping for sanitary control at the sanitary stations in the Straits (Article 3); paying tax and charge for sanitary control, services of lighthouses etc. (Annex D); and communicating to the officials at the station in the Straits in order to report their name, nationality, tonnage, destinations and last port of call (Article 2, par.2). In this regard, it is clear that Turkey cannot ban the passage of merchant ships through the Straits but “complete freedom of navigation” does not mean that Turkey has no right to regulate passages in terms of safe passage. This notion strongly emphasizes that the Straits may not be closed to foreign ships again as was experienced during the “ancient rule” in the past.

*ii.* Another way to interpret a treaty is to examine whether there is any subsequent practice in the application of the treaty which establishes the agreement of the parties (Article 31 para. 3/b). Subsequent practice of parties in implementing a treaty is the most important element in the interpretation of any treaty<sup>651</sup> and these practices constitute objective evidence of the common understanding of parties.<sup>652</sup> This is because subsequent practices are usually a good indication of what parties understand from the treaty and mean that implementations are consistent or accepted by all parties.<sup>653</sup>

In this respect, after concluding the Montreux Convention in 1936, on 25 December 1965 Turkey adopted the Istanbul Ports Regulation in accordance with its

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<sup>650</sup> According to Baxter: In time of peace freedom of passage through international waterways must be understood in two senses. The first of these is “the legal obligation to permit free passage by vessels of other nations in the sense of not placing legal prohibitions or reasonable restrictions on the use of the waterways” and the second sense of free passage, “which may be referred to as the technical aspect of transit, is concerned with the prevention of physical impediments to transit and with the maintenance and improvement of waterway to make it suitable for navigation.” See: R. R. Baxter, p.149.

<sup>651</sup> A. Aust, p.194; R. K. Gardiner, p.253-255; U. Linderfalk, p. 168-169. The topic „subsequent agreement and practice“ will be examined extensively in Chapter 8.

<sup>652</sup> O. Dörr & K. Schmalenbach, p.554.

<sup>653</sup> A. Aust, p.194.

municipal law.<sup>654</sup> The definition of Istanbul Port's borders contained the Bosphorus almost completely and the Regulation established some rules in order to secure safe navigation. For instance, it established two-way vessel traffic. On grounds of safe passage, ships passing into the Sea of Marmara had to follow the Asian side of the midline; in the opposite direction ships passing into the Black Sea had to follow the European side (Article 26). In addition, ships could pass at a maximum speed of 10 miles (Article 29). Subsequently, Turkey renewed the Regulations by the new Istanbul Port Regulation on 21 April 1982.<sup>655</sup> This Regulation abolished the old one and changed the directions of two-way vessel traffic in the Bosphorus. According to the new Regulation, ships passing into the Sea of Marmara must follow the European side of the midline and in the opposite direction they have to follow the Asian side (Article 10), although the speed limit remained 10 miles (Article 14). Article 13 stated that under any obligatory circumstances the Istanbul Port Authority may suspend passage temporarily. Additionally, on 11 September 1982 Turkey adopted a similar regulation for the Port of Çanakkale, whose borders cover most of the Dardanelles.<sup>656</sup> With respect to the above-mentioned applications, for many years there was no objection by the signatory states of the Montreux Convention concerning the passage regulation. This meant they agreed that Turkey may regulate passage through Straits in order to secure navigation in conformity with the Montreux Convention and relevant rules of the law of the sea.

*iii.* The general rule of interpretation was laid down mainly in Article 31 of the Vienna Convention of 1969. However, although preparatory work of a treaty is not a primary means of interpretation, in order to come to an understanding of what parties negotiated and what their intentions were, preparatory work is one of the important supplementary means of interpretation.<sup>657</sup> Therefore, the Convention considered that if interpretation leaves the meaning ambiguous or leads to a result which is unreasonable, supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion can be examined (Article 32). Despite the fact that the preparatory work was not defined in the Convention, it is generally understood to include written material, such as drafts of the treaty, conference records, memoranda, diplomatic exchanges between the negotiating parties, commentaries and other

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<sup>654</sup> *Resmi Gazete [Official Gazette of Turkey]*, No: 12186. (1965, December 25).

<sup>655</sup> *Resmi Gazete [Official Gazette of Turkey]*, No: 17671. (1982, April 21).

<sup>656</sup> *Resmi Gazete [Official Gazette of Turkey]*, No: 17809. (1982, September 11).

<sup>657</sup> A. Aust, p.197; O. Dörr & K. Schmalenbach, p.571; U. Linderfalk, p.240-245.

statements and observations by governments transmitted to each other, as well as minutes of commission.<sup>658</sup>

Considering the preparatory work of the Montreux Convention, on 22 June 1936 Turkey submitted a draft Convention containing 13 Articles. The security demands of Turkey in the preamble and freedom of navigation for merchant vessels offered by Turkey in the draft text were mostly recognized and were instituted with similar wording in the Montreux Convention. Article 12 of the draft text of Turkey aimed to reserve its territorial sovereignty over the Straits and emphasized that the interpretation of Convention should not be broadened so as to breach Turkey's sovereign rights.<sup>659</sup> On 4 July 1936, England amended some of the provisions of the Turkish draft text and submitted its own draft. It claimed that the above mentioned article could be narrowly interpreted and may affect freedom of navigation through the Straits. It proposed in its draft Article 22 that, "Subject to the provisions of this Convention, Turkey's sovereign rights on its territory and on its territorial sea are fully preserved." Some of England's provisions were revised again on 6 July and then the draft Article 22 provided that "subject to the provisions of this Convention, Turkey's sovereign rights in the regulated area and on its territorial waters are fully preserved."<sup>660</sup>

Because of the difficulties of finding suitable terms during the negotiations, at the 9<sup>th</sup> Session of the Conference on 3 July, the British delegate, Mr. Rendel, stated that nobody had the intention to restrict Turkish sovereign rights over the Turkish Straits area, and subsequently, as the president of the session, the Romanian delegate, Mr. Contzesco, stressed that it was not necessary to include the term "sovereignty" in the Convention, because no state agreed to limit its sovereignty by voluntarily signing this Convention.<sup>661</sup> The Turkish Foreign Minister, Mr. Aras proposed the repeal of this article, expressing the purpose of the Conference was only to regulate the passage regime through the Straits and there was no suspicion about Turkish sovereignty and jurisdiction over this region. There was no objection against his interpretation.<sup>662</sup> From

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<sup>658</sup> O. Dörr & K. Schmalenbach, p.575; R. K. Gardiner, p. 254-255.

<sup>659</sup> S. I. Meray & O. Olcay, p.437- 440; Inan, Y. (2001, March-May). The Current Regime of the Turkish Straits. *Perceptions – Journal of International Affairs, Vol. VI, No.1*, pp. 1-10.

<sup>660</sup> S. I. Meray & O. Olcay, p.452; S. Toluner (1979), p.83-84.; Y. Inan (2001), p.5.

<sup>661</sup> S. I. Meray & O. Olcay, p.361-362.

<sup>662</sup> S. I. Meray & O. Olcay, p.240; S. Toluner (1979), p.84; See also: T. Tarhanlı, p.33.

this discussion it can be understood that the parties did not give special meaning to the term “complete freedom of transit and navigation in the Straits” apart from its real meaning, and they agreed on Turkey's sovereignty over the Strait and its jurisdiction. Consequently, it can be interpreted that the term “freedom of navigation” does not forbid Turkey to regulate vessels traffic in the Straits, on which it has full sovereign right and jurisdiction.<sup>663</sup>

iv. Under Article 2 of the Montreux Convention weapons have also been transported through the Turkish Straits, and Turkey has no right to control this cargo. However, upon the intelligence concerning the military weapons and weapon spare parts which would be transported illegally to Turkey from Burgas (Bulgaria) on 3 June 1977, Turkish authorities stopped Bulgarian flagged merchant ship called “Vasoula”, which was claimed to be destined to Massava (Ethiopia). Although it was claimed to be “engine spare parts” on the bill of lading; 495 missile launchers, 755 missile markers, 990 missile bags, 10,000 missiles and 60 gas bombs were found.<sup>664</sup> As a result of the investigation, the General Assembly of Criminal Chambers of Turkey pointed out the jurisdiction of Turkey over the Straits in its decision. The Court considered the provisions of the Montreux Convention, international law, state practice and national interest as well to conclude its decision. According to its decision:

“Here, it should be underlined that vessels to enjoy freedom of passage are merchant vessels. It is not the smuggling vessels that are considered to be illegal and illegitimate not only by Turkish law but as well by all countries’ and by international agreements. Such a vessel that may not be considered as a normal one and that is involved in illegal activities may not enjoy this right granted by the [Montreux] Convention, by issuing made-up documents. ... Moreover, if that vessel has been secretly carrying weapons and ammunition to those combatting against the Turkish State, and was seized upon last call, it is not possible at all to call her an innocent merchant vessel. Under normal circumstances and in

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<sup>663</sup> According to Toluner: “Turkey, under its powers of police (*le droit de contrôle administratif et de police judiciaires, la police de la navigation*), especially reserved and unchallenged, can regulate passage through the Straits conformity Colreg 10 with the express provisions of the Montreux Convention and in accordance with the applicable rules of the law of the sea.” See: S. Toluner (1979), p. 84. See also: Toluner, S. (July 2001). Rights and Duties of Turkey Regarding Merchant Vessel Passing through the Straits. *Turkish Straits: New Problems, New Solutions*, 27-32.

<sup>664</sup> T. Tarhanlı, p.36; See also: footnote 197 of S. Toluner (1989), p.166.



equal conditions, no State may sign an agreement that is to lead her to accept activities to destroy her existence. It may never be expected of her to sign it.”<sup>665</sup>

The decision emphasizes that Turkey reserves its jurisdiction when the material transported is used illegally against the Turkish State and threatens its territory and political independence, and that the Montreux Convention does not abolish Turkey's jurisdiction over the Straits.

v. In addition, it may also be useful to examine other instruments of the Law of the Sea to assess whether Turkey has rights to regulate passage through the Straits.<sup>666</sup> With respect to the passage regime of international straits used for international navigation in the LOS Convention; passage regime does not affect the legal status of waters and coastal states' sovereignty or jurisdiction over such waters, their air space, bed and subsoil (Article 34). Other than this, both Article 17 of the Territorial Convention of 1958 and Article 21 of the LOS Convention gave rights to coastal states to adopt laws and regulations in their territorial waters. Furthermore, Article 42 of the LOS Convention also gives right to coastal states of straits to adopt laws and regulations in respect to safe navigation and the control of pollution.

On the other hand, Turkey has been a party of the IMO since 1958, and then became a party of SOLAS 74, COLREG 72, MARPOL (73/78) and the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes.<sup>667</sup> With respect to the IMO Resolution A.827 (19), the IMO General Assembly also pointed out the following “the [IMO] Rules and Recommendations on Navigation through the Straits of Istanbul, the Straits of Çanakkale and the Marmara Sea are established purely for the purpose of safety of navigation and environmental protection and are not intended in any way to affect or prejudice the rights of any ship using the Straits under international law, including the United Convention on the Law of the Sea, 1982 and the 1936 Montreux Convention, and that national regulations promulgated by the coastal State should be in total conformity with the said rules and recommendations.” In other words, the IMO recognized Turkey's right to regulate

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<sup>665</sup> T. Tarhanlı, p.41-42.

<sup>666</sup> Article 30 (3) of the Vienna Convention of 1969 provided that “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

<sup>667</sup> *Resmi Gazete [Official Gazette of Turkey]*, No:21935. (1994, May 15)

passage through the Turkish Straits; however, regulations must be in total conformity with the Montreux Convention and other relevant rules of the law of the sea as well.

Consequently, in light of the above-mentioned preparatory works of the Montreux Convention, interpretative methods under the Vienna Convention of 1969, the decision of the Turkish Court, the IMO rules and recommendations, and the rules of both the Territorial Convention of 1958 and the LOS Convention it can also be interpreted that Turkey has reserved its sovereign and jurisdiction rights over the Straits. Furthermore, due to the fact that the Straits fall within its territorial waters, it can adopt laws and regulations and in order to ensure safe navigation it can take measures and has the right to regulate marine traffic and the passage of merchant ships through the Straits as long as the regulations do not hamper that passage. However, all regulations should be in conformity with the Montreux Convention and all other generally accepted rules of the international law of the sea.

## **CHAPTER 7 Implementation of the Montreux Convention and its Effects in the Last Decade**

### **1. Implementation of the Montreux Convention and Discussion Topics on the South Ossetia War, 2008**

Because of their geographical and strategic significance, the Turkish Straits and hence the Montreux Convention attracted attention again when tension escalated in Caucasus due to the Five-Day War in Georgia. In fact, the conflict over Abkhazia and South Ossetia between Russia and Georgia began when Georgia gained its independence in 1991 after the dissolution of Soviet Russia. Since then, the two regions, Abkhazia and South Ossetia, had been longing for their independence, and this issue was placed on the UN agenda for a long time, however, the problem could not be solved by the efforts of the UN either. After the Rose Revolution in 2003, the new President of Georgia, Saakashvili, aimed to control the two territories.<sup>668</sup> Consequently, tensions arose in

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<sup>668</sup> Ellison, B. J. (2011). Russian Grand Strategy in the South Ossetia War. *Demokratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 19, No.4, pp. 343-366; Erkan, S. (2016, April 6). 2008 Rusya-

South Ossetia. On 8 August 2008, Russia responded to Georgia with excessive power when a Georgian military attack began against separatist forces in South Ossetia. The war, which was also known as the Five-Day War, was ended by a French-brokered peace agreement on 13 August 2008. Although the conflict emerged only in South Ossetia Russia also invaded Abkhazia which is located at the Black Sea coast besides South Ossetia. As a result of the conflict, on 26 August Russia unilaterally recognized the independence of both Abkhazia and South Ossetia despite protests by Georgia and the international community.<sup>669</sup>

Arguably, behind Russia's invasion were many reasons, such as Kosovo's declaration of independence from Serbia in February 2008, Georgia's desire to join NATO and negotiations pursued by NATO and the U.S., etc. However, following the invasion the international community was only able to protest the war and defend Georgian integrity. They could not intervene in the war, perhaps because neither parties of the war were members of NATO and because Russia has veto power in the Security Council of the UN. However, the Five-Day War revived the debate over the application of the Montreux Convention due to the passage of four NATO member states' warships into the Black Sea in conformity with the Montreux Convention during the conflict.<sup>670</sup> The passage of warships of NATO forces and their existence in the Black Sea raised alarm in Russia and it claimed that NATO vessels violated the 1936 Montreux Convention which maintains a limitation of three weeks for warships of non-riparian countries in the Black Sea.<sup>671</sup>

Additionally, the Russian occupation also caused the tension to rise between Russia and the U.S. which had had close relations and cooperation with Georgia after the Rose Revolution. The growing tension placed Turkey in a difficult diplomatic position in view of the application of the Montreux Convention. The U.S. attempted to send humanitarian aid to Georgia with two hospital ships. The ships, the "USNS Mercy" and the "USNS Comfort" weighing a total of 140,000 tons, belonged to the U.S

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Gürcistan Savası ve Uluslararası Toplum [Russian-Georgian War of 2008 and International Community]. *International Journal of Economic and Administrative Studies*, 2016(17), pp. 41-64.

<sup>669</sup> S. Erkan, p.45; B. J. Ellison, p.354.

<sup>670</sup> S. Erkan, p.49; *Milliyet: ABD gemileri bugün Boğaz'da [The warships of the U.S are in the Straits]*, 22 August 2008; *New York Times: NATO Ships in Black Sea Raise Alarms in Russia*, 27 August 2008.

<sup>671</sup> Ibid.

navy.<sup>672</sup> This attempt was strongly responded to by Russia, who claimed that the passage of the two ships might violate the Montreux Convention and that “what the Americans call humanitarian cargoes – of course, they are bringing in weapons.”<sup>673</sup> Article 18 (d) of the Convention provided that if one or more non-riparian states wish to send naval forces into the Black Sea for humanitarian purposes they will be allowed to enter the Black Sea without the notification required by Article 13 [a prior notification 15 days before the entrance], if they do not exceed total tonnage of 8,000 tons altogether. However, an authorization must be obtained from the Turkish government, and Turkey must immediately inform the Black Sea powers about the request. If there is no objection from Black Sea powers within 24 hours of receiving this information, Turkey should reply within 48 hours to the government which requested the passage. Additionally, this tonnage of the humanitarian aid will be included in the above-mentioned total tonnage limitation (45,000 tons).

