



Erik Franckx

*President of the Centre for International Law
Full-time Research Professor
Faculty of Law and Criminology
Vrije Universiteit Brussel*¹*

Book Review:

*Alexander Lott's **The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage***

Published as the seventeenth volume in Brill Nijhoff's prestigious series titled 'International Straits of the World', Alexander Lott's *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage* (Leiden, 2018, 306 pages) brings this series back to the Baltic Sea after a span of nearly 40 years. It follows a more general work by G. Alexandersson, *The Baltic Straits* (Leiden, Brill Nijhoff, 1982, 150 pages), which appeared in this series in 1982, four years after the series first saw the light of day, in 1978. Written at a time when notions such as 'Comecon' and 'Warsaw Pact' still justified a separate heading in such volumes, the work did not focus much on the eastern part of the Baltic, south of the Gulf of Finland, as far as straits used for international navigation were concerned, as the Soviet Union extended across that entire stretch of coastline. Moreover, not long after the work's publication, that country closed off the majority of these straits by means of a system of straight baselines, in 1985. Lott's volume fills the gap in some sense, as it zooms in on several straits in the vicinity of Estonia that fully deserve renewed attention in view of the major geopolitical changes that occurred in the area in the early 1990s.

It addresses first of all Viro Strait, north of Estonia. This represents new nomenclature, introduced by the author for purposes of distinguishing between the strait north of Estonia that leads into the Gulf of Finland and the Gulf of Finland proper. The term 'Gulf of Finland' has, in practice, been used to cover a much wider area than Viro Strait, leading to a situation whereby the former term has been used to designate either body of water, or both. Secondly, it discusses Irbe Strait, which lies to the south of Estonia – i.e., the main entrance to the Gulf of Riga. The third main body of water dealt with, lying between the two above-mentioned straits, is the Sea of Straits, a water area surrounded by the Estonian mainland to the east, the Island of Vormsi to the north, and the islands of Hiiumaa and Saaremaa to the west. In discussing these areas, the book appears to be a timely addition, filling in a certain void left in the International Straits of the World series ever since the Soviet Union's disappearance from the political map of the world. In setting this work in general context, it is interesting to note, finally, that the series remains in the Baltic with its next volume, Pirjo Kleemola-Juntunen's *The Åland Strait* (Leiden, Brill Nijhoff, 2019, 173 pages). This strait, situated to the north of the Gulf of Finland, had at least been touched upon specifically in connection with the strait issue through the 1982 book by Alexandersson, albeit in a rather succinct manner.

¹ The author has been serving as the president of the Belgian Society of International Law since 2017 and also holds teaching positions at Université Libre de Bruxelles; the University of Kent's Brussels School of International Studies; the Vrije Universiteit Brussel Institute of European Studies; Sorbonne University Abu Dhabi, in the United Arab Emirates; and the University of Akureyri, in Iceland.

Lott's volume builds on the doctoral dissertation he successfully defended at Estonia's University of Tartu in early 2017, in which public defence this reviewer served as opponent. The volume in the straits series is a slightly reworked and expanded version of that sound piece of research.

The book starts out by providing a legal categorisation of the various straits in general. In decades gone by, the issue of straits used for international navigation had for a long time been considered to constitute a mere side aspect of the international law of the sea, normally settled by means of either international treaties guaranteeing passage rights in a few problematic straits with overlapping territorial seas, such as the Bosphorus and the Dardanelles or the Danish straits, or, in the absence of such agreements, decisions of courts and tribunals, as with the Corfu Channel Case, ruled on by the International Court of Justice in 1949. Once states started seriously envisaging their territorial seas as extending beyond three nautical miles, however, this attitude changed radically. In reality, this meant that as soon as the strongest opponents to such expansion started to compass among themselves the legal implications of such a possible extension, issues arose. A good example here can be found in the early ideas developed, separately, firstly by the United States and its allies, on one hand, and the Eastern bloc, on the other, in the wake of the failure of the second United Nations Conference on the Law of the Sea (hereinafter, 'UNCLOS') in 1960. In the confusion that followed, wherein sometimes widely divergent state practice started to develop, the major maritime powers of that era initially tried to resolve the few remaining issues by proposing a three-pronged approach whose guiding principles can be summarised thus: Firstly, extension of the territorial sea beyond the three-nautical-mile limit would no longer be opposed; secondly, a limited extension in fisheries jurisdiction by the coastal state, to beyond the newly enlarged territorial sea, would be acceptable; and, lastly but not least, a special regime for newly created 'territorial' straits, based on freedom of navigation, had to be established. Once the two blocs realised that they were striving to arrive at similar outcomes in parallel to contain what one author has called the siren song of the 'territorial temptation' at sea,² they even joined forces by the end of the 1960s through direct contacts in aims of stemming that tide by means of a common approach, despite the fact that all these discussions coincided with the height of the Cold War era.

