The Application of the Transit Passage Regime in Straits Used for International Navigation: A Study of the Strait of Hormuz

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List of Abbreviations

Acronym	Description
1958 Geneva Convention	The 1958 Geneva Convention on Territorial Sea and Contiguous Zone
UNCLOS	United Nation Convention on the Law of the Sea
NM	Nautical miles
IMO	International Maritime Organisation
EEZ	Exclusive Economic Zone
TTS	Traffic Separation Scheme
ICJ	International Court of Justice
ILA	International Law Association
U.S.	United States of America
VCLT	Vienna Convention on the Law of Treaties
UAE	United Arab Emirates
MSC	Maritime Safety Committee
SRS	Ship Reporting System
AIS	Automatic Identification System

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Abstract

The Strait of Hormuz is of great importance as it is the gateway for the Gulf States maritime activities and in particular their oil and liquified natural gas exports to the rest of the world. About one fifth of the global oil supply passes through the Strait. Thus, the Strait is a potential source of violent conflict, and this was evident during the Iran-Iraq war in the 1980s. Therefore, the significance of establishing a sustainable and peaceful legal framework for navigating through such straits cannot be over-emphasised. This study examines the applicable transit passage regime in straits used for international navigation, with a special focus on the Strait of Hormuz (the Strait). Most straits used for international navigation, which are choke points, are prone to generating conflicts and the Strait of Hormuz is a notable example.

There are competing claims on the applicable legal regime of passage through the Strait among some stakeholders in the use of the Strait including notably Iran, the United States, and Oman. The problem of the rights of passage through the Strait is of paramount importance for the Middle East States, since its unresolved issues may result in conflicts. Considering the strategic importance of the Strait for international trade and security, resolving the competing claims on the applicable legal regime is in the interest of user States and, indeed, the entire international community. This research is a critical examination of applicable transit passage regime for instituting a peaceful and sustainable passage through the Strait of Hormuz. This thesis adopts a formalist, doctrinal approach, to set out the need for a sustainable regime of passage through the Strait.

The issue of transit passage through this strait gains' greater significance in light of Iran's repeated threats to block the passageway. Hence, the significance of establishing a sustainable and peaceful legal framework for navigating through such straits cannot be over-emphasised. Yet, the critical issue of the legal regime of the Strait of Hormuz remains largely under-researched. Despite its relevance to coastal States, there appears to be a lack of contemporary research on this issue, either in English or in Arabic. There is a gap in literature/scholarship and this thesis addresses this gap and makes a scholarly contribution. This thesis aims to provide a comprehensive analysis of the legal regulation of the transit passage through the Strait of Hormuz. Considering the strategic importance of the Strait for international trade, finding solutions for the problem is in the interest of other States and of the entire international community. The research shall be practically important for the national authorities, politicians, economic decision-makers, as well as for the scholars working over the problem of legal regime of transit passage through international straits.

Chapter 1: Introduction

The Application of the Transit Passage Regime in Straits Used for International Navigation: A Study of the Strait of Hormuz

INTRODUCTION

Straits used for international navigation perform a vital function, namely that of linking extensive international maritime highways. Straits offer a beeline for international shipping due to the time and money saved.[1] The significance of free access through straits was acknowledged by jurists like Hugo Grotius since the seventeenth century.[2] Hence, a schism emerges between the interest of the Coastal States[3] and user States.[4] The former wants to regulate passage and the latter wants an uninterrupted passage. This division has developed over the centuries, particularly when the near and far clash of interests was experienced in the twentieth century and posed a significant challenge which had to be addressed by international law.[5]

The Strait of Hormuz is of great importance for the Gulf States, to the extent that it constitutes a doorway for the maritime transport of oil and gas to the rest of the world and a 'pivotal' point 'in global diplomacy'[6]. Statistics show that a fifth of the global oil supply passes through the Strait and about '18 million barrels of oil passed through the Strait of Hormuz every day in 2020.'[7] Thus, the Strait of Hormuz is a potential source of violent conflict, and this was