Turkey was in a difficult situation between the two powers; one was its traditional ally in NATO, the other was its trading partner and one of its biggest energy suppliers.<sup>674</sup> Consequently, Turkey denied the U.S.’s passage request on account of the tonnage limitation exceeding the aforementioned provision of the Montreux Convention. In the days following, while Turkey was accused of being an unhelpful state by the U.S. on the one hand, and on the other Russia's deputy military chief declared that, "if the NATO ships continue to stay in the Black Sea after the expiration of 21-day period, then I would like to remind you that Turkey would be responsible."<sup>675</sup> Thus, debates about the restrictive provisions of the Montreux Convention arose both in

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<sup>672</sup> *Radikal* (2008, August 20): *ABD gemilerine Montrö izin vermiyor [The Montreux Convention does not allow the U.S. ships]*, <<http://www.radikal.com.tr/dunya/abd-gemilerine-montro-izin-vermiyor-894609/>> (accessed January 10, 2018). According to the press release of the Ministry of Foreign Affairs of Turkey, there was no official request regarding the passage of the USNS Mercy and the USNS Comfort by the U.S. See: *Press Release (SC 21) of the Ministry of Foreign Affairs of the Republic of Turkey on 20 August 2008 [The American ship "Comfort" and about the implementation of the Montreux Convention]*.

<sup>673</sup> *New York Times* (2008, August 27): *NATO Ships in Black Sea Raise Alarms in Russia*, <<http://www.nytimes.com/2008/08/28/world/europe/28russia.html>> (accessed January 10, 2018).

<sup>674</sup> Turkey imports nearly 100% of its gas and 90% of its oil. Russia's role is especially big in the gas sector; and in 2009 Turkey imported 57% of its gas needs from Russia. In 2013 imports from Russia covered over 55% of Turkey's gas needs. See: Balcer, A. (2014, July). *Dance with the Bear: Turkey and Russia After Crimea. Global Turkey in Europe, Working Paper 08*, pp. 1-9.

<sup>675</sup> *Hürriyet: Russia warns Turkey on U.S. ships in Black Sea* (2008, August 28).

Turkey and in the international community and Turkey faced a diplomatic crisis between powers.

## 2. The War in Syria, 2011-

The Syrian civil war has been ongoing since the year 2011. In connection with the civil war in Syria, the influences of naval traffic in the Turkish Straits began to increase, particularly after the start of military intervention by other powers in the civil war. The key element behind the increase in the naval traffic in the Straits was Russian logistical support to Syria. For the transfer of logistical support and military equipment from Russia to Syria, the Straits offer Russia good movement opportunities. In return for its support, Russia obtained a naval base on the Syrian coast by an agreement which was signed with Syria on 19 January 2017. According to the agreement, Russia leased the Port of Tartus for 49 years.<sup>676</sup> This agreement meant that Russia succeeded in reaching its centuries-long dream of the warm water, and it also meant that hereafter it will be able to pass many more warships through the Turkish Straits where there is already dense traffic due to the increasing number of tanker and cargo ships. According to passage statistics of warships, while 168 warships passed through the Straits in 2006, this number increased to 200 due to South Ossetia conflict in 2008. After the beginning of the Syrian civil war, the total number of warships that passed through the Straits increased to 237 in 2014 and to 318 in 2015. Additionally, in 2016, 347 warships passed through the Straits<sup>677</sup> and 254 of these were Russian warships.<sup>678</sup> Shipping statistics illustrate that the Russian naval base on the Syrian coast will cause the warships passing through the Straits to increase further.

There is no doubt that in accordance with the Montreux Convention warships may pass through the Straits. However, the passage of warships can escalate tension easily in the narrow straits, and their passage has the potential to cause more complicated conflicts. For instance, tension in the Turkish Straits seriously escalated

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<sup>676</sup> Daly, J. C. (2017, June 5). *Russia's Syria Resupply Route Through the Turkish Straits: Vulnerable to Terrorist Attack?* See at <<https://jamestown.org/program/russias-syria-resupply-route-turkish-straits-vulnerable-terrorist-attack/>> (accessed January 19, 2018).

<sup>677</sup> See: *The Statistics Summary of Vessels passed through the Turkish Straits in 2016* [General Directorate of Maritime Trade of Turkey].

<sup>678</sup> See: *Bosphorus Naval News* (2016), <<https://turkishnavy.net/foreign-warship-on-Bosporus/foreign-warship-on-Bosporus-in-2016/>> (accessed January 20, 2018).

when a Russian-Syrian jet was shot down by Turkey in November 2015. Following this development, Turkish-Russian relations grew more problematic. On 4 December 2015, a Russian navy serviceman held a rocket launcher pointed towards the city of Istanbul on his shoulder as his ship passed through the Bosphorus. Turkey accused Russia of provocation.<sup>679</sup> This event caused disagreements over the provisions of the Montreux Convention to begin again. Furthermore, in the Turkish community it was hotly debated whether the act of the Russian soldier damaged “inoffensive” passage and whether Turkey had the right to ban the passage of the above-mentioned warship. It was clear that any additional acts from either side might have been very destructive.

### **3. The Conflict in Ukraine, 2014**

For an interpretation of the relationship between the Montreux Convention and the Ukrainian Conflict in 2014, it is necessary to examine the newly formed geopolitical dimension of the Black Sea region in view of the military and energy security of the powers.

Ukraine and Russia’s common historical past dates back to the 900s. The Kievan Rus state, which was founded in Kiev, has frequently been called by Russians as “the mother of Russian cities.” Most of present-day Ukraine, except the westernmost provinces, came under the control of Ukrainian Cossacks in 1648. However, because they needed a partner to secure their territory, the Treaty of Pereislav was signed with Tsarist Russia in 1654. From this time on, Ukrainian autonomy weakened and Russian troops destroyed the eastern region of Ukraine (Zaporizhian Sich) in 1775, and Russia gradually absorbed the lands.<sup>680</sup> The treaty remained questionable and it is also under discussion by Russians and Ukrainians as to whether the treaty was only a temporary military agreement or the natural reunification of the Russian and Ukrainian peoples.<sup>681</sup>

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<sup>679</sup> *The Telegraph*: Turkey angered by serviceman brandishing rocket launcher on Russian ship passing through Istanbul. (2015, December 7).

<sup>680</sup> Bukkvoll, T. (1997). *Ukraine and European Security*. Oslo: The Royal Institute of International Affairs. p. 61-62; Yekelchik, S. (2014, June). The Ukrainian Crisis: In Russia's Long Shadow. *Origins, Current Events in Historical Perspective, Vol.7, Issue.9*, pp 1-9.

<sup>681</sup> T. Bukkvoll, p. 61-62.

In the 20<sup>th</sup> century after the Bolshevik Revolution, Ukraine came under Russian control, and in 1922, the Ukrainian Soviet Socialist Republic theoretically became one of the equally founding republics of the Soviet Union.<sup>682</sup> However, Ukraine declared its independence in August 1991. Due to the above-mentioned historical ties it was hard for many Russians to accept the independence of Ukraine, which was also called “divorce syndrome,”<sup>683</sup> With the independence of Ukraine, two main debates occurred between Ukraine and Russia, one regarding the border of the new independent state and the other being the Crimea issue. The existence of a Russian population in the eastern side of Ukraine kept the border controversy fresh after the independence of Ukraine.

The Crimean peninsula was the first foothold of Tsarist Russia in the Black Sea against the Ottoman monopoly in 1774 and it remained part of Russian territory between 1783 and 1954. In 1954, Crimea was ceded to the Ukrainian SSR by Khrushchev in order to celebrate the 300<sup>th</sup> anniversary of the incorporation of the Tsarist Russia and Cossack Ukraine.<sup>684</sup> However, because the Port of Sevastopol on the Crimean peninsula was the main base of the Soviet Black Sea Fleet, the status of Crimea remained a longstanding problem between Kiev and Moscow in the years following the independence of Ukraine. In the aftermath of the annexation of the Crimea peninsula by Tsarist Russia in 1783,<sup>685</sup> the peoples inhabiting the peninsula were deported and Russians have become the ethnic majority in Crimea. According to statistics from 1989, 67% of the population of Crimea was Russians, while Ukrainians constituted only 25%.<sup>686</sup> Therefore, most Russians were felt that Crimea was Russian territory due to both the Russian population on the peninsula and its historical background. Other than this, the port of Sevastopol has offered significant opportunities

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<sup>682</sup> S.Yekelchyk, p. 1-9.

<sup>683</sup> Solchanyk, R. (1998). Ukraine, Russia, and the CIS. *Ukraine in the World: Studies in the International Relations and Security Structure of a Newly Independent State*, pp. 19-43.

<sup>684</sup> Yekelchyk, p. 1-9; Tarasyuk, B. (1998). *Ukraine in the World: Studies in the International Relations and Security Structure of a Newly Independent State*, pp. 9-15.

<sup>685</sup> See Chapter 2.

<sup>686</sup> R. Solchanyk, p.35. In 1983, about 95% of the population of the Crimea peninsula was Tatars. However, in the next century the Tatar population declined about 50% of the total population. Then, in 1944, about 188,000 Tatars were deported from the Crimea to Central Asia. Since then a steady stream of Tatars has returned to Crimea. According to the 1995 statistics, about 240,000 Tatars were living in Crimea. See: T. Bukkvoll, p.55. In 2014, 2.2 million people were living in the peninsula and the Crimean Tatar population was between 240,000 and 300,000 (between 12%-13% of the peninsula's population). See: *Unrepresented Nations & Peoples Organization [UNPO]: Member Profile of Crimean Tatars, Statistics* (2014), < <http://unpo.org/members/7871> > (accessed January 15, 2018).

to the Russian Black Sea Fleet given its military and geostrategic position in the Black Sea. For these reasons, before the independence of Ukraine, demands for a separate status for Crimea started to appear immediately. Thus, after independence, negotiations about the status of Crimea and the division of the Black Sea fleet of the Soviet Union continued concurrently between Ukraine and Russia.

In 1992, the Ukrainian parliament recognized the autonomous status of Crimea, its own parliament and council of ministers.<sup>687</sup> On the other hand, the longstanding debate came to an end with the signature of the Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation on 31 May 1997. They agreed to accept the territorial integrity of one another. Article 2 of the Treaty stipulates, “in accord with the provisions of the UN Charter and the obligations of the Final Act of the Conference on Security and Cooperation in Europe, the High contracting parties shall respect each other’s territorial integrity and reaffirm the inviolability of the borders existing between them.”<sup>688</sup> In parallel with the Treaty, both parties signed a declaration regarding the division of the Black Sea fleet and using the ports of Crimea for their naval forces on 28 May 1997. Thus, in the final division, 81.7% of the Black Sea fleet was transferred to Russia and 18.3% of it to Ukraine.<sup>689</sup> Additionally, Russia leased the port of Sevastopol (18,500 hectares of land, 15,000 of which are outside of Sevastopol) for 20 years by a renewable agreement.<sup>690</sup> Normally, the above-mentioned agreement would finish in 2017. In this regard, the Ukrainian government had also proposed an evacuation plan for Russian military forces in Crimea before V. Yanukovich came to power in 2010. However, he signed the Kharkov agreement which provides for the

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<sup>687</sup> Dolya, A. (2016, February 23). The Annexation of Crimea: Lessons for European Security. *Foundation Robert Schuman/ European Issue No.382*, pp. 1-7.

<sup>688</sup> The Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation (1997, May 31) see: *Ukraine in the World, Ukrainian Research Institute-Harvard University, 1998*, Annex G, p.319. See also: A. Dolya, p.2. Other than this, before the above-mentioned bilateral Friendship Treaty, in 1994 they also declared the territorial integrity of each other when they signed the trilateral statement with the United States regarding the security of nuclear weapons. See: Trilateral Statement by the President of the United States, Russia, Ukraine (1994, January 14). *Ukraine in the World, Ukrainian Research Institute-Harvard University, 1998*, Annex E, p.313.

<sup>689</sup> T. Bukkvoll, p.68. According to the Ukrainian Foreign Ministry, at the time of signing the declaration in 1997, there were 102 warships and 4 submarines in the Black Sea Fleet. See: *Russia’s occupation of Crimea, The Ministry of Foreign Affairs of Ukraine* < [https://mfa.gov.ua/mediafiles/sites/china/files/Russias\\_occupation\\_of\\_Crimea.pdf](https://mfa.gov.ua/mediafiles/sites/china/files/Russias_occupation_of_Crimea.pdf) > (accessed January 16, 2018).

<sup>690</sup> Sherr, J. (1997, Autumn). Russia-Ukraine Rapprochement?: The Black Sea Fleet Accords. *Survival, Vol.39, No.3*, pp. 33-50.



existence of the Russian fleet in Crimea for the next 25 years (until 2042) in exchange for major discounts on Russian gas.<sup>691</sup>

As a state, Ukraine covers a large area and separates European Union (EU) states and Russia, acting as a buffer zone. Conversely, Ukraine connects Russia and the EU States, taking on special role by importing Russian gas into the EU. Ukraine still maintains its importance as a transit land between energy-supplying and energy-demanding countries. European States import about the two-thirds of natural gas, and their main gas supplier state in 2012 with 23% was Russia. In 2014 when the Ukrainian-Russian crisis occurred, roughly 50% of all Russian gas was imported through Ukrainian territory into the EU.<sup>692</sup> Ukraine is also one of the states who depend on Russian gas. The energy dependence of states gives Russia opportunities to negotiate different prices. For instance, countries in eastern and central Europe pay higher average gas prices than Germany.<sup>693</sup> Besides other mutual economic relations between powers, energy demand causes a geo-economic supremacy of suppliers and it forces states that need energy to keep good relations with energy suppliers.

Regardless of its location, Ukraine found itself under the influence of Europe and Russia after its independence. Especially after the Orange Revolution in 2004, governments of independent Ukraine tried to keep good relations with western powers. It was promised future memberships in the NATO alliance at the Bucharest summit in 2008 and it started association agreement negotiations with the EU in 2007. However, when President Yanukovich came to power he followed pro-Russian politics and expanded cooperation with Russia. Furthermore, during his term Ukraine's financial dependence on Russia increased. He suspended the association agreement process with the EU in the winter of 2013, despite a willingness to be incorporated with the EU by most Ukrainians. In the aftermath of Yanukovich's act, protests broke out and caused political instability in Ukraine. This lack of stability created ideal conditions for the annexation of Crimea.

Even though Russia has quarantined the Sevastopol Port until 2042, the peninsula, Crimea, has been considered part of Russia and its geographical position

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<sup>691</sup> A. Dolya, p.2.

<sup>692</sup> Hübner, C. (2014, July). European Energy Supply Security in Light of the Ukraine Crisis. *Facts&Findings, Konrad Adenauer Stiftung, No.151*, pp. 1-7.

<sup>693</sup> Ibid.

provides supremacy in the Black Sea. For Russia, the peninsula was a place that should never be lost.<sup>694</sup> On 26 February 2014, protests between pro-Russian and pro-Ukrainian groups broke out and immediately the next day on 27 February government buildings in Crimea were locked up and connections between Crimea and mainland Ukraine were blocked by Russian forces. On the same day, the Supreme Council of Crimea voted to hold a referendum for the status of Crimea; on 16 March Crimean people voted for their independence under the pressure of Russian force. Only a day later on 17 March, Russia unilaterally declared that it recognized the independence of the peninsula, as in the South Ossetia and Abkhazian case. However, both Russia and Ukraine had agreed on the territorial integrity of both sides with the Friendship Treaty of 1997. Thus, Russia created the opportunity for its army to settle on a peninsula which has a critical role in the Black Sea region without any lease agreement for an unlimited time. It can be said that as after the annexation of 1783, Russia would settle for the second time on the peninsula.<sup>695</sup>

Besides Ukraine, several EU and NATO member states refused to recognize the legality of the referendum. Turkey was also concerned with the annexation because of the existence of Tatars on Crimea, and furthermore declared that it did not recognize the result of the referendum. In the aftermath of the annexation, the Montreux Convention became a theme for discussion on the agenda of the international community once more. After the beginning of the Ukraine conflict, warships belonging to NATO forces passed into the Black Sea in a manner consistent with the Montreux Convention. However, debate has grown heated, especially after the passage of American warships the “USS Mount Whitney” and the “USS Taylor”.