Pardo's initiative in 1967, in which he addressed the General Assembly of the United Nations with a three-hour speech expounding on the fate to which deep-seabed mineral resources would be consigned, entirely changed this approach. Instead of trying, once again, to tie up the remaining loose ends from UNCLOS I and II, UNCLOS III introduced a totally new approach in efforts to get all states on board this time. Indeed, the many developing states, most of which had become independent since the conclusion of the 1958 convention framework, considered the latter to reflect the interests of the developed states. Pardo, by promoting the idea of a common heritage of mankind with respect to deep-seabed mineral resources, opened a new window of opportunity. If all these law-of-the-sea issues were to be linked together, both groups could become active stakeholders in the development of a single convention document. For that goal to be reached, though, the standard majority-voting procedures employed for UNCLOS I and II needed to be adapted and the approach exchanged for a consensus-driven form of negotiations. At the same time, a package-deal approach was to be applied to the final result to be attained. In contrast to the four separate law-of-the-sea conventions of 1958, a single final document needed to be arrived at that states could accept either *in toto* or not at all, as reflected in Article 309 of the United Nations Convention on the Law of the Sea ('the 1982 Convention' hereinafter), which, as a rule, prohibits all reservations except those expressly permitted.

In this melting pot of law-of-the-sea issues considered during UNCLOS III, lasting from 1973 until 1982, the strait issue formed a quintessential part. For those Soviet and US scholars closely related to these protracted negotiations, the issue of straits is said to have constituted not only a *sine qua non* for the conclusion of the 1982 Convention³ but also, at the same time, an issue the settlement of which formed a precondition for the resolution of many other issues the conference needed to tackle.⁴ As Lott mentions in the book, Satya Nandan, who not only co-chaired a working group that dealt specifically with the strait issue but

² Bernard H Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law* 830. DOI: <https://doi.org/10.1017/s0002930000031912>.

³ Representing the US point of view: John Norton Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *American Journal of International Law* 77, 77. DOI: <https://doi.org/10.2307/2200905>.

⁴ Representing the Soviet point of view: S V Vinogradov and L V Skalova, 'Prolivny, ispol'zuemye dlia mezhdunarodnogo sudokhodstva: Znachenie i obshchaia kharakteristika' (Straits Used for International Navigation: Meaning and General Characteristics) in A P Movchan and A Iankov (eds), *Mirovoi okean i mezhdunarodnoe pravo: Otkrytoe more, mezhdunarodnye prolivny, arkhpelazhnye vody* (vol 3, Nauka 1988) 87 and 89 (see also the discussion on page 87).

also served for roughly a decade as Under-Secretary-General of the United Nations and Special Representative of the Secretary-General for the Law of the Sea after the conclusion of UNCLOS III (1983–1992), even labelled the matter of straits ‘by far the single most important issue at the Conference’.⁵

With this being such a crucial issue, it comes as no surprise that the application of the consensus procedure to the process of finding a compromise between states bordering a strait and user states finally resulted in a multitude of legal categories of straits. Nevertheless, one would have expected at the outset that the number of such legal categories of straits would have been fixed. However, depending on whether one prefers to read Part III of the 1982 Convention (‘Straits used for international navigation’) in isolation or, instead, as closely coupled with the other provisions of that document, this number varies. Lott distinguishes among seven distinct types of straits but admits that, as yet, there remains some doubt amongst scholars as to the exact number.⁶ Secondly, one would have assumed Part III of the 1982 Convention to provide a bagatelle-type legal classification of straits, with this analogy referring to putting in a coin at the top and thereby knowing in advance exactly which category it would end up in at the bottom. In other words, one might have expected a process that would be watertight, with no possibility of tampering *en cours de route* when attempts are made to apply these convention provisions to any given strait.

One of the main contributions of the book is that it leads the reader to recognise that this is not necessarily so. The states bordering a strait – and, in fact, even those not bordering a particular strait – can influence, by their own actions, the legal qualification of a particular strait. Moreover, the book demonstrates that the classification of a strait at a particular point in time need not be set in stone, as it may well change in the course of time in consequence of general political developments or even specific actions undertaken by relevant states.