[1] Nilufer Oral, 'Navigating the Oceans: Old and New Challenges for the Law of the Sea for Straits Used for International Navigation' (2019) 46 Ecology LQ 163.
[2] ibid.
[3] Coastal state means "a state having an open sea coast and asserting the sovereignty or jurisdiction in the areas of the sea adjacent to this coast". See Robin Churchill, '11 Under-Utilized Coastal State Jurisdiction: Causes and Consequences', *Jurisdiction over Ships* (Brill Nijhoff 2015) 278.
[4] User states means that states pass through straits used for international navigation.
[5] Oral (n 1).
[6] 'Strait of Hormuz - Oil Flows 2020' (*Statista*) <https://www.statista.com/statistics/277157/key-figures-for-the-strait-of-hormuz/> accessed 2 March 2024.
[7] ibid.

demonstrated by the fact that it was 'an important aspect of the Iran-Iraq war in the 1980s.'[8] In December 2018 Iran threatened that if it cannot sell its oil to the rest of the world through the Strait, then no other State in the region should be able to.[9] These threats are viewed as alarming by the Gulf States and other States in the region.[10] Thus, research on viable approaches to maintaining peace through international law is important. Where, as demonstrated by this study, the issue has been under-researched at best, the significance of this study cannot be over-emphasised. This thesis addresses the contentious issue of transit passage in the Strait of Hormuz among key stakeholders, reviews the main legal problems, and attempts to offer solutions to those problems.

Navigation through straits used for international navigation has always been important. However, the importance of navigating through internationally significant straits has increased because of their role in advancing both international trade, and the interests of the international community as a whole. They have also revealed themselves to be a very essential component of the international law of the sea, which is founded on the fundamental idea of the "freedom of the seas." The freedom of the seas in modern international law is attributed to Grotius who affirmed that "the air, running water, the sea . . . are common to all."[11] Due to the freedom of the sea, all countries are entitled to use them for fishing and navigation, and as a result, the straits like Gibraltar, Hormuz, Malacca, and Bab el-Mandab are used for both commercial shipping and military transport vessels.[12]

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[8] ibid.
[9] 'If Iran Can't Export Oil from Gulf, No Other Country Can, Iran's President Says' *Reuters* (4 December 2018) <https://www.reuters.com/article/us-oil-iran-idUSKBN1O30MI> accessed 30 September 2019.
[10] 'Tensions between Iran and the West Have the Gulf States on Edge' [2019] *The Economist* <https://www.economist.com/middle-east-and-africa/2019/07/25/tensions-between-iran-and-the-west-have-the-gulf-states-on-edge> accessed 30 September 2019.
[11] JS Reeves, 'Two Conceptions of the Freedom of the Seas' (1917) 22 The American Historical Review 535, 537.
[12] Devaditya Chakravarti and Nirmal Mathew, *The Legal Regime of Passage Rights through International Straits: The Legal Framework and an Analysis of the Political Implications for the Straits of Hormuz, Malacca and South China Sea* (Lambert Academic Publishing 2014) 3.

It is important to note that numerous attempts have been made to create a regulatory framework for international straits to support the preservation of the legitimate common interests of the international community. These interests as Tanaka points out in his assessment of Simma's elucidation of the same issue,[13] revolves around "international peace and security, solidarity between developed and developing countries, protection of the environment, the common heritage of mankind, and the protection of human rights".[14] Specifically, the issue of the right of passage through international straits, as a component of the freedom of the seas, has become more prominent due to the numerous political tensions and military conflicts that have occurred throughout history as a result of limitations on the use of international straits and discriminatory treatment of foreign ships in the name of protecting national security.[15] The Crimean War, which was sparked by the Bosporus and Dardanelles Straits, the landmark Corfu Channel case, and the conflict between Israel and Egypt, which was centred on the Tiran Strait, are notable examples.[16]

With the extension of the territorial sea to 12 nautical miles (NM), the fear of restriction and control of navigation over straits has been sensed throughout the user States, making it necessary to establish a comprehensive treaty regime for international straits.[17] The 1958 Geneva Convention on Territorial Sea and Contiguous Zone offered a partial solution when it set certain rules on passage on the territorial sea, as well as clarified the rights and duties of States with regards to the territorial sea.[18] Article 16(4) of the Convention provides that innocent passage of foreign ships through straits, which are used for international navigation