The “USS Mount Whitney” entered the Black Sea on 4 February 2014 under the Montreux Convention and then Russia claimed that the USS Mount Whitney was heavier than 15,000 tons (Article 14).<sup>696</sup> This was actually not the first passage of the

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<sup>694</sup> In 2008, the Russian President Putin also expressed this sentiment by saying “Ukraine is not even a state. Part of its territories is Eastern Europe, but the greater part is a gift from us... if Ukraine joins NATO, without Crimea and East it will break into separate territories.” See: *Russia’s occupation of Crimea, The Ministry of Foreign Affairs of Ukraine*.

<sup>695</sup> According to the data of the Ukrainian Foreign Ministry: Before the annexation of Ukraine, in 2014, there were 12,500 troops on Crimea. In March 2017 this number increased to 30,000. See: *Ibid*.

<sup>696</sup> Technological improvements give opportunity to add some extra weapons and other equipment on warships after they were produced. This new equipment can change the aggregate tonnage of warships, and it is difficult to control tonnages during their passage through the Straits. The relevant authority of

“USS Mount Whitney” into the Black Sea; it had already passed through the Turkish Straits many times. For instance, it also entered the Black Sea during the Georgian conflict in 2008.<sup>697</sup> Nevertheless, although its tonnage was reported as 13,957 tons in the American diplomatic note and it had also passed before this conflict, interpretation of its passage under Article 14 is controversial and caused a crisis to develop between Russia, the U.S. and Turkey.<sup>698</sup> Furthermore, the “USS Taylor” entered the Black Sea on 5 February 2014. However, on its return, the vessel had an accident while entering Port Samsun.<sup>699</sup> The vessel could not sail under its own power and, unable to exit the Black Sea on its previously notified date, had to stay more than 21 days in the Black Sea – in conflict with Article 18 of the Montreux Convention. There were no technical provisions in the Montreux Convention for such cases. Russia protested Turkey’s actions and accused it of violating the Montreux Convention. As a consequence, tensions between Russian and American forces escalated in the Black Sea and Turkey was placed under the diplomatic pressure by both Russia and the U.S., as it once more faced an international problem.

Because Turkey is responsible for the application of the Montreux Convention, it was accused of having misapplied the provisions of the Convention. The Turkish Foreign Minister made a press statement on 12 April 2014, saying “We are perplexed by the Russian Federation’s insistence on keeping the implementation of the Montreux Convention on the agenda. We would never allow the violation of the Montreux Convention whatsoever.”<sup>700</sup> Upon dense diplomatic traffic between Turkey, Russia and the U.S in Ankara, the “USS Taylor” was carried from the Black Sea with the help of

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Turkey, the Foreign Ministry of Turkey takes basis the reported tonnage by diplomatic note from flag state and the Ministry compares it with the registration tonnage of warship when it was produced. For the passage of the “USS Mount Whitney”, the U.S Embassy in Ankara reported its tonnage as 13,957 tons in the diplomatic note.

<sup>697</sup> See; *America's Navy by the Sea* (2008, November 11): USS Mount Whitney Visits Varna on Course for Black Sea Partnership Cruise, <[http://www.navy.mil/submit/display.asp?story\\_id=40826](http://www.navy.mil/submit/display.asp?story_id=40826)> (accessed January 19, 2018).

<sup>698</sup> Whilst Article 14 gives passage right to non-Black Sea naval forces which are not heavier than 15,000 tons, Article 10 allows only the ship categories of light surface vessels, minor war vessels and auxiliary vessels. However, the tonnage of these three categories does not exceed 10,000 tons (Annex II). For more information see Chapter 4.

<sup>699</sup> See: *Press Release (No:116) of the Ministry of Foreign Affairs of the Republic of Turkey on 12 April 2014. [About the implementation of the Montreux Convention]*,

<sup>700</sup> *Hürriyet Daily News: Turkey urges Russia to drop Montreux off the agenda* (2014, April 13).

tugboats.<sup>701</sup>

The occupation of Crimea and the conflict of Ukraine caused problems in the Black Sea region and thus the Montreux Convention was discussed more frequently both in the international community and in Turkey. While Russia protested against Turkey for not applying the Montreux Convention properly, on the other hand it was argued that the restrictive provisions of the Montreux Convention relating to non-Black Sea navies contributed to the annexation and that it should be revised or amended. Additionally, it was argued that because the Convention limits the access of warships of non-Black Sea nations, the Convention guarantees Russia a major strategic advantage in any war involving the Black Sea states such as Ukraine and Georgia.<sup>702</sup> At this point, it is necessary to ask and exercise two questions: Did the Convention play genuinely a role in the annexation of the Crimea and in the Ukrainian crisis? And what influence can the Ukrainian crisis have on the revision of the Montreux Convention?

*i.* In 1936, the Montreux Convention was concluded only for 20 years (Article 28) to protect Turkey and the Black Sea states from the imminent danger of war and outside threat, under pre-Second World War conditions. At that time, as a coastal state other than Soviet Russia and Turkey, there were Bulgaria and Romania who were under the influence of Soviet Russia. It could be said that a conflict within the Black Sea was not considered under the conditions of 1936. In light of this view, the Montreux Convention did not foresee any conflict among coastal states and it is possible to say that the Convention offers strategic advantage to a powerful coastal state if there is conflict within the Black Sea region.

*ii.* However, the Convention does have a provision governing how it could be revised or amended (Article 29). Although there has been longstanding debate regarding the revision of the Montreux Convention, so far, neither the coastal states including

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<sup>701</sup> See: *Press Release (No:116) of the Ministry of Foreign Affairs of the Republic of Turkey on 12 April 2014. [About the implementation of the Montreux Convention].*

<sup>702</sup> Starr, S. (2014, May 12). *How The 1936 Montreux Convention Would Help Russia in a Ukraine War*, <<http://www.ibtimes.com/how-1936-montreux-convention-would-help-russia-ukraine-war-1582507>> (accessed January 18, 2018); Sinan, I. & Schwarz, P. (2008, September 9). *Georgian conflict poses dilemma for Turkey*, <<https://www.wsws.org/en/articles/2008/09/turk-s09.html>> (accessed January 18, 2018); Kucera, J. (2014, April 22). *Ukraine Crisis Reignites Black Sea Tension*, <<https://www.securityassistance.org/europe/blog/ukraine-crisis-reignites-black-sea-tension>> (accessed January 18, 2018).

Ukraine<sup>703</sup> nor non-Black Sea states have conveyed an official application regarding the revision or amendment of the Convention to the French Government, which still act as the depository state. As such, it is possible to say that the Convention has played a balanced role between riparian and non-riparian states, and it also provides all of them with some advantages alongside the disadvantages observed above.<sup>704</sup>

*iii.* Since the Convention was signed in 1936, the boundaries and the balance have changed in the Black Sea. During the Cold War era, the entire Black Sea region formed the territory of the Warsaw Pact except for Turkey, which has been a party to NATO since 1952. After the dissolution of Soviet Russia, newly independent states Ukraine and Georgia became coastal states. Furthermore, while Romania and Bulgaria joined NATO and the EU; Ukraine and Georgia followed pro-western politics and they took

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<sup>703</sup> After the resolution of the Soviet Union, the Russian Federation was accepted as a continuing state of the Soviet Union and it is still a party to the Montreux Convention.

According to Article 16 of the 1978 Vienna Convention on Succession of States, conventions which were signed before their independence are not binding on newly independent states. Additionally, Article 17(3) of the Convention provided that “When, under the terms of the treaty or by reasons of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as party to the treaty only with such consent.” In light of the 1978 Vienna Convention, it is clear that independent states cannot be a party to the Montreux Convention without their free will and the consent of other parties.

In this context, so far, no attempt has been made by countries for negotiations of their participation in the Montreux Convention. See: A. N. Ünlü, p.127. However, because of their geographical location the new independent Black Sea states, Georgia and Ukraine are affected directly from the provisions of the Montreux Convention. Hence, they could be allowed to be a party to the Montreux Convention. For instance, under Article 18 of the Convention coastal states should inform Turkey about the total tonnage of their fleet annually. After the division of the Black Sea fleet between Russia and Ukraine in 1997, Ukraine began to send the total tonnage of its fleet. According to the report of 1998, Ukraine informed Turkey that its total tonnage was 23,431 tons and Russia had the biggest fleet with 75,000 tons. See footnote: S. Birkner, p.155. Ukraine sent its fleet information, not because it has fulfilled the obligation in the Convention but it wanted to convey the message that it was an objective regime. See footnote: A. N. Ünlü, p.127. On the other hand, in accordance with Article 24 of the Montreux Convention Turkey has been informing the Ukrainian Embassy in Ankara along with the other parties to the Montreux Convention if it receives any passage requests through diplomatic channel. There has been no objection from parties against this implementation namely that Ukraine is considered a party to the Convention.

However, no attempt has yet been made by Georgia and Article 24 has not been implemented by Turkey for Georgia. Because the Convention refers to the Black Sea States, Georgia could be allowed to be a party of the Convention. On the other hand, it does not matter whether it is a party of the Convention. As a Black Sea state, its ships have the same right as other Black Sea states which are a party of the Montreux Convention. However, the participation of others such as Serbia which is the party as the continuation of the former Yugoslavia or newly independent states such as Kazakhstan, Turkmenistan etc. is questionable because their interest is not different than the other user states of the Straits. See also: A. N. Ünlü, p.127.

<sup>704</sup> This theme will be examined in Chapter 8.

steps to become members of NATO. In other words, since the Cold War period the balance in the Black Sea has changed in the last decades. Neither Ukraine nor Georgia are members of NATO, and no operations are possible under Article 5 (collective defense) of NATO. However, if it is taken into consideration that Turkey, Bulgaria, and Romania are NATO member states and the other two states, Georgia and Ukraine have close relations with western powers, it is hard to say that the Montreux Convention alone gives Russia the opportunity to occupy Crimea, Abkhazia or South Ossetia. In other words, the boundaries of the Black Sea have changed since the Cold War era and the Turkish Straits are not the only way to interfere in conflicts in the Black Sea region any more. It can be argued that besides the restrictive clauses of the Montreux Convention, nowadays there are other strategic and geo-economic factors between states which are more politically important.

*iv.* From another perspective, in contrast to the discussion regarding the revision or amendment of the Montreux Convention, it could be argued that the Convention has prevented a larger and more dangerous war in the Black Sea. If more warships of non-Black Sea nations had entered the Black Sea, both the Ukrainian and Georgian conflicts might have turned into a dangerous war in which NATO states were involved. Considering this view, it might be possible to interpret the restrictive provisions of the Montreux Convention relating to the passage of warships as protecting the stability following two conflicts in the Black Sea.

The events above prove the Montreux Convention still maintains its importance in the world politics. In parallel with the improvements in world politics, states' interests and priorities have been changing. In view of this reality, it would not be wrong to assert that although clauses of the Montreux Convention were heavily criticized during the Ukraine conflict, political, geo-strategic and geo-economic interests of powers in the region did not allow them to attempt in changing of the Montreux regime because it prevents military events from expanding and intensifying in the Black Sea; and the Convention has established a balance between the coastal and non-coastal states of the Black Sea for longer than 80 years. Ultimately, the aforementioned conflicts did not give rise to demands for revising or denouncing the Convention. In each instance, problems arising due to the lack of details in the Convention were solved through diplomatic channels in the context of mutual understanding. However, these conflicts

also show that the Montreux Convention will continue to be intensively discussed due to the next possible conflicts in the Black Sea region.

## **CHAPTER 8 Modification of the Montreux Convention**

### **1. Advantages and Disadvantages of the Convention for Powers**

As observed above, under the pressure of pre-World War conditions the Convention aimed to conclude two main problems: the security of both Turkey and the Black Sea States and the freedom of navigation through the Straits without a fixed time limitation. As it was intended, in conformity with the customary law at that time, the Montreux Convention guaranteed the continuation of “freedom of navigation”<sup>705</sup> of all nations’ merchant vessels without any time limit. However, many provisions of the Montreux Convention regarding the passage of warships were inspired by the agreements in the history of the Straits. Therefore, it can be argued that some provisions of the Convention contain influences from the past political experiences on the passage regime of Straits. Therefore, in order to interpret the Convention correctly and to examine its possible modification or denunciation; besides political balance and other impacts in the Black Sea region, the interests of different powers should be taken into consideration.

Looking at the history of the passage regime in the Straits, after the capture of Istanbul by the Ottomans in 1453, the Black Sea turned into an inland sea of the Ottomans and the Straits were closed to all ships of other nations. This application was recognized as “the ancient rule or the Ottoman rule” by powers and continued until Russia became a coastal state at the end of the 18<sup>th</sup> century. No sooner had Russia obtained a foothold on the Black Sea shore then the Black Sea began to be a counterbalance scene between western powers and Russia. During the weak-period of the Ottomans, while Russia was endeavoring to pass through the Straits without any obstacles – it even intended to capture the Straits – western powers pursued a policy of containment aiming to preserve the “ancient rule” as a block against Russian expansion.

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<sup>705</sup> See the Chapter 3. Article I of the Lausanne Convention of 1923 which stipulated that “the High Contracting Parties agree to recognize and declare the principle of freedom of transit and of navigation by sea and by air in the Strait of Dardanelles. The Sea of Marmora and the Bosphorus hereinafter comprised under the term of the Straits.”

The struggle of counterbalance between Russia and western powers continued especially from 1774 to the First World War. As a result, the passage regime of the Straits was renovated in the interests of the western powers, the Ottomans and Russia. After the crises or wars between them, the regime was changed and regulated by bilateral or multilateral treaties. Also, from time to time, these powers changed their positions regarding the passage regime, depending on their interests or weaknesses. For instance, Tsarist Russian policy on the passage regime of the Straits was shaped on three main positions, depending on the situation of the moment. In times of difficulty, it suggested that the Turkish Straits should be open to warships. During the neutralization of the Black Sea by the Paris Treaty of 1856 it denounced the neutralization during the negotiations of the Treaty of Berlin of 1871. Additionally, during the annexation crisis of Bosnia in 1908 Russia defended an open-door policy. On the other hand, when it felt weak, it followed a defensive policy and it demanded that Straits should be closed to all warships. Furthermore, it followed an aggressive policy when it felt strong and it demanded the Straits open only for Russian warships.<sup>706</sup> Russia's changeable position continued after the First World War. Because of its internal problems after the Bolshevik revolution, Russia followed a defensive policy and Lenin expressly disavowed any Russian claim both on the Straits and Istanbul in 1917. However, when Russia had power shortly after the Second World War, Stalin suggested controlling the Straits with Turkey and put pressure on Turkey to reach this aim. Of course, not only the Russian position but also that of western powers changed based on their prevailing interests. As an example, although Britain had defended the view that the closing of the Straits to warships of all other nations since the bilateral Treaty of Kale-i Sultaniye (Çanakkale) of 1809, during the negotiations of the Treaty of the Berlin 1871 it demanded that foreign warships of friendly and allied powers could pass through the Straits by the Sultan's permission because England was an ally of the Ottomans at that time. Other than this, when Allied powers won the First World War, they opened the Straits to all ships of other nations. On the contrary, under the pressure of the pre-Second World War conditions, during the negotiations of the Montreux Convention they agreed on restrictive provisions for warships of non-Black Sea states against the next possible threat of Italian, German and Japan navies. With regard to the position of the U.S., especially until the Second World War the American perspective regarding

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<sup>706</sup> C. Bilsel (1947), p.743, R. R. Baxter, p.165-166.



international straits was liberal regulation. It favored opening the international straits to merchant ships and warships of all nations. It refused to join the negotiations of the 1923 Lausanne Convention and the American representative attended only as an observer. However, its attention was drawn to the Turkish Straits with the beginning of the Cold War and against the Soviet Russian threat.

As observed above, in the past, any revision of the Straits regime took place only after dangerous events that would never be desired. In this context, a balance has been by the final regime, the Montreux Convention, between the Black Sea states and the others. Its provisions have been applied over eighty years and as such it has become customary and also offers some advantages and disadvantages to powers in today's conditions. As experienced in the past, it can be argued that any revision or denunciation possibility of the continuation of the passage regime of the Straits has close relation to the political counterbalance between powers.