The book opens its Part I by focusing on the legal categories of straits. As indicated above, even their mere classification is far from settled. For instance, one interesting topical question is that of whether straits located in ice-covered waters, and thereby subject to Article 234 of the 1982 Convention, constitute a separate category. The legal issue here is whether Part III trumps Article 234 in the case of straits in ice-covered waters, in line with the position taken by the United States or, alternatively, Article 234 provides the coastal state with some further competence, not referenced in Part III itself. As Article 234 is the only article giving the coastal state regulatory powers with respect to navigation issues that do not necessitate submission to the International Maritime Organization for approval, it entails a seemingly discretionary power for the coastal state. In light of the extremely vague notion of ‘due regard to navigation’ articulated in Article 234 – the only limitation to otherwise apparently limitless discretionary power – Lott opines that, given the importance attached to the strait issue during UNCLOS III, clearer expression of the precedence of Article 234, prioritising it over Part III, would have been required in the convention text, *quod non*. He therefore argues against Article 234’s standing as a basis for creation of a separate legal category of straits.

Then, Part II shifts the focus to the Baltic Sea and, more specifically, to the significance of maritime-boundary delimitation treaties for the legal regime of the straits around Estonia, as described above. The Gulf of Finland, for purposes of maritime delimitation between Estonia and Russia, is considered under two subheadings. The discussion under the first of these focuses on territorial-sea delimitation and that under the second subheading on the delimitation of the exclusive economic zone. With regard to the territorial sea, this boundary has had a tumultuous and complex evolution because of a history wherein Estonia moved from independence to forming part of the Soviet Union, then back to independence. The treaties concluded during the ‘first independence’, such as 1920’s Tartu Peace Treaty and the 1925 Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors (referred to below as ‘the 1925 Helsinki Convention’), and their impact on the delimitation of the territorial sea (or lack thereof) create complex legal issues, which the author subsequently tries to rhyme with the present-day reality. The material under this subheading ends with a detailed analysis of the territorial sea’s delimitation in the Narva Bay, which remains pending. The presence of numerous islands in the Gulf of Finland most certainly constitutes a complicating factor in this respect.

The presentation under the subheading for the exclusive economic zone is much shorter but may be of even greater importance for the author’s project, as it proves that Russia has consistently maintained an exclusive economic zone in the eastern part of the Gulf of Finland, even though the geography of the area,

⁵ As quoted on page 9 of the book.

⁶ See p. 22 *ff.* of the book.

precisely because of the presence of numerous islands, would normally have allowed a 12-mile territorial sea to cover the whole area. By hanging on to a small exclusive economic zone north of Gogland, Russia is able to influence the legal regime of Viro Strait even though it no longer borders that particular strait.

Presented under the third and final subheading in Part II, focusing on the significance of boundary treaties with regard to the legal regime of straits concerns, is the Gulf of Riga. Here, one can make remarks similar to those offered with respect to the Gulf of Finland. Historical treaties concluded between Estonia and Latvia in the 1920s come into play once again, and also pertinent is the existence today of a rather small pocket of Latvian exclusive economic zone in the eastern part of the Gulf of Riga, which very much influences the legal regime applicable to the Strait of Irbe. Coupled with the effect of islands on maritime delimitation, contested sovereignty over the island Ruhnu, located in the middle of the Gulf of Riga, further strained bilateral relations as the two countries tried to find a solution to the conundrum of their maritime boundary in this particular area.

Part III then turns attention to the significance of the outer limits of maritime zones with regard to the legal regime of straits. Two examples are provided – namely, Irbe Strait, in the Gulf of Riga, and Viro Strait, in the Gulf of Finland. In the case of the former, the two states that border the strait are also the only two states having a coastline within the Gulf of Riga. Also, even though relying on the Soviet enclosure of the gulf by means of a single stretch of straight baseline in 1985, as already alluded to, Estonia and Latvia could in all probability have opted to continue application of that status had they both agreed,⁷ one of the parties objected to this approach and a delimitation agreement was finally arrived at in 1996. The main result of this delimitation agreement is that the Latvian side today possesses an exclusive economic zone area, making Irbe Strait an Article 37 strait for which the regime of transit passage applies, even though the normal shipping route to Riga only passes through territorial-sea areas. In stark contrast to the Russian position on the Gulf of Finland, this is a favourable position neither for Latvia nor for Estonia, leading the author to recommend the creation of an exclusive economic zone corridor in Irbe Strait itself, which would allow both riparian states to better address potential security concerns in their respective territorial seas.