In this context, to interpret revisions or a denunciation of the Montreux Convention, both the new world order and today's geostrategic importance of the Black Sea region should be taken into account. Compared with the time at which Convention was signed, the boundaries and alliances in the Black Sea region have changed. In 1936 Turkey, Russia and under Russian influence Romania and Bulgaria were coastal states. Today there are also two additional independent riparian states, Ukraine and Georgia. Of even greater importance is that while Romania and Bulgaria joined the EU and NATO, Georgia and Ukraine took the step of becoming NATO members. In other words, in comparison with pre-World War and Cold War era conditions, today the EU has become a coastal power of the Black Sea and NATO has expanded its influence in the region with the memberships of Romania and Bulgaria. Therefore it can be argued that besides the riparian states, via their member states, both the EU and NATO have a voice in taking decisions about the Black Sea in the new era. Simultaneously, as an irrefutable truth the Black Sea has turned into an energy corridor between Asia and Europe. Furthermore, in the new world order Russia has taken its place as an important energy supplier and has developed its economic relations based on energy transfer with both coastal states and western countries. Taking into consideration the above-mentioned perspective, it is necessary to look at what advantages the Montreux Convention offers to these powers.

*If the Montreux Convention is evaluated in terms of Turkey*, at the time of this writing it can be asserted that Turkish inclination is to secure the Convention as a passage regime of its Straits. Of course, the Ottomans controlled the Straits for many centuries but when young Turkey was founded the Straits and Istanbul were under the control of the Allied powers. It was insisted that Turkey apply Sevres dictate and its unacceptable provisions on the Straits region although it was an unratified Treaty. Subsequently, although it proved its power in the national war, it could not obtain control of the Straits region which was its territory by Lausanne Convention of 1923, either. Furthermore, until the Montreux Convention, passage through the Straits was controlled by an international commission and the Straits region was demilitarized. During this period, Turkey felt defenseless but it once again gained control over its territory through the Montreux Convention. It can be said that these negative experiences were coded in the memory of the young Turkey. In other words, it is Turkey's perception that control of the Straits region was provided to Turkey by the Montreux Convention.

In addition, the Convention gives Turkey the right to close the Straits when it feels an imminent threat of war or when it is a belligerent. These provisions are assurance for its security and give it an opportunity to manage any danger against its sovereignty. On the other hand, because of the lack of detail instruction for the passage of merchant vessels and tonnage restrictions for warships of non-Black Sea states, Turkey has faced some difficulties and has thereby been exposed to controversy. However, it is understood that due to the above-mentioned negative experiences and the advantages in war time, Turkey tends to solve those problems through negotiations by diplomatic channels, instead of the revising the Montreux Convention. It can be argued that to eliminate such debates Turkey might wish to revise the restrictive provisions concerning warships in conformity with technological improvements. Yet on the other hand, it might defend the status quo because it is not be able to calculate what provisions would be accepted in the next possible convention and what unforeseen problems would arise.

*In terms of Russia*, the Turkish Straits have played diverse roles in Russian interests. Sometimes it considered the treaties regulating the regime of the Turkish Straits as a block against its rivals, and sometimes, when it was strong, the Straits were regarded as a place to be captured for its expansion. After the dissolution of the Soviet

Union, and especially by the participation of Romania and Bulgaria in the EU and in the NATO, Russia has lost its old dominant position in the Black Sea. However, it should be emphasized that Russia is one of the strongest states in the Black Sea, as was evinced in the annexation of Crimea, Abkhazia and South Ossetia. In the last decade, the crisis that occurred in the Black Sea proves that the restrictive provisions of the Montreux Convention concerning non-Black Sea navies provide a convenient way for Russia to act in the Black Sea. Additionally, because it already has a naval base on the Syrian coast, the unique connection between its naval base in the Mediterranean and the main naval base in the Black Sea is more important than ever. It can be argued that the existence of the Montreux Convention is desirable for Russia in today's conditions. On the other hand, Russia is one of the biggest natural gas suppliers for both Turkey and the EU countries and there are undeniable economic ties among them. Most natural gas, oil products and other needs have been carried both by the pipeline under the Black Sea and by ships through the Straits. This means that the Black Sea and the Straits contribute to the continuation of economic ties between Russia and other nations. Thus the stability and preservation of the status quo in the Black Sea is desirable by Russia. Although some debates have occurred regarding the passage of non-Black Sea warships, it can be said Russia is willing to continue the present passage regime of the Straits. In other words, if it wished to revise or amend the Convention, it would have tried to change it because as a party to the Convention, Russia has the right to apply to change or denunciate the Convention. If we set aside Stalin's desire to control the Straits with Turkey after the Second World War, Russia has not attempted to change the provisions of the Montreux Convention. Additionally, during discussions about the Turkish maritime regulation on the passage of merchant vessels at the IMO from 1994 to 1998, it objected strongly to the regulations, but did not attempt to revise the Convention. For all the reasons above, it can be interpreted that the present passage regime is still desirable for Russia under the present conditions, and that as concerns the international law on the sea, it does not seek to change the Convention because it knows it cannot gain more rights than it has now.

*In view of western powers*, since the inclusion of Romania and Bulgaria in the EU, it has become a neighbor with the other Black Sea coastal states. Additionally, the Black Sea had been linked with West European countries through the connection of the rivers Rhine-Main-Danube in 1992. This means that EU members not only Romania

and Bulgaria but also other Western European countries reached the Black Sea directly and also the Caspian region. This situation has provided an irrefutable possibility for mutual economic relations. Other than this, the Turkish Straits have also been used by big tankers and cargo ships for transportation between the Black Sea region and European countries. Additionally, as mentioned above, most of Europe's energy needs are transferred by the pipelines under the Black Sea. Thus, it is possible to say that a new balance based on mutual economic benefits has been established in the Black Sea region and is different from Cold War conditions. Considering the above-mentioned economic ties, the stability in the Black Sea is one of the most important matters for EU countries, the Black Sea states and the Caspian region states too. Consequently, any attempt to revise the Convention could alter the stability in the region and nobody can guess what conditions would occur after such an attempt.

As regards the military aspect, today the two EU member states and Turkey are NATO member states. This means that most of the Black Sea shores belong to NATO member states. Compared to conditions during the Cold War, it can be argued that today's distribution in the Black Sea is favorable to the EU and NATO. It seems the restrictive provisions of the Montreux Convention are not a disadvantage for the EU anymore because the navies of its member states, Romania and Bulgaria, can pass through the Straits without any restrictions. However, if there is any threat against their members in the Black Sea as with the Ukrainian or Georgian cases, they might wish to help them without such challenges. By taking into consideration past experiences, it is possible to say that in order to complete their connection smoothly with the Black Sea via the Turkish Straits, NATO and EU would prefer to revise the restrictive rules of the Montreux Convention concerning non-Black Sea navies. However, on the other hand, it can be interpreted that as long as Turkey is a member state of NATO; EU states will tend to support that the main body of the Montreux Convention remains in force. This is because in the case of a war between a Black Sea state and a non-Black Sea state, the Convention gives the right to Turkey, an allied power in NATO, to close the Straits to a belligerent. However, in such a case, according to Article 19 (Paragraph 2) of the Convention, Turkey could open the Straits to its alliances under mutual agreements.<sup>707</sup>

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<sup>707</sup> For more information see Chapter 4. Article 19 (2) of the Montreux Convention: "Vessels of war belonging to belligerent Powers shall not however, pass through the Straits except in cases arising out of the application of Article 25 of the present Convention, and in cases of assistance rendered to a State

*For America*, the Straits question has a different meaning. Because America does not have as much of a geographical tie and mutual economic dependency with the Black Sea region as the others; the present passage regime cannot be an appropriate alternative to it. During both the Georgian and Ukrainian crises its warships also faced problems with the restrictive provisions of the Montreux Convention. Although America is a member state of NATO, its own interests both in the Black Sea region and the Caspian region require the presence of its navy in the Black Sea, apart from NATO forces. Therefore, it can be argued that it considers the existence of a limited number of NATO navies in the Black Sea insufficient for its interests, and it wishes to revise the Montreux Convention's provisions in favor of non-Black Sea states. However, as observed above, it can also be interpreted that as a NATO member-state Turkey, the guardian of the Straits, is sided with America and this situation might prove advantageous in the case of war. For the same reason as the EU, in the case of war the Convention gives Turkey, as a NATO allied power, the right to close the Straits to belligerents. From the perspective of security for a non-coastal state, the above-mentioned sanctions would help confine the problem to the Black Sea.

On the other hand, England, which was party to the Convention, is not a member state of the EU any more. The same conditions and considerations apply which were considered for America above. Therefore, it can be argued it will act similarly to America with regard to possible revisions or a denunciation of the Montreux Convention.

At the time of writing, there have been no indications by the parties that they would seek to revise the Convention. Nevertheless, the experiences of implementing of the Montreux Convention over eighty years have showed that there have been two main problems for Turkey and the user states. The first is the restrictive provisions and outdated criteria concerning warships, and the second the establishment of regulations for merchant ships passing through the Straits. In this regard there are three options for the solution to these two problems. The first is the formal avenue; to denounce the Convention and to conclude a new one (Article 28). The second path is to revise some provisions of the Convention (Article 29). The third is to look for a solution in the scope

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victim of aggression in virtue of a treaty of mutual assistance binding-Turkey, concluded within the framework of the Covenant of the League of Nations, and registered and published in accordance with the provisions of Article 18 of the Covenant."

of evolving international law and collaboration with international institutions. However, independent from the above-mentioned solutions some other developments, such as building a new canal linking the Black Sea to other seas, could also affect the Straits regime. What effect would the construction of a new canal have on the Montreux Convention?

## **2. Possible Modification Scenarios of the Convention**

*i.* The first formal possibility is to denounce the Montreux Convention. The Vienna Convention on the Law of Treaties of 1969 (VCLT) foresaw various circumstances in which a treaty can be denounced, terminated or its application suspended in Articles 42-45 and 54-64. The Convention states that “the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the provisions of the treaty or of the present Convention” (Article 42(2)) and that “the termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty or at any time by the consent of all the parties after consultation with the other contracting states” (Article 54). That is to say, the Vienna Convention gives priority to the specific provisions of treaties. In this context, because the Montreux Convention contains provisions on duration and denunciations, it will be effective to firstly examine its own clauses.

The Montreux Convention was ratified on 9 November 1936 and its duration of validity was assumed at first to be 20 years. Article 28 gave the signatory states the right to inform the French government about their intention to denounce the Convention since 9 November 1954 (two years prior to the expiry of the first 20 year-period). In such a case, the denunciation would take effect two years after the notice has been given to the French government. However, if the Convention is being denounced in accordance with Article 28, the signatories are committed to be represented at a conference in order to conclude a new Convention. In any case, Article 1 (the principle of freedom of transit and navigation by sea in Straits) cannot be denounced (Article 28).

In this case, the meaning of the clause is obvious: a conference must be convoked upon an intention to denounce the Convention by a signatory state for the purpose of concluding a new convention.

Other than this formal avenue, the Montreux Convention may of course be terminated at any time by the consent of all the parties in line with Article 54(b) of the Vienna Convention. However, considering the long history of the Turkish Straits it can easily be said that this is almost impossible. Another possible route, considering the new order in the Black Sea region as it was observed above, is the possibility for a signatory state of the Montreux Convention to invoke a fundamental change of circumstances (*rebus sic stantibus* – Article 62) in the Black Sea region similar to the Turkish action on changing of the Lausanne Convention of 1923.<sup>708</sup> However, as has been experienced many times since the treaty of London of 1841 and in line with Article 28 of the Montreux Convention, a conference would be convoked to determine a new passage regime due to political reasons in the region.

In light of the different scenarios above, it seems that as a matter of fact the Straits' regime will continue to be regulated by a new agreement formed at a conference; namely that the Turkish Straits will also be subjected to Article 35 (c) (straits regulated by long-standing international conventions) of the LOS Convention. Thus, the new regime will not be affected by the LOS Convention's rules. Undoubtedly for the passage of merchant vessels, the general rules of the international law on the sea will be adopted, and for warships more liberal rules will be demanded by non-Black Sea states; however, due to their security interests, the Black Sea states will insist on adopting restrictive rules for the passage of warships again. On the other hand, the provisions of the Montreux Convention have already been implemented over eighty years, and its provisions have been followed not only by the parties of the Convention but also by non-party states since 1936. It is possible to say that its provisions have become customary rules for the Turkish Straits' passage regime. That is to say, at a new Conference convoked for a new agreement, parties might insist on adding similar provisions to those which are still in force. Considering the advantages of the current regime that were observed above for the different powers, it is foreseeable that similar restrictive rules will also be contained in the new convention. Furthermore, nobody can guarantee that new provisions will not cause new and unpredictable problems among powers. Additionally, as a general rule "a treaty does not create either obligations or rights for a third state without its consent" (Article 34 VCLT). A treaty cannot impose an obligation on a third state, nor modify any way the legal rights of a third state

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<sup>708</sup> For more information see Chapter 4.

without its consent.<sup>709</sup> Therefore, third parties may not be bound by a new convention, and a new situation may cause new conflicts between coastal and user states.

On the other hand, at such a new conference, Turkey could insist on renewing the definition of Turkish Straits. It is already discussed intensively in Turkey that the waterway between the Black Sea and the Aegean Sea consists of two different straits, “the Bosphorus” and “the Dardanelles”, and the Sea of Marmara which is an inland sea. If the two straits are considered, the Bosphorus links a high sea – the Black Sea- and an inland sea (the Sea of Marmara), and the Dardanelles links an inland sea and a high sea (the Aegean Sea or the Mediterranean). Such a definition of the Turkish Straits does not comply with the definition of international straits in the LOS Convention.<sup>710</sup> Thus, it can be asserted that a new debate on the definition of the Straits might occur if Turkey insists on this new definition. Therefore, this solution does not seem practical which may be the reason above all why no attempt to denunciate the Convention has been made over eighty years, the exception being Stalin’s desire for the common control of the Straits.

*ii.* The second formal avenue is to amend the Convention, revising some provisions of the Convention. Due to evolving circumstances, long-life multilateral treaties are more likely to need amendment. However, amending a multilateral treaty can raise various problems. This is because agreeing on amendments and bringing them into force is not easier than negotiating and bringing the original treaty into force. The Law Commission was aware of these problems and foresaw a special amendment procedure in Articles 39-40 of the VCLT.<sup>711</sup> As a general rule Article 39 states, “a treaty may be amended by agreement between the parties” and the rules laid down in Part II of the Convention will apply to such an agreement “except insofar as the treaty may otherwise provide”. Any proposal to amend a multilateral treaty is governed by Article 40 but it separates treaties which have their own amendment rules by expressing “unless the treaty otherwise provides”. Considering these two rules together, it can easily be argued that an amendment to the Montreux Convention is not affected by the scope of

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<sup>709</sup> A. Aust, p.207.

<sup>710</sup> Article 37 of the LOS Convention states that, “this section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

<sup>711</sup> A. Aust, p.212-213; Nolte, G. (2013) *Treaties and Subsequent Practice*. Oxford University Press, see Introduction, pp. 1-10.



these rules because of the special provisions in the Montreux Convention regarding its amendment procedure (Article 29).

According to Article 29 of the Montreux Convention, as a first step the signatories may suggest the amendment of one or more provisions of the Convention three months before the end of each five-year period following its entry into force.<sup>712</sup> For a proposal relating to tonnage and duration of warships in the Black Sea (Article 14 and 18) to be accepted, only one more signatory state is required. Other proposals must be supported by two other signatories. The details of revision are to be negotiated through the diplomatic channel and diplomatic notification should contain the details of the proposed revision and the reasons motivating them. In the rest of the same Article; as a second step, if no agreement can be reached through an exchange of notifications, the signatories are obliged to convoke a conference for the purpose of revising the Convention. The conference can take decisions by a unanimous vote. However, for the revision of Articles 14 and 18 a majority of three-quarters of the signatories shall be sufficient. Furthermore, this majority shall include the three-quarters of the Black Sea signatory states, including Turkey.