Such a self-imposed corridor of exclusive economic zone, obliging states bordering a strait to refrain from extending their respective territorial seas to their maximal limit, has been a recipe tested in Viro Strait. By creating a stretch of exclusive economic zone in the middle of that strait, Estonia and Finland have been able to guarantee freedom of navigation primarily for ships from Russia, equally before World War II and after that country lost most of its Baltic Sea coastline in 1991. This particular approach taken by the states bordering a strait places the latter under the legal category of an Article 36 strait ('High seas routes or routes through exclusive economic zones through straits used for international navigation').

Part IV addresses the thorny issue of whether Viro Strait should not be considered an Article 35(c) strait instead – that is, a strait whose legal regime 'is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits', in that convention's words. A theoretical argument could be made that the 1925 Helsinki Convention, when read together with its 1926 Moscow Protocol concluded among Estonia, Finland, and the Soviet Union (creating sea lanes where freedom of the seas applied irrespective of the provisions of the 1925 Helsinki Convention), could well be considered to fall under the legal category described in Article 35(c) of the 1982 Convention. However, the chequered history of this agreement (which encompasses the Estonian Supreme Court's restrictive reading of the Moscow Protocol in 1932, Estonia's *de facto* ceasing to be a party to that convention for 40 years, and Finland's formal withdrawal in 2010) leads the author to conclude that this line of reasoning is no longer tenable at present. The 1994 bilateral agreement between Estonia and Finland, establishing the exclusive economic zone corridor mentioned above, may be of a very similar nature, but for obvious reasons this agreement cannot pass the 'long-standing' hurdle established by Article 35(c).

The fifth and final part of the book addresses the Sea of Straits, which comprises numerous passages, of various sorts, running in either a north–south or an east–west direction. Ever since 1993, when Estonia passed its Maritime Boundaries Act, all these straits have been enclosed by a 'newly' established system of straight baselines that, in fact, very much resemble the straight baselines established in 1985 by the Soviet Union.⁸ As these straits connect one part of the high seas or exclusive economic zone with another part of

⁷ Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), International Court of Justice, Judgement of 11 September 1992, para 394.

⁸ Alex G Oude Elferink, 'Estonia: The Law on the Boundaries of the Maritime Tract' (1994) 9 *International Journal of Marine and Coastal Law* 235, 237. DOI: <https://doi.org/10.1163/157180894x00106>.

the same, the regime of transit passage would normally apply in accordance with Part III. The question here is whether these straits are subject to the provision of Article 35(a) of the 1982 Convention whereby internal waters in straits are excluded from being subject to the regime of transit passage unless the establishment of a straight baseline in accordance with the method set forth in Article 7 has ‘the effect of enclosing as internal waters areas which had not previously been considered as such’, as provided in that article, in which case transit passage remains in operation. To clarify this issue, Lott delves into material from Estonian archives in attempts to demonstrate that this country, prior to 1940, already considered the Sea of Straits to be internal waters. Primarily on the basis of the 1938 Neutrality Act adopted by the Estonian Parliament, mirroring the Nordic Rules of Neutrality, by means of which Denmark, Finland, Norway, and Sweden had mutually harmonised their respective neutrality legislation, he concludes that Article 35(a) applies to the Sea of Straits today, without applicability of the exception specified in that article. Secondly, he argues that, even if a country does not accept the foregoing conclusion, the so-called Messina exception of Article 38(1) (applicable if a route of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island) would still reduce the transit regime to a regime of non-suspendable innocent passage.

For anyone interested in the issue of straits, this book is definitely to be counted as highly recommended literature. Based as it is on thorough research involving Estonian archival sources, taken in conjunction with more recent parliamentary and governmental documents, it provides the reader with a good sense of how intricate the determination of the precise legal category of a particular strait under Part III of the 1982 Convention can become in practice. This book, beyond a shadow of a doubt, adds new insights as to the exact legal regime applicable to these straits surrounding Estonia, which heretofore had not been covered by specialist literature in any comparable depth. It must be readily admitted that the particular complex relationship that exists between Estonia and its neighbours, especially Russia because of obvious historical and geographical specificities, will not provide the reader with any easy transplants ready to be applied to straits in other parts of the world. The book nevertheless brings useful insights with regard to the level of malleability that characterises Part III of the 1982 Convention when it is being applied in practice.

The book clearly proceeds from an Estonian perspective, and this reviewer would be rather interested in reading possible Finnish and Russian perspectives – grounded in a similar level of rigorous research – on the conclusions reached by the author with respect to Viro Strait, along with Latvian views on his findings related to the Strait of Irbe. Finally, it can be added that the form of the book has been attended to very well and that its author employs clear and polished language. If any additional wish might be expressed with respect to the form, it would be related to the maps reproduced in the annexes, since these were presented in a much clearer format in the publication containing the doctoral dissertation itself, as published by the University of Tartu.