*As regards the first step of the revision clause*, it is possible to revise a few outdated clauses that are still a problem both for all signatories and third states through notification exchange via the diplomatic channel. For instance, collecting information about the tonnage of the Black Sea states is not necessary any longer. Due to the total tonnage of the biggest navy of the coastal state, the permissible aggregate tonnage of non-Black Sea navies has already increased to 45,000 tons (Article 18(b)). This clause should be revised. Moreover, Turkey sent the above-mentioned information to the League of Nations yearly and continued to send it to the United Nations without any objection from the signatory states when the UN undertook the mission of the League of Nations. Thus, the UN was accepted by the signatories without any change of wording in the Convention. Therefore, the wording “League of Nations” should be changed as “United Nations.” Other than this, because of the existence of the Security Council in the present day, a declaration of justification of the imminent danger of war by the League of Nations (or by the UN) is not needed (Article 21). In addition, Annex II which contains the classification of warships could be replaced by a modern

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<sup>712</sup> Such five-year periods expire on 9 August 2016, 9 August 2021, and so on. (Date of final entry into operation: 9 November 1936).

classification. The limitation and definition of guns should also be renewed in conformity with technological developments on warships. Furthermore, the notions “neutral” and “belligerent” are not clear in today’s conditions because compared to the past, the content of the term “war” has changed and there is no ‘front war’ in today’s conditions. That is why the term “belligerent and neutral” in the Convention causes different interpretations. For instance, if America was classified a “belligerent” in Iraq or Syria, its warships would not be allowed to pass through the Straits. Similarly, if Russia is considered a “belligerent” in Syria or in Ukraine its warships may not pass through the Straits either (Article 19). Of course, this interpretation is also valid for other third states which have conflict with others. Therefore, the notion of “belligerent or neutral” should be defined in conformity with today’s military concepts. It is obvious possible new provisions will give greater freedom to warships than before. However, as observed above, it is not difficult to guess that any demand for revising other clauses of the Convention could cause debates based on the interests of powers. It is very likely such an attempt would be very limited and would trigger the second step of this process.

*If the second step is taken*, the conference would be attended by Turkey, England, France, Italy, Greece, Bulgaria, Romania, Russia, Ukraine and Georgia.<sup>713</sup> Except Articles 14 and 18, for the revision of any provision a unanimous vote is required. It can be said that the second step of the revision clause is similar to the “denunciation case,” namely that similar predictions of the denunciation case are valid for this option. Additionally, at a possible new conference held for the amendment of some provisions of the Convention, it would be possible to open up new issues, other than the proposed revision. Negotiations at the new conference might turn into the denunciation of the Convention. As observed above, states may not wish to have to discuss these other issues.

For the revision of Articles 14 and 18, if the afore-mentioned ten countries attend the new conference, at least eight (three-quarters) of them would need to agree on any proposal relating to the two Articles. However, this alone is not enough, these eight countries shall include three-quarters of the Black Sea states. In other words, at least five Black Sea states should agree on the same proposal. However, there is a further stipulation: Turkey must be among the above-mentioned five coastal states. For this

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<sup>713</sup> For participation of Ukraine and Georgia see footnote 686 in Chapter 7.

reason, given the substantially different interests of the coastal states and others, it can be asserted that there is very little probability that the parties would be able to agree on the same proposal. In addition, for the revision of Articles 14 and 18, Turkey's positive vote is required which means that Turkey has such a veto right. If Turkey does not agree to the proposal, changes to the two clauses could not be approved.

Again taking under consideration the period from signing the Montreux Convention and the latest two conflicts, the Georgian and Ukrainian cases, these two restrictive rules for non-Black Sea states have resulted in disagreements between powers, and regarding the last two cases it was asserted that these restrictive rules gave Russia the opportunity to occupy Abkhazia, South Ossetia and Crimea too.<sup>714</sup> Compared to pre-Second World War conditions, the boundaries of coastal states and relations in the Black Sea region has changed. The two last conflicts proved that stronger powers of the Black Sea can take advantage of the protective features of the Montreux regime in order to fulfill their ambitions with regard to other riparian states. On account of the new the order in the Black Sea region, revising these two articles might be a solution and a preliminary attempt for resolving possible future conflicts in the Black Sea. On the other hand, compared to the procedure for amending any other clause of the Convention, which requires unanimous vote, a different and easier amendment procedure (requiring two-thirds) of the two articles show that the Montreux Conference also took into consideration these rules might need to change under the evolving circumstances and under technological developments. Actually, the amendment possibilities given in each five-year period can be assumed to be the result of the same considerations by the Conference. Nevertheless, this option might still be problematic in reaching a solution. Besides other possible unpredictable problems, negotiations may cause the emergence of new discussions on the revision of other clauses and on the participation of third countries in the conference. That is to say, similar to the denunciation case above, these negotiations would influence the position of countries that are not actually party to the Convention and may result in conflict. Therefore, without any other precautions the second step of the revision clause does not seem to be a practical solution and it will not contribute to finding solutions in the Straits for pollution, the prevention of collision, security of navigation etc.

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<sup>714</sup> For more information see Chapter 7.

*iii.* In view of the delicate balance between the Black Sea states and others, it seems that denunciation or amendment of the Convention is likely only for political reasons. Any attempt at these two options could damage the stability in the Black Sea region and cause unpredictable political circumstances to emerge. Therefore, in order to ensure safe navigation in the Turkish Straits and prevent new conflicts in the Black Sea region, instead of these formal approaches, interpreting the Convention's clauses in good faith and applying the provisions with multilateral consent, looking for a solution in the scope of evolving international law and collaborating with the international institutions would form an appropriate solution.

The amendment of treaties is a subject of great practical importance, and always needs to be considered seriously when a treaty is concluded. Amending a multilateral treaty can cause a multitude of problems between parties.<sup>715</sup> In this context, the notion "subsequent agreement and subsequent practice" of Article 31 (3) (a) and (b) of the VCLT which deals with the interpretation method of a treaty<sup>716</sup> has been discussed with regards to whether it plays a role in the modification or amendment of a treaty. Under the general rule of interpretation of the VCLT Article 31 (3) provides:

"There shall be taken into account, together with the context;

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties."

Subsequent practice may have different effects with regard to treaties; but in course of time a variety of approaches by parties in interpreting a treaty and evolving circumstances caused the emergence of modification/amendment of treaties by subsequent practices. Actually; during the negotiations of the VCLT, for the purpose of modifying a treaty the Commission proposed taking subsequent practice into account in its draft Article 38 and provided that "a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions". Because of the particular nature of treaties, as a strategic choice, the draft

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<sup>715</sup> A. Aust, p.212.

<sup>716</sup> R. K. Gardiner, p.244-247 und 253-254.

article was rejected at the Vienna Conference<sup>717</sup>; however, the Commission recognized that subsequent practice and subsequent agreements could have such a modifying effect.<sup>718</sup>

With regard to this issue, the International Law Commission, which has also been occupied with the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states<sup>719</sup>, added the topic “subsequent agreement and subsequent practice with respect to treaties” in its Working Groups’ program in 2007.<sup>720</sup> The Working Group stated in its proposal that the purpose of the law is to provide stability in the face of evolving circumstances, however, in order to ensure a meaningful respect for the agreements of parties legal system must also leave some room for a consideration of subsequent developments and that international law provides certain formal amendment, denouncement or termination opportunities either by concluding an Additional Protocol in line with Article 41<sup>721</sup> or by using the special amendment procedure of the VCLT (Articles 39-40, 56, 61 and 62). Additionally, it was expressed in the proposal that international law has a specific feature which took

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<sup>717</sup> Kohen, M. G. (2013). Keeping Subsequent Agreements and Practice in Their Right Limits. In G. Nolte, *Treaties and Subsequent Practice* (pp. 34-49). Oxford: Oxford University Press, p.35; Hafner, G. (2013). Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment. In G. Nolte, *Treaties and Subsequent Practice* (pp. 105-122). Oxford: Oxford University Press, p.116.

<sup>718</sup> G. Nolte, p.172.

<sup>719</sup> According to Article 15 of the Statute of the International Law Commission: “In the following articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”

<sup>720</sup> Ibid, p.3; R. K. Gardiner, p.246-247.

<sup>721</sup> Article 41 of the VCLT provides: (Agreements to modify multilateral treaties between certain of the parties only)

“1. Two or more of the parties to multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

a) the possibility of such a modification is provided for by treaty; or

b) the modification in question is not prohibited by treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole

2. Unless in case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”

evolving circumstances into account in a manner compatible with the agreement of parties. This feature of the international law is referred to in Article 31 (3) (a) and (b) and both mean of interpretation and considerable practical importance.<sup>722</sup>

The line between interpretation and modification (or amendment) does not seem to have been precise mostly in cases dealing with international law.<sup>723</sup> Although whether “subsequent practice” can lead to the modification of a treaty is still debated, that “subsequent practice” leading to agreement can be taken into consideration together with the context for the purpose of treaty interpretation is not controversial, hence Article 31(3) has not been a source of disagreement.<sup>724</sup> In line with this, in some cases International courts and tribunals referred to Article 31 based on interpretation and considered that subsequent agreements and practice did not imply the modification of a treaty.<sup>725</sup> On the other hand, the International Court of Justice has recognized that “subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in departure from the original intent on the basis of a tacit agreement”<sup>726</sup>, however, what specific criteria should be employed for distinguishing an interpretation from a modification by way of subsequent conduct was never specifically discussed at the Court.<sup>727</sup>

Now, in light of evolving international law on the sea and on treaty law, it might be possible to propose some solutions to the discussion points around safe navigation in the Turkish Straits and the restrictive clauses for warships in the Montreux Convention.

*With regard to the clauses for merchant vessels in the Montreux Convention, the Montreux Convention was concluded in accordance with international law at the time. Later, the Convention and its provisions were recognized as “a long-standing convention” by both the Territorial Convention of 1958 and the LOS Convention. This means the Montreux Convention is still in force in conformity with the international law on the sea. Additionally, as it was observed in Chapter 6, during the negotiations of the*

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<sup>722</sup> G. Nolte, p.3.

<sup>723</sup> Kadelbach, S. (2013). Domestic Constitutional Concerns with Respect to the Use of Subsequent Agreements and Practice at the International Level. In G. Nolte, *Treaties and Subsequent Practice* (pp. 146-153). Oxford: Oxford University Press, p.148; G. Nolte, p.200.

<sup>724</sup> M. G. Kohen, p.35; Gardiner, p.273-280.

<sup>725</sup> M. G. Kohen, p.38-41; G. Hafner, p.112-117; G. Nolte, p.209; S. Kadelbach, p.148.

<sup>726</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgement) [2009], I.C.J Reports 2009, p.242, para 64; see also: G. Nolte, p.200.

<sup>727</sup> G. Nolte, p.207.

Montreux Convention, Turkey's jurisdiction and traffic regulation rights over the Straits was recognized by the parties. For the purpose of ensuring passage safety the Maritime Traffic Regulations of 1998, which can be considered subsequent practice and was in accordance with both the Montreux Convention and international law on the sea, reduced disagreements compared to the 1994 Regulations. Therefore, similar to other straits regulated by a long-standing treaty, in order to protect human life and the environment, the clauses related to merchant ships and the notion of "freedom of navigation" in the Convention may be interpreted in line with generally accepted international maritime standards under Article 31 of the VCLT. However, this interpretation should not be applied by unilateral action and it must be in accordance with other instruments of international law. In other words, as a coastal state of the Straits, Turkey should not interpret the Convention's clauses only in favor of its interests in the Straits and it should not adopt any new regulations that are inappropriate for either the Montreux Convention or international law. On the other hand, user states should not interpret the clauses of the Convention only in favor of their interests either, and they should accept any additional regulations relating to maritime developments when the regulations are fully in accordance with both the Montreux Convention and the international law on the sea.<sup>728</sup>

Considering the dense traffic in the Straits, developments in shipping technology, the transportation of various hazardous cargoes and new rules and applications in the maritime; it is foreseeable that if new regulations are introduced in the near future, conflicts of interests are possible. In order to prevent new debates between coastal and user states, participation in the IMO may be offered, of which both Turkey and most of users-states are members. That is to say, any new regulations may be discussed at the IMO before they are adopted in the Straits. Furthermore, if there are necessary adaptations because of developments in the maritime sector, new regulations and requirements can also be suggested by the relevant authority of the IMO. Thus, such an attempt by the IMO would prevent possible debates between coastal and user states on one side, and on the other side generally-accepted standards would be adopted in time in accordance with the evolving international law of the sea. In other words, discussion at the IMO can prepare a comfortable atmosphere to negotiate and eliminate

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<sup>728</sup> Turkey can establish some regulations unilaterally but the process of the 1994 Turkish Maritime Regulation and discussions at IMO have proved how effective unilateral regulations are. See Chapter 6.

disagreements. Furthermore, if new debates arise, in order to finish such possible future debates completely and for the reinterpretation of the clauses of the Montreux Convention regarding merchant vessels in terms of “subsequent practice”, cooperation with the International Court of Justice might also be the right attitude as a second solution.

Other than this, designation of the Turkish Straits, which is one of the busiest straits, as a Particularly Sensitive Sea Area (PSSA) might solve problems caused by the big size of ships carrying hazardous cargo. In this context, participation by the IMO could also create an appropriate atmosphere for the designation of Turkish Straits, at least the Bosphorus, as a PSSA.<sup>729</sup> It is possible to designate the Straits area as a PSSA when taking into consideration the dense population in the Turkish Straits area, the historical significance of the city of Istanbul which was also declared an area of the common heritage of humankind by UNESCO, as well as the Straits’ function for biological diversity between the Black Sea and the Mediterranean, alongside other features of the Straits. The other designations of PSSA by the IMO like the Danish Straits (the Great Belt and the Sound) which are also subjected to a long-standing international treaty, and the Torres Straits and the Strait of Bonifacio which are also used for international navigation<sup>730</sup> would support the declaration of the Turkish Straits as a PSSA.

*With regard to the clauses of warships*, first of all, both the lack of some important detailed information in the Montreux Convention and the occurrence of events previously unforeseeable (such as the USS Taylor case) should be assessed within this frame and should be interpreted in good faith by all sides. In such cases diplomatic solutions should be considered, as has been done up to now. However, as another permanent solution, modification of Articles 14 and 18, which restrict passages by warships of non-Black Sea states without changing the main body of the convention would be an appropriate solution as it was considered in scenario (ii). In that scenario there were three main problems: providing a positive vote of three-quarters (at least 5 states) of the Black Sea signatory states, including Turkey; the possibility that other clauses might come under discussion and break the stability which established by the Montreux regime at a possible Conference; and, as a result of this, a new discussion

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<sup>729</sup> See Chapter 6.

<sup>730</sup> See Chapter 6.



might emerge on the participation of third states and their assent. Therefore, it is necessary to offer a solution which excludes these three problems in order to protect the stability in the Black Sea region.

Since 1936, the provisions of the Montreux Convention related to warships have been applied consistently although some debates have occurred in cases such as post-World War II, the Ukrainian and Georgian crises.<sup>731</sup> These debates did not result in the adoption of new rules and regulations and no other “subsequent agreement and practice” developed in terms of passage of warships through the Turkish Straits. Besides this reality, because the Convention has special mechanisms for its modification, it can be argued that the Convention does not lend itself to the possibility of modification by way of subsequent practice. Therefore, combining evolving international law on treaties with modification mechanisms of the Convention might help reduce problems in the Black Sea.

There are examples where some of the parties to a treaty make an agreement in order to modify the treaty, only between them.<sup>732</sup> An *inter se* agreement is permissible if the treaty provides such a modification (Article 41 (a) of the VCLT).<sup>733</sup> Alternatively, it is also permissible if the treaty does not prohibit such a modification. However, such an *inter se* agreement must not prejudice the rights or add to the obligations of other parties, and must not relate to a provision, derogation from which would be incompatible with the effective execution of the object and purpose of the treaty as a whole (Article 41 (b)). The second paragraph of the same article states that unless a treaty otherwise provides, “the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it

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<sup>731</sup> For more information See Chapters 5 and 7.

<sup>732</sup> A. Aust, p.222.

<sup>733</sup> Article 41 of the VCLT provides: (Agreements to modify multilateral treaties between certain of the parties only)

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
  - a) the possibility of such a modification is provided for the treaty; or
  - b) the modification in question is not prohibited by the treaty and:
    - i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
    - ii) does not relate to a provision, derogation from which is compatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in case falling under 1 (a) the treaty otherwise provides the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

provides.” This second part of this method is similar to the modification mechanism of the Montreux Convention provided in Article 29.

The Montreux Convention does not provide a possibility for such a modification via an *inter se* agreement but neither is there a provision which prohibits such a course of action. In this context, in order to modify Article 14 and 18 of the Montreux Convention Article 41(b) can be put into operation by some signatory states. In other words, some of signatory states, especially coastal states of the Black Sea, might agree to modify only Article 14 and 18 in accordance with the new technological and political circumstances. Such an *inter se* agreement can limit the modification intention of parties at the next possible conference (the second step of the modification mechanism of the Montreux Convention), and in this way the second problem mentioned above might be solved.

On the other hand, there is nothing in international law which prevents a right in favor of third state.<sup>734</sup> A provision of a treaty creates rights for third state if the parties to it so intend and the third state assents. However, “its assent shall be presumed as long as the contrary is not indicated, unless the treaty provides otherwise” (Article 31 (1) of the VCLT). In light of this provision, for the purpose of modification of Article 14 and 18 at a possible conference all Black Sea states and other non-coastal signatory states would participate. This means that Black Sea states might defend their own right and might assent to the possible amendment. The question is related to assent of third states that are not coastal states. At this point two aspects should be considered. Firstly, possible modification of Articles 14 and 18 will upgrade the tonnage restrictions in favor of non-coastal states; hence such a modification would be appreciated by third states. Secondly, the passage regime of the Montreux Convention is valid *erga omnes* (for all the world).<sup>735</sup> That means possible modification of certain rules will not exclude some of states from others; hence it can be argued that it will also be valid for all third states (all the world). Thus, the third problem mentioned above would be eliminated in this way.

An *inter se* agreement which is formed by riparian states in particular might solve the first problem, that of requiring a positive vote of three-quarters (at least 5

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<sup>734</sup> A. Aust, p.208.

<sup>735</sup> For more information see Chapter 6; A. Aust, p.209.

states) of the Black Sea signatory states. This issue is completely related to political circumstances. Turkey's position has a key role in the modification of these Articles because in any case Turkey's positive vote is required. From the perspective of Turkey, modification of the two Articles does not conflict with Turkish interests in the Straits as long as the special geographical features of the Straits are considered, it does not damage the environment and it does not threaten human life or Turkish integrity. Turkey already expressed its red line and declared that it was ready to negotiate the revision of the Convention at a conference during the notes exchange period after the Second World War. That is to say, Turkey will vote for the revision of the two Articles when they contribute to protecting the rights of other nations. Considering the Georgian and Ukrainian crises, in light of the new order in the Black Sea region which was observed above, close cooperation with the EU and NATO, Ukraine, Georgia, Romania or Bulgaria might start negotiations in order to prepare an *inter se* agreement for modifying the two Articles of the Montreux Convention. It is foreseeable that the other non-coastal signatories, England, Italy, Greece, France, which are both EU and NATO member states, will support such an agreement. This operation might solve the problem posed by the requirement for a majority vote.

However, in line with Article 41 of the VCLT such an operation must not affect the rights of other parties and must not be incompatible with the object and purpose of the Montreux Convention. Therefore, all circumstances and rights of parties must be considered objectively. Moreover, such an *inter se* agreement must consider all evolving circumstances besides the past experiences acquired for many centuries. On the one hand it must protect coastal states' rights against other powers, and furthermore it should not break the balance in the Black Sea in favor of coastal or non-coastal states. For all the reasons above, for the purpose of modification of the two Articles of the Montreux Convention, in accordance with Article 15 of its Statute, cooperation with the International Law Commission would be an appropriate solution.

Consequently, besides the modification mechanism of the Montreux Convention, putting into operation an *inter se* agreement might be a suitable response to the disagreements surrounding the Montreux Convention. Such a solution could protect the status quo and main body of the Convention, while still providing an opportunity to change some provisions and outdated notions which were detailed in scenario (ii) above.

### 3. The Canal of Istanbul and the Montreux Convention

The Turkish government plans to build a canal parallel with the Bosphorus called “the Canal of Istanbul” that connects the Black Sea and the Sea of Marmara. The canal is planned to be about 45 kilometers long, 25 meters deep and 250 meters wide.<sup>736</sup> Independent of the solutions examined above, if the Canal was built, how would Montreux Convention be affected by this situation and might the canal solve the existing problems without requiring revisions of the Montreux Convention?

The international law on the sea separates passage the regime of straits and those of human-made canals. Canals are considered internal waters and are not subjected to the innocent-passage regime of the law of the sea. Because canals are human-made and unique problems such as management, control, financial integrity, and maintenance always occur in these waterways, regulation of the passage through canals is permitted.<sup>737</sup> Passage through canals is generally governed by international treaties as in Panama and the Suez Canals.<sup>738</sup> Besides an existing international treaty regulating their passage regime, due to the history of their building and operation as well as the background of international law, these canals are called international canals.<sup>739</sup> The passage right through these canals is essentially meant in the sense of customary international law and has gained an international character through long-standing practice.<sup>740</sup> However, if there is no such an international treaty and if they fall within a state’s territory, canals are considered a part of that state and are called national canals. There is no subjective right of passage through such canals for foreign merchant vessels under international law and they are embodied in that state’s domestic laws without any

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<sup>736</sup> *World Wide Fund Report 2015: Ya Kanal Ya Istanbul [Canal or Istanbul]*, <[https://d2hawiim0tjbd8.cloudfront.net/downloads/kanalistanbul\\_1.pdf](https://d2hawiim0tjbd8.cloudfront.net/downloads/kanalistanbul_1.pdf)>, (accessed January 29, 2018).

<sup>737</sup> J. M. Dyke (2009), p. 229.

<sup>738</sup> The 1888 Constantinople Convention constitutes the main body of the passage regime of Suez Canal. See; *Suez Canal Authority*, <<https://www.suezcanal.gov.eg/English/About/SuezCanalAuthority/Pages/default.aspx>> (accessed July 6, 2018). With regard to the Panama Canal, the US-Panama Treaty Concerning the Permanent Neutrality and the Operation of Panama Canal of 1977 set out principles of passage regime of the Panama Canal.; *Panama Canal Authority*, <<https://www.pancanal.com/eng/>> (accessed July 6); see also: J. M. Dyke (2009), p.229-231; R. R. Baxter, p.38-42.

<sup>739</sup> Yang, H. (2006). *Jurisdiction of the Coastal State over Foreign Merchant Ships in International Waters and the Territorial Sea*. Berlin-Heidelberg: Springer, p.80.

<sup>740</sup> H. Yang, p. 81.

international obligation in general.<sup>741</sup> Additionally, if a canal divides two or more states the regimes of such canals are determined by bilateral treaties between the neighboring states who share them.<sup>742</sup>

In this context, as important human-made canals, while the Panama and Suez Canals have been regulated by international treaties under special rules, the Corinth Canal which is located in Greek territory and connects the Gulf of Corinth and Aegean Sea, and the Kiel Canal which falls in the territory of Germany, are subject to the domestic law of these countries. All regulations of the Corinth Canal are unilaterally determined by Greece.<sup>743</sup> With regard to the Kiel Canal, although Article 380<sup>744</sup> of the Versailles Treaty of 1919 caused the emergence of different opinions on the status of this canal, according to most authors' opinion in international law "the internationalization system of the Versailles Treaty has been abandoned".<sup>745</sup> The Canal falls within the German territory, and today the passage is regulated by the relevant German authority [Wasserstraßen- und Schifffahrtsverwaltung des Bundes].<sup>746</sup> The Canal is considered as internal waters and only merchant vessels are allowed to pass under the regulation of the authorities. They are obliged to pay passage payment and the master is requested to present the original International Tonnage Certificate and a copy of crew list for the Immigration office.<sup>747</sup> Additionally, warships of other nations may pass through the Canal only by permission given from the Foreign Ministry of Germany via the diplomatic channel.<sup>748</sup>

In light of the above-mentioned cases, if Turkey succeeds in building the Canal, similarly with the Corinth or Kiel Canal cases, the Canal will wholly fall within Turkish territory. Due to the lack of any treaty or practice regulating it, it is possible to say that

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<sup>741</sup> Ibid, p.80; Camyamac, A. (2017). Kiel Kanalinin Hukuki Rejimine Dair Bir Degerlendirme [Legal Status of the Kiel Canal]. *D.E.Ü. Hukuk Fakültesi Dergisi*, Vol.19, pp. 2749-2802.

<sup>742</sup> Pazarıcı, H. (2011, May 4). 'Çılgınlığın' Olası Uluslararası Etkileri [Possible Effect of Crazy (Projects)], <<http://www.yeniyaklasimlar.org/m.aspx?id=739>> (accessed January 29, 2018); D. R. Rothwell & T. Stephens (2010), p.54-55.

<sup>743</sup> A. Camyamac, p.2757.

<sup>744</sup> Article 380 of the Versailles Treaty: "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." For the text of Treaty see at < <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>> (accessed August 14, 2017).

<sup>745</sup> H. Yang, p.79-81; J. M. Dyke (2009), p.230.

<sup>746</sup> See: *Kiel Canal Authority*, <<https://www.kiel-canal.de/kiel-canal/authorities/index.htm>> (accessed July 6, 2018).

<sup>747</sup> Ibid.

<sup>748</sup> A. Camyamac, p.2783-2785.

the canal will be subject to internal-waters regulations and it will be regulated by the relevant Turkish authority based on Turkey's domestic law.<sup>749</sup> Its regime may be determined by Turkey in accordance with the generally accepted rules of international law. Then again, one of the aims of building the canal is to reduce the traffic in the Bosphorus and to protect human rights and the environment too. Thus, it is possible to say that Turkey will open the canal not only to its merchant ships but also merchant ships of other nations, as in the case of the Kiel Canal. That is to say, while the status of the canal would be a national canal, it would be open for other merchant vessels in terms of economic interest and safe passage in the Bosphorus. With regard to the passage of warships of other nations, it is foreseeable that they will continue to pass under the Montreux regime via the route of the Bosphorus, the Sea of Marmara and the Dardanelles. Additionally, the Turkish government can declare the canal closed to foreign warships or it can apply its current ordinance regarding the visiting procedures for foreign warships to Turkish ports or internal waters, as in the cases where a warship of another nation visits any port of Turkey in the Straits region. In such cases they are required to ask for permission from the Turkish government via the diplomatic channel.<sup>750</sup> Therefore, if Turkey applies the regulations as laid out above, in general, it can be said that the canal will not directly affect the Montreux Convention. What is more, as an advantage of the canal, it is foreseeable that the existence of an alternative waterway connecting the Black Sea and the Sea of Marmara can support Turkey's argument for the Turkish Straits to be designated as a PSSA by the IMO, given above as a solution to ensure safe passage in the Bosphorus.

However, on the other hand, it is clear that the practical implementation of regulations in the canal might affect the Montreux regime and could spark many disagreements over the provisions of the Montreux Convention and even its legality in the coming years. The main problem is the definition of the Turkish Straits in the preamble of the Montreux Convention: "the Strait of the Dardanelles, the Sea of

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<sup>749</sup> Pazarıcı, H. (2011, May 4). '*Çılgınlığın' Olası Uluslararası Etkileri [Possible Effect of Crazy (Projects)]*, <<http://www.yeniyaklasimlar.org/m.aspx?id=739>> (accessed January 29, 2018). According to Oppenheim; "When canals are confined within the territory of a single state they are integral parts of the territory." See: Oppenheim L. *International Law*, Volume I, 9<sup>th</sup> Edition. (1992). Harlow: Longman Group UK Limited [R. Jennings and A. Watts (ed)], p.591.

<sup>750</sup> *Yabancı Silahlı Kuvvetlere Bağlı Gemilerin Türk İcsularına ve Limanlarına Gelisleri ve Bu Sulardaki Hareket ve Faaliyetlerine İlişkin Yönetmelik [Ordinance for Foreign Warships Visiting the Ports of Turkey]* (1983, November 24), <<http://www.mevzuat.gov.tr/MevzuatMetin/3.5.837467.pdf>> (accessed July 6, 2018).

Marmara and the Bosphorus comprised under the general term Straits.” In other words, the Montreux regime covers the whole waterway between the entrance of the Black Sea and the Aegean Sea, and its provisions are valid for the whole waterway of the Bosphorus, the Sea of Marmara and the Dardanelles. However, the proposed canal will only connect the Black Sea and the Sea of Marmara. Therefore, between the Black Sea and the Aegean Sea (in both directions) ships which use the canal will have to use the rest of the waterway for their passage – the Sea of Marmara and the Dardanelles – which is subject to the Montreux regime. In light of the use of the canal instead of the Bosphorus, the following problems might be occur and might cause the emergence of unpredictable disagreements over the Montreux regime and its revision or amendment.

*In terms of merchant vessels*, because Turkey will determine the passage regime of the Canal of Istanbul, it might ban the passage of tankers or large cargo ships through the Bosphorus in order to protect human rights and the environment when the canal opens. However, above all, “freedom of passage” through the Straits was guaranteed by Article 1 of the Montreux Convention without any time limit, and all merchant vessels should enjoy freedom of navigation with any kind of cargo under Article 2. Therefore, Turkey has no right to ban the passage of merchant vessels through the Bosphorus. Secondly, under the international law of the sea it is not possible to ban ships through a strait which is used for international navigation. However, compared to the provisions regarding ‘taxes and charges’ in the Montreux Convention (for sanitary control, services of lighthouses etc. Article 2 and Annex I), Turkey may determine plausible passage payment through the canal in order to reduce the traffic in the Bosphorus. In line with this strategy the building of the canal would only reduce traffic of vessels in the Bosphorus; however, ships would not be forced to pass through the new canal.

However, under the Montreux Convention, the payment of merchant ships covers the Bosphorus, the Sea of Marmara and the Dardanelles, and it is also valid for the return passage of ships for the next six months. In other words, the fee is paid once for the round trip, and if a vessel does not return in six months it is obliged to pay taxes and charges for the next passage again. In this context, if a merchant vessel coming from the Black Sea or the Aegean Sea passes through the canal, will “tax and charge” be paid the for the vessel under the Montreux Convention because it uses the rest of the waterway (the Sea of Marmara and the Dardanelles)? Or if the tax and charge is paid as a round trip for a merchant ship under the Montreux Convention, what would happen if the

vessel uses the canal for its next passage in the next six months? Should the passage through the canal be paid for extra? If they should pay “tax and charge” for passage through the canal, should they also pay an extra “tax and charge” under the Montreux Convention for the rest of the passage? If they do not have to pay the complete “tax and charge” how will the new amount be determined when there is no related information in the Montreux Convention? Besides these, it is likely some other unpredictable problems to occur due to using both the Bosphorus and the canal.

*In terms of warships*, as it was claimed above, if Turkey ban the passage of foreign warships through the canal no problem will arise for the Montreux regime. However, if Turkey regulates the passage of foreign warships visiting Turkish ports under the ordinance, or if Turkey allows warships which complete the passage between the Black Sea and the Aegean Sea to pass through the canal, such a regulation will likely become a problem for powers with regards to the Montreux Convention.

Suppose that Turkey allow passage right to warships of other nations through the canal for their complete passage in entering the Black Sea coming from the Aegean Sea or in entering the Aegean Sea coming from the Black Sea. According to Article 13 of the Montreux Convention, warships’ passages are possible only by prior notification (8 days for Black Sea states and 15 days for non-Black Sea states) given to the Turkish Foreign Ministry through the diplomatic channel. This permission covers the whole waterway – the Bosphorus, the Sea of Marmara and the Dardanelles – but in this context, would the flag states of warships be obliged to obtain passage permission 8 or 15 days in advance through the diplomatic channel if their warships use the canal for their passage? Would the tonnage restrictions in Article 14 and 18 also be valid for warships passing through the canal and would Turkey be responsible for informing other signatory states about such passage of warships? Yet, on account of the definition of “Straits” in the Montreux Convention such an application would be protested by signatory states and because it is clear enough in the Convention, it is predictable that Turkey will ban the passages of foreign warships through the canal in terms of complete passage between the Black Sea and the Aegean Sea in accordance with the Montreux regime. In other words, foreign warships will pass through the Bosphorus instead of the canal as in the Montreux regime.



Suppose that for the passage through the canal Turkey applies its ordinance for foreign warships which visit Turkish ports under friendly cooperation with the Turkish army. For such visits, permission via the diplomatic channel is required and the Turkish General Staff are responsible for organization. In such an event, a warship of a non-Black Sea state may pass through the Dardanelles and the Sea of Marmara and visit the Port of Istanbul under mutual military relations even if the warship does not comply with the Montreux Convention. Such a visit is organized through the military channel and tonnage information or passage permission 8 or 15 days in advance are not necessary. The basic argument is because the warship does not complete the passage – the Dardanelles, the Sea of Marmara and the Bosphorus – under the Montreux Convention. In this context, could a warship coming from the Aegean Sea which visited the Istanbul Port (or any port in the Sea of Marmara) enter into the Black Sea without prior notification if it uses the waterway of the Dardanelles, the Sea of Marmara and then the canal for its passage? The vessel does not complete the passage which was described in the Montreux Convention; hence such passages are not subjected to prior notification by the diplomatic channel. If such passage might be possible, how would Turkey control whether warships entering into the Black Sea comply with Articles 14, 18 and Annex II (tonnage restrictions) of the Convention? How would the aggregate tonnage (45,000 tons) of non-coastal states in the Black Sea and the duration of 21 days be controlled? It is not difficult to say that the Black Sea states would object to such passages and that they would accuse Turkey of violating the Montreux Convention. Similarly, this problem is also valid for warships coming from the Black Sea via the canal in order to visit any port in the Straits area based on notification 8 days in advance. Could they continue to pass through the Dardanelles after their visit in the Sea of Marmara or Istanbul Port because their passage through the canal was not subject to the Montreux Convention?

Thus, it is foreseeable that the canal project might not affect the Montreux passage regime directly but the application of the regulations of the canal could cause challenges for the Montreux Convention. To prevent such debates, it can be argued that Turkey should only offer the passage through the canal for merchant vessels, not for warships. Otherwise, it could be argued that new disagreements over the Montreux Convention might occur if the canal opens for the passage of warships. Of course, it depends on the political conditions at the time, but such debates could result in the

“denunciation or revision” of the Montreux Convention. In such case the above-mentioned estimations (section 8.2) on the denunciation and revision of the Convention would be valid.

## **Conclusion**

Today, there is no demand for the revision of the Montreux Convention although many problems have arisen due to its passage regime. As can be observed in the long history of the Straits, “political and economic” conditions rather than legal requirements play a central role in alterations of its passage regime.

The Montreux Convention has been applied over eighty years and produced many experiences of how powers would act upon the debate of any provision of the Convention. Today’s mutual economic interests show that most of the powers involved, including some riparian states of the Black Sea and Turkey, have a tendency to protect the current situation and stability in the Straits region. Nobody can foresee what problems might occur as a result of a new convention and how those problems would be solved. These consequences might result from a lack of experience on any newly established passage regime, and because any changes could cause unwanted results for both coastal and non-Black Sea states. These are the likely reasons why any legal amendment or modification demand by signatory states has not yet arisen although the Montreux Convention contains clear mechanisms for these which leave no room for uncertainty. However, while the Montreux regime has established a balance between the coastal and non-coastal states, in the course of time some of its clauses have given rise to debate on passage of both merchant ships and warships.

With regard to merchant ships, although compared to the 1994 Regulations, the Maritime Regulation of 1998 and the subsequent application (which was adopted in conformity with the international standards in maritime regulations) reduced disagreements between Turkey and user states, it is not difficult to predict that different views on Article 2 of the Montreux Convention will continue to be used as a political tool by states or companies. Furthermore, new debates on the Montreux regime and new applications by Turkey might arise because of novel materials for transportation and

ships functioning under ever-evolving circumstances, including technological developments.

With regard to warships, particularly the events of the last decade – the occupation of Georgian and Ukrainian territories – show that the interests originally involved in concluding the Montreux Convention were quite different from those today. Political agreement in that period aimed to protect the riparian states of the Black Sea including Turkey and the interest of other non-coastal signatory states as allies, against any attack from outside. However, since then alliances have been broken, new alliances and supranational institutions established which have interests and close relations in the Black Sea region, the boundaries of the Black Sea region have changed and new economic and political relations have been established in the region. Thus, while the key role of the Montreux regime based on the balance between the Black Sea regions and others has continued, and while the existence of the restrictive rules (Articles 14 and 18) for non-Black Sea states' warships and the outmoded classification (Annex II) secure coastal states' interests against non-coastal states, the above-mentioned two crises revealed that not all possible conflicts between coastal states in the Black Sea have been considered in the Montreux Convention. Considering the new order and geopolitical interests in the Black Sea region, it can be said that although conflicts which occurred after the signing of the Montreux Convention have been solved by mutual understanding through diplomatic channels, it seems the restrictive provisions of the Convention will continue to be debated by powers. Furthermore, as an undesirable result they might cause unpredictable problems for which a diplomatic approach will not suffice.

The geopolitical features of both the Turkish Straits and the Black Sea will secure their crucial role between Asia and Europe, and as such the Montreux Convention will continue to be an issue for discussion on the world politics agenda. In this context, interpreting the provisions of the Montreux Convention in good faith and adopting regulations which are generally accepted international standards in the maritime sector by multilateral consent, including the IMO and designation of the Turkish Straits as a PSSA in order to protect human life, prevent pollution and ensure biological diversity in the Straits area, would be a possible solution for the issue of the passage of merchant vessels. However, modifying the restrictive clauses of the passage of warships is a possible permanent solution but is directly related to political

circumstances. There is currently no demand for the modification of the Montreux Convention, however, if there is such a demand, besides the legal mechanism of the Montreux Convention, (i) a comprehensive perspective to protect stability and to foresee possible problems and their effects, (ii) a resolute and plausible action plan to conclude necessary revisions or amendments and (iii) the inclusion of international institutions in the process and cooperation with them in order to protect mutual equity of states and their rights and to be able to adopt generally-accepted principles in accordance with the international law may form a solution.

## ANNEX: The Montreux Convention<sup>751</sup>

### CONVENTION REGARDING THE REGIME OF THE STRAITS SIGNED AT MONTREUX ON 20 JULY 1936<sup>1</sup>

**Date of provisional entry into operation: August 15, 1936**

**Date of final entry into operation: November 9, 1936**

HIS MAJESTY THE KING OF THE BULGARIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, HIS MAJESTY THE KING OF THE HELLENES, HIS MAJESTY THE EMPEROR OF JAPAN, HIS MAJESTY THE KING OF ROMANIA, THE PRESIDENT OF THE TURKISH REPUBLIC, THE CENTRAL EXECUTIVE COMMITTEE OF THE UNION OF SOVIET SOCIALIST REPUBLICS, AND HIS MAJESTY THE KING OF YUGOSLAVIA;

Desiring to regulate passage and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus comprised under the general term «Straits» in such manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea, of the riparian States, the principle enshrined in Article 23 of the Treaty of Peace signed at Lausanne on the 24<sup>th</sup> July, 1923;

Have resolved to replace by the present Convention the Convention signed at Lausanne on the 24<sup>th</sup> July, 1923, and have appointed as their Plenipotentiaries:

\* \* \*

#### Article 1

The High Contracting Parties recognise and affirm the principle of freedom of passage and navigation by sea in the Straits.

The exercise of this freedom shall henceforth be regulated by the provisions of the present Convention.

<sup>1</sup> *The authentic version of this Convention is in French.*

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<sup>751</sup> The text of the Montreux Convention accessed from the "Report Annual-The Ministry of Foreign Affairs of the Republic of Turkey. (2013). *Report Annual – Sur Le Mouvement Des Navires A Travers Les Detroits Turcs.*" Ankara: The Ministry of Foreign Affairs of the Republic of Turkey.

## **Section I – Merchant Vessels.**

### **Article 2**

In time of peace, merchant vessels shall enjoy complete freedom of passage and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities, except as provided in Article 3 below. No taxes or charges other than those authorised by Annex I to the present Convention shall be levied by the Turkish authorities on these vessels when passing in transit without calling at a port in the Straits.

In order to facilitate the collection of these taxes or charges, merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 their name, nationality, tonnage, destination and last port of call (provenance).

Pilotage and towage remain optional.

### **Article 3**

All ships entering the Straits by the Aegean Sea or by the Black Sea shall stop at a sanitary station near the entrance to the Straits for the purposes of the sanitary control prescribed by Turkish law within the framework of international sanitary regulations. This control in the case of ships possessing a clean bill of health or presenting a declaration of health testifying that they do not fall within the scope of the provisions of the second paragraph of the present article, shall be carried out by day and by night with all possible speed, and the vessels in question shall not be required to make any other stop during their passage through the Straits.

Vessels which have on board cases of plague, cholera, yellow fever, exanthematic typhus or smallpox, or which have had such cases on board during the previous seven days, and vessels which have left an infected port within less than five times twenty four hours shall stop at the sanitary stations indicated in the preceding paragraph in order to embark such sanitary guard as the Turkish authorities may direct. No tax or charge shall be levied in respect of these sanitary guards and they shall be disembarked at a sanitary station on departure from the Straits.

### **Article 4**

In time of war, Turkey not being belligerent, merchant vessels, under any flag or with any kind of cargo, shall enjoy freedom of passage and navigation in the Straits subject to the provisions of Articles 2 and 3.

Pilotage and towage remain optional.

## **Article 5**

In time of war, Turkey being belligerent, merchant vessels not belonging to a country at war with Turkey shall enjoy freedom of passage and navigation in the Straits on condition that they do not in any way assist the enemy.

Such vessels shall enter the Straits by day and their passage shall be effected by the route which shall in each case be indicated by the Turkish authorities.

## **Article 6**

Should Turkey consider herself to be threatened with imminent danger of war, the provisions of Article 2 shall nevertheless continue to be applied except that vessels must enter the Straits by day and that their passage must be effected by the route which shall, in each case, be indicated by the Turkish authorities. Pilotage may, in this case, be made obligatory, but no charge shall be levied.

## **Article 7**

The term "Merchant vessels" applies to all vessels which are not covered by Section II of the present Convention.

## **Section II – Vessels of War**

### **Article 8**

For the purposes of the present Convention, the definitions of vessels of war and of their specification together with those relating to the calculation of tonnage shall be as set forth in Annex II to the present Convention.

### **Article 9**

Naval auxiliary vessels specifically designed for the carriage of fuel, liquid or non-liquid, shall not be subject to the provisions of Article 13 regarding notification, nor shall they be counted for the purpose of calculating the tonnage which is subject to limitation under Articles 14 and 18, on condition that they shall pass through the Straits singly. They shall, however, continue to be on the same footing as vessels of war for the purpose of the remaining provisions governing passage.

The auxiliary vessels specified in the preceding paragraph shall only be entitled to benefit by the exceptional status therein contemplated if their armament does not include : for use against floating targets, more than two guns of a maximum

calibre of 105 millimeters; for use against aerial targets, more than two guns of a maximum calibre of 75 millimetres,

#### **Article 10**

In time of peace, light surface vessels, minor war vessels and auxiliary vessels, whether belonging to Black Sea or non - Black Sea Powers, and whatever their flag shall enjoy freedom of passage through the Straits without any taxes or charges whatever, provided that such passage is begun during daylight and subject to the conditions laid down in Article 13 and the Articles following thereafter.

Vessels of war other than those which fall within the categories specified in the preceding paragraph shall only enjoy a right of passage under the special conditions provided by Articles 11 and 12.

#### **Article 11**

Black Sea Powers may send through the Straits capital ships of a tonnage greater than that laid down in the first paragraph of Article 14, on condition that these vessels pass through the Straits singly, escorted by not more than two destroyers.

#### **Article 12**

Black Sea Powers shall have the right to send through the Straits, for the purpose of rejoining their base, submarines constructed or purchased outside the Black Sea, provided that adequate notice of the laying down or purchase of such submarines shall have been given to Turkey.

Submarines belonging to the said Powers shall also be entitled to pass through the Straits to be repaired in dockyards outside the Black Sea on condition that detailed information on the matter is given to Turkey.

In either case, the said submarines must travel by day and on the surface, and must pass through the Straits singly.

#### **Article 13**

The passage of vessels of war through the Straits shall be preceded by a notification given to the Turkish Government through the diplomatic channel. The normal period of notice shall be eight days; but it is desirable that in the case of non-Black Sea Powers this period should be increased to fifteen days. The notification shall specify the destination, name, type and number of the vessels, as also the date of entry for the outward passage and, if necessary, for the return journey. Any change of date shall be subject to three days' notice.



Entry into the Straits for the outward passage shall take place within a period of five days from the date given in the original notification. After the expiry of this period, a new notification shall be given under the same conditions as for the original notification.

When effecting passage, the commander of the naval force shall, without being under any obligation to stop, communicate to a signal station at the entrance to the Dardanelles or the Bosphorus the exact composition of the force under his orders.

#### **Article 14**

The maximum aggregate tonnage of all foreign naval forces which may be in course of transit through the Straits shall not exceed 15,000 tons, except in the cases provided for in Article 11 and in Annex III to the present Convention.

The forces specified in the preceding paragraph shall not, however, comprise more than nine vessels.

Vessels, whether belonging to Black Sea or non - Black Sea Powers, paying visits to a port in the Straits, in accordance with the provisions of Article 17, shall not be included in this tonnage.

Neither shall vessels of war which have suffered damage during their passage through the Straits be included in this tonnage; such vessels, while undergoing repair, shall be subject to any special provisions relating to security laid down by Turkey.

#### **Article 15**

Vessels of war in transit through the Straits shall in no circumstances make use of any aircraft which they may be carrying.

#### **Article 16**

Vessels of war in transit through the Straits shall not, except in the event of damage or peril of the sea, remain therein longer than is necessary for them to effect the passage.

#### **Article 17**

Nothing in the provisions of the preceding Articles shall prevent a naval force of any tonnage or composition from paying a courtesy visit of limited duration to a port in the Straits, at the invitation of the Turkish Government. Any such force must leave the Straits by the same route as that by which it entered, unless it fulfills the

conditions required for passage in transit through the Straits as laid down by Articles 10, 14 and 18.

### **Article 18**

(1) The aggregate tonnage which non-Black Sea Powers may have in that sea in time of peace shall be limited as follows:

(a) Except as provided in paragraph (b) below, the aggregate tonnage of the said Powers shall not exceed 30,000 tons :

(b) If at any time the tonnage of the strongest fleet in the Black Sea shall exceed by at least 10.000 tons the tonnage of the strongest fleet in that sea at the date of the signature of the present Convention, the aggregate tonnage of 30,000 tons mentioned in paragraph (a) shall be increased by the same amount, up to a maximum of 45,000 tons. For this purpose, each Black Sea Power shall, in conformity with Annex IV to the present Convention, inform the Turkish Government, on the 1<sup>st</sup> January and 1<sup>st</sup> July of each year, of the total tonnage of its fleet in the Black Sea; and the Turkish Government shall transmit this information to the other High Contracting Parties and to the Secretary-General of the League of Nations.

(c) The tonnage which any one of non - Black Sea Power may have in the Black Sea shall be limited to two - thirds of the aggregate tonnage provided for in paragraphs (a) and (b) above;

(d) In the event, however, of one or more non - Black Sea Powers desiring to send naval forces into the Black Sea, for a humanitarian purpose, the said forces which shall in no case exceed 8,000 tons altogether shall be allowed to enter the Black Sea without having to give the notification provided for in Article 13 of the present Convention provided an authorisation is obtained from the Turkish Government in the following circumstances:

if the figure of the aggregate tonnage specified in paragraphs (a) and (b) above has not been reached and will not be exceeded by the dispatch of the forces which it is desired to send, the Turkish Government shall grant the said authorisation within the shortest possible time after receiving the request which has been addressed to it; if the said figure has already been reached or if the dispatch of the forces which it is desired to send will cause it to be exceeded, the Turkish Government will immediately inform the other Black Sea Powers of the request for authorisation, and if the said Powers make no objection within twenty - four hours of having received this information, the Turkish Government shall, within forty - eight hours at the latest, inform the interested Powers of the reply which it has decided to make to their request.

Any further entry into the Black Sea of naval forces of non-Black Sea Powers

shall only be effected within the available limits of the aggregate tonnage provided for in paragraphs (a) and (b) above.

(2) Vessels of war belonging to non - Black Sea Powers shall not remain in the Black Sea more than twenty - one days whatever be the object of their presence there.

### **Article 19**

In time of war, Turkey not being belligerent, warships shall enjoy complete freedom of passage and navigation through the Straits under same conditions as those laid down in Articles 10 to 18.

Vessels of war belonging to belligerent Powers shall not, however, pass through the Straits except in cases arising out of the application of Article 25 of the present Convention, and in cases of assistance rendered to a State victim of aggression in virtue of a treaty of mutual assistance binding Turkey, concluded within the framework of the Covenant of the League of Nations, and registered and published in accordance with the provisions of Article 18 of the Covenant.

In the exceptional cases provided for in the preceding paragraph, the limitations laid down in Articles 10 to 18 of the present Convention shall not be applicable.

Notwithstanding the prohibition of passage laid down in paragraph 2 above, vessels of war belonging to Belligerent Powers, whether they are Black Sea Powers or not, which have become separated from their bases, may return thereto.

Vessels of war belonging to belligerent Powers shall not make any capture, exercise the right of visit and search or carry out any hostile act in the Straits.

### **Article 20**

In time of war, Turkey being belligerent, the provisions of Articles 10 to 18 shall not be applicable; the passage of warships shall be left entirely to the discretion of the Turkish Government.

### **Article 21**

Should Turkey consider herself to be threatened with imminent danger of war she shall have the right to apply the provisions of Article 20 of the present Convention.

Vessels which have passed through the Straits before Turkey has made use of the powers conferred upon her by the preceding paragraph, and which thus find themselves separated from their bases, may return thereto. It is, however, understood

that Turkey may deny this right to vessels of war belonging to the State whose attitude has given rise to the application of the present Article.

Should the Turkish Government make use of the powers conferred by the first paragraph of the present Article, a notification to that effect shall be addressed to the High Contracting Parties and to the Secretary-General of the League of Nations.

If the Council of League of Nations decide by a majority of two thirds that the measures thus taken by Turkey are not justified, and if such should also be the opinion of the majority of the High Contracting Parties signatories to the present Convention, the Turkish Government undertakes to discontinue the measures in question as also any measures which may have been taken under Article 6 of the present Convention.

#### **Article 22**

Vessels of war which have on board cases of plague, cholera, yellow fever, exanthematic typhus or smallpox or which have had such cases on board within the last seven days and vessels of war which have left an infected port within less than five times twenty - four hours must pass through the Straits in quarantine and apply by the means on board such prophylactic measures as are necessary in order to prevent any possibility of the Straits being infected.

### **Section III – Aircraft.**

#### **Article 23**

In order to assure the passage of civil aircraft between the Mediterranean and the Black Sea, the Turkish Government will indicate the air routes available for this purpose, outside the forbidden zones which may be established in the Straits. Civil aircraft may use these routes provided that they give the Turkish Government, as regards occasional flights, a notification of three days, and as regards flights on regular services, a general notification of the dates of passage.

The Turkish Government moreover undertake, notwithstanding any remilitarisation of the Straits, to furnish the necessary facilities for the safe passage of civil aircraft authorised under the air regulations in force in Turkey to fly across Turkish territory between Europe and Asia. The route which is to be followed in the Straits zone by aircraft which have obtained an authorisation shall be indicated from time to time.

## **Section IV – General Provisions**

### **Article 24**

The functions of the International Commission set up under the Convention relating to the regime of the Straits of the 24<sup>th</sup> July, 1923 are hereby transferred to the Turkish Government.

The Turkish Government undertake to collect statistics and to furnish information concerning the application of Article 11, 12, 14 and 18 of the present Convention.

They will supervise the execution of all the provisions of the present Convention relating to the passage of vessels of war through the Straits.

As soon as they have been notified of the intended passage through the Straits of a foreign naval force the Turkish Government shall inform the representatives at Ankara of the High Contracting Parties of the composition of that force, its tonnage, the date fixed for its entry into the Straits, and, if necessary, the probable date of its return.

The Turkish Government shall address to the Secretary-General of the League of Nations and to the High Contracting Parties an annual report giving details regarding the movements of foreign vessels of war through the Straits and furnishing all information which may be of service to commerce and navigation, both by sea and by air, for which provision is made in the present Convention.

### **Article 25**

Nothing in the present Convention shall prejudice the rights and obligations of Turkey, or of any of the other High Contracting Parties members of the League of Nations, arising out of the Covenant of the League of Nations.

## **Section V – Final Provisions.**

### **Article 26**

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited in the archives of the Government of the French Republic in Paris.

The Japanese Government shall be entitled to inform the Government of the French Republic through their diplomatic representative in Paris that the ratification has been given, and in that case they shall transmit the instrument of ratification as

soon as possible.

A procès - verbal of the deposit of ratifications shall be drawn up as soon as six instruments of ratification, including that of Turkey, shall have been deposited. For this purpose the notification provided for in the preceding paragraph shall be taken as the equivalent of the deposit of an instrument of ratification.

The present Convention shall come into force on the date of the said procès - verbal.

The French Government will transmit to all the High Contracting Parties an authentic copy of the procès - verbal provided for in the preceding paragraph and of the procès - verbaux of the deposit of any subsequent ratifications.

### **Article 27**

The present Convention shall, as from the date of its entry into force, be open to accession by any Power signatory to the Treaty of Peace at Lausanne signed on the 24<sup>th</sup> July, 1923.

Each accession shall be notified, through the diplomatic channel, to the Government of the French Republic, and by the latter to all the High Contracting Parties.

Accessions shall come into force as from the date of notification to the French Government.

### **Article 28**

The present Convention shall remain in force for twenty years from the date of its entry into force.

The principle of freedom of passage and navigation affirmed in Article 1 of the present Convention shall however continue without limit of time.

If, two years prior to the expiry of the said period of twenty years, no High Contracting Party shall have given notice of denunciation to the French Government, the present Convention shall continue in force until two years after such notice shall have been given. Any such notice shall be communicated by the French Government to the High Contracting Parties.

In the event of the present Convention being denounced in accordance with the provisions of the present Article, the High Contracting Parties agree to be represented at a conference for the purpose of concluding a new Convention.

## Article 29

At the expiry of each period of five years from the date of the entry into force of the present Convention each of the High Contracting Parties shall be entitled to initiate a proposal for amending one or more of the provisions of the present Convention.

To be valid, any request for revision formulated by one of the High Contracting Parties must be supported, in the case of modifications to Articles 14 or 18, by one other High Contracting Party, and, in the case of modifications to any other Article, by two other High Contracting Parties.

Any request for revision thus supported must be notified to all the High Contracting Parties three months prior to the expiry of the current period of five years. This notification shall contain details of the proposed amendments and the reasons which have given rise to them.

Should it be found impossible to reach an agreement on these proposals through the diplomatic channel, the High Contracting Parties agree to be represented at a conference to be summoned for this purpose.

Such a conference may only take decisions by an unanimous vote, except as regards cases of revision involving Articles 14 and 18, for which a majority of three - quarters of the High Contracting Parties shall be sufficient.

The said majority shall include three - quarters of the High Contracting Parties which are Black Sea Powers, including Turkey.

## ANNEX I.

1. The taxes and charges which may be levied in accordance with Article 2 of the present Convention shall be those set forth in the following table. Any reductions in these taxes or charges which the Turkish Government may grant shall be applied without any distinction based on the flag of the vessel :

Nature of service rendered	Amount of tax or charge to be levied on each ton of net register tonnage Francs gold
a) Sanitary Control Stations .....	0.075
b) Lighthouses, Light and Channel Buoys up to 800 tons .....	0.42

Above 800 tons .....	0.21
c) Life Saving Services, including Life-boats, Rocket Stations, Fog Sirens, Direction-finding Stations, and day Light Buoys not comprised in (b) above, or other similar installations .....	0.10

2. The taxes and charges set forth in the table attached to paragraph I of the present Annex shall apply in respect of a return voyage through the Straits (that is to say, a voyage from the Aegean Sea to the Black Sea and return back to the Aegean Sea or else a voyage through the Straits from the Black Sea to the Aegean Sea followed by a return voyage into the Black Sea) ; if, however, a merchant vessel re-enters the Straits with the object of returning into the Aegean Sea or to the Black Sea, as the case may be, more than six months after date of entry into the Straits for the outward voyage, such vessel may be called upon to pay these taxes and charges a second time, provided no distinction is made based on the flag of the vessel.

3. If, on the outward voyage, a merchant vessel declares an intention of not returning, it shall only be obliged as regards the taxes and charges provided for in paragraphs (b) and (c) of the first paragraph of the present Annex, to pay half the tariff indicated.

4. The taxes and charges set forth in the table attached to the first paragraph of the present Annex, which are not to be greater than is necessary to cover the cost of maintaining the services concerned and of allowing for the creation of a reasonable reserve fund or working balance, shall not be increased or added to except in accordance with the provisions of Article 29 of the present Convention. They shall be payable in gold francs or in Turkish currency at the rate of exchange prevailing on the date of payment.

5. Merchant vessels may be required to pay taxes and charges for optional services, such as pilotage and towage, when any such service shall have been duly rendered by the Turkish authorities at the request of the agent or master of any such vessel. The Turkish Government will publish from time to time the tariff of the taxes and charges to be levied for such optional services.

6. These tariffs shall not be increased in cases in the event of the said services being made obligatory by reason of the application of Article 5.



## ANNEX II<sup>(1)</sup>

### A. STANDARD DISPLACEMENT.

(1) The standard displacement of a surface vessel is the displacement of the vessel, complete, fully manned, engined, and equipped ready for sea, including all armament and ammunition, equipment, outfit, provisions and fresh water for crew, miscellaneous stores and implements of every description that are intended to be carried in war, but without fuel or reserve feed water on board.

(2) The standard displacement of a submarine is the surface displacement of the vessel complete (exclusive of the water in non-watertight structure), fully manned, engined and equipped ready for sea, including all armament and ammunition, equipment, outfit, provisions for crew, miscellaneous stores and implements of every description that are intended to be carried in war, but without fuel, lubricating oil, fresh water or ballast water of any kind on board.

(3) The word «ton» except in the expression «metric tons» denotes the ton of 2,240 lb (1,016 kilos).

### B. CATEGORIES.

(1) Capital Ships are surface vessels of war belonging to one of the two following sub - categories :

(a) Surface vessels of war, other than aircraft - carriers, auxiliary vessels, or capital ships of sub - category (b), the standard displacement of which exceeds 10,000 tons (10,160 metric tons) or which carry a gun with a calibre exceeding 8 in. (203mm);

(b) Surface vessels of war, other than aircraft - carriers, the standard displacement of which does not exceed 8,000 tons (8,128 metric tons) and which carry a gun with a calibre exceeding 8 in. (203 mm).

(2) Aircraft - Carriers are surface vessels of war, whatever their displacement, designed or adapted primarily for the purpose of carrying and operating aircraft at sea. The fitting of a landing - on or flying - off deck on any vessel of war, provided such vessel has not been designed or adapted primarily for the purpose of carrying and operating aircraft at sea, shall not cause any vessel so fitted to be classified in the category of aircraft - carriers.

The category of aircraft - carriers is divided into two sub-categories as follows :

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<sup>(1)</sup> The wording of the present Annex is taken from the London Naval Treaty of March 25, 1936

(a) Vessels fitted with a flight deck, from which aircraft can take off, or on which aircraft can land from the air;

(b) Vessels not fitted with a flight deck as described in (a) above.

(3) Light Surface Vessels are surface vessels of war other than aircraft-carriers, minor war vessels or auxiliary vessels, the standard displacement of which exceeds 100 tons (102 metric tons) and does not exceed 10,000 tons (10,160 metric tons), and which do not carry a gun with a calibre exceeding 8 in. (203 mm). The category of light surface vessels is divided into three subcategories as follows :

(a) Vessels which carry a gun with a calibre exceeding 6.1 in. (155 mm.) ;

(b) Vessels which do not carry a gun with a calibre exceeding 6.1 in. (155 mm.) and the standard displacement of which exceeds 3,000 ton (3,048 metric tons) ;

(c) Vessels which do not carry a gun with a calibre exceeding 6.1 in. (155 mm.) and the standard displacement of which does not exceed 3,000 tons (3,048 metric tons).

(4) Submarines are all vessels designed to operate below the surface of the sea.

(5) Minor War Vessels are surface vessels of war, other than auxiliary vessels, the standard displacement of which exceeds 100 tons (102 metric tons) and does not exceed 2,000 tons (2,032 metric tons), provided they have none of the following characteristics :

(a) Mount a gun with a calibre exceeding 6.1 in. (155 mm.);

(b) Are designed or fitted to launch torpedoes;

(c) Are designed for a speed greater than twenty knots.

(6) Auxiliary Vessels are naval surface vessels the standard displacement of which exceeds 100 tons (102 metric tons), which are normally employed on fleet duties or as troop transports, or in some other way than as fighting ships, and which are not specifically built as fighting ships, provided they have none of the following characteristics :

(a) Mount a gun with a calibre exceeding 6.1 in. (155 mm.) ;

(b) Mount more than eight guns with a calibre exceeding 3 in. (76 mm.);

(c) Are designed or fitted to launch torpedoes;

(d) Are designed for protection by armour plate;

(e) Are designed for a speed greater than twenty-eight knots;

- (f) Are designed or adapted primarily for operating aircraft at sea;
- (g) Mount more than two aircraft-launching apparatus.

**C. OVER-AGE.**

Vessels of the following categories and sub-categories shall be deemed to be «over-age» when the undermentioned number of years have elapsed since completion :

- (a) Capital ships ..... 26 years;
- (b) Aircraft-carriers ..... 20 years;
- (c) Light surface vessels, sub-categories (a) and (b):
  - (i) If laid down before 1<sup>st</sup> January, 1920 ... 16 years;
  - (ii) If laid down after 31<sup>st</sup> December, 1919 ..20 years;
- (d) Light surface vessels, sub-category (c) ..... 16 years;
- (e) Submarines .....13 years;

**ANNEX III.**

It is agreed that, of the three over-age training ships, as indicated below, belonging to the Japanese Fleet, two units may be allowed to visit ports in the Straits at the same time.

The aggregate tonnage of these two vessels shall in this case be considered as being equivalent to 15,000 tons.

Date when laid down	Date of entry into service	Standard displacement (tons)	Armaments
Asama ..... 20-X-1896	18-III-1899	9,240	IV x 200 mm. XII x 150 mm.
Yakumo ..... 1-IX-1898	20-VI-1900	9,010	IV x 200 mm. XII x 150 mm.
Iwate ..... 11-XI-1898	18-III-1901	9,180	IV x 200 mm. XIV x 150 mm.

**ANNEX IV.**

1. The categories and sub-categories of vessels to be included in the calculation of the total tonnage of the Black Sea Powers provided for in Article 18 of the present Convention are the following:

Capital Ships:

Sub-category (a); Sub-category (b).

Aircraft-Carriers:

Sub-category (a); Sub-category (b).

Light Surface Vessels:

Sub-category (a); Sub-category (b); Sub-category (c)

Submarines

As defined in Annex II to the present Convention.

The displacement which is to be taken into consideration in the calculation of the tonnage is the standard displacement as defined in Annex II. Only those vessels shall be taken into consideration which are not over - age according to the definition contained in the said Annex.

2. The notification provided for in Article 18, paragraph (b), shall also include the total tonnage of vessels belonging to the categories and sub - categories mentioned in paragraph 1 of the present Annex.

## **PROTOCOL**

At the moment of signing the Convention bearing this day's date, the undersigned Plenipotentiaries declare for their respective Governments that they accept the following provisions:

(1) Turkey may immediately remilitarise the zone of the Straits as defined in the Preamble to the said Convention.

(2) As from the 15<sup>th</sup> August, 1936, the Turkish Government shall provisionally apply the regime specified in the said Convention.

(3) The present Protocol shall enter into force as from this day's date. Done at Montreux, the 20<sup>th</sup> of July, 1936.

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