[13] Bruno Simma, *From Bilateralism to Community Interest in International Law* (Martinus Nijhoff 1994).
[14] Yoshifumi Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea' (2011) 15 Max Planck Yearbook of United Nations Law Online 329, 332.
[15] Chakravarti and Mathew (n 12) 3.
[16] ibid.
[17] United Nations, 'United Nation Convention on the Law of the Sea' (1982) 1833 U.N.T.S. Treaty Series 397. art 3.
[18] Geneva Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, 15 UST 1606 (1958 Geneva Convention).

between one part of the high seas and another part of the high seas or the territorial sea, shall not be suspended.[19] Nevertheless, neither the right of transit passage which means (the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit), nor the standards for the prohibition of innocent passage were clearly defined in the 1958 Geneva Convention. This, coupled with other unresolved questions of the legal regulation of the international regime of the sea, led the United Nation to establish a new multilateral convention that would, among other things, provide an adequate legal regime of international straits and offer clear rules of passage through them.[20]

United Nation Convention on the Law of the Sea (UNCLOS) that has been opened for signature at the 1982 United Nation Third Conference on the Law of the Sea, among other things, established the 12 NM limit of the territorial sea and provided a regime of transit passage and non-suspendable innocent passage through international straits in addition to the innocent passage regime in the territorial sea. The innocent passage in the territorial sea allows a ship from a foreign country to enter the territorial seas of another country as long as the navigation is peaceful and not offensive. Ships from all States, whether they are landlocked or coastal, are granted the right of innocent passage in the territorial sea. The right of non-suspendable innocent passage applies in straits of the type defined in Article 45(1)(b) and (2) of UNCLOS.[21] These articles have their origins from the above-mentioned Article 16(4) of the 1958 Geneva Convention. Even though UNCLOS has not escaped critical observation, especially those provisions relating to the transit passage regime, the navigational articles are still generally believed to provide a minimal satisfactory balance between the interests of trade and military navigation on the one hand, and the interests of straits States in protection their security and

[19] ibid art 16(4).
[20] Abdullah Al Sheddi, 'The Legal Regime of International Straits: A Case Study of the Legal and Political Implications for the Strait of Hormuz' (University of British Columbia 1991). 3.
[21] UNCLOS (n 17) art 45(1)(b).

resources on the other.[22] By way of illustration, straits states were given some regulatory authority to designate sea lanes, create traffic separation schemes with the consent of the International Maritime Organisation (IMO), and adopt laws and regulations to prevent the discharge of oily substances and other noxious substances from ships. In return, foreign shipping was granted unrestricted passage through straits subject to the transit passage.

Probably the most acute example of this controversy is the case of the Strait of Hormuz. This strategically important strait connects the Arabian Gulf to the Indian Ocean. Both Iran and Oman (the coastal States of the Strait) claimed 12 NM of territorial sea in their domestic laws before the 1982 Convention codified the limit. Further extension of their territorial sea would lead to loss by the Strait of its central point of the High Seas. Oman signed UNCLOS in 1/7/1983 and ratified it in 17/8/1989. Whereas Iran signed it in 10/12/1982. However, Iran does not appear to have ratified this convention.[23]

The vulnerability of the sea lanes threatened by military conflicts, terrorist activities, economic wars, and other factors of instability, have raised concern about maintenance of the Strait's safety. This safety cannot be achieved unless the disputes surrounding the Strait are resolved. This includes Iranian claims to some strategic islands at the entrance to the Strait namely Abu Musa, Greater Tunb, and Lesser Tunb. The dispute of these islands goes back to the 19th century when the British navy landed on the islands as part of a mission to combat piracy in the Gulf. Since then, British records show that the islands were left to both Iran (then Persia) and the tribal sheikhs on the Arabian side of the Gulf. On November 30, 1971, a day before the United Arab Emirates's independence from Britain, Iran, led by the Shah, occupied the islands.[24] As

[22] Al Sheddi (n 20) 3.
[23] United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 16 January 2021.
[24] Simon Henderson, 'The Persian Gulf's' Occupied Territory': The Three-Island Dispute' (2008) 1402 The Washington Institute for Near East Policy, Policy Watch. 1.

its armies were retreating from the Gulf, the United Kingdom was unable to prevent the Shah, and the United Arab Emirates, a nascent and weak confederation of minor sheikhdoms, was also unable to resist. Since 1971, the dispute has been an important component of United Arab Emirates diplomacy in Arab forums and the international community, serving to unify the country's diverse federation, whose members, while nominally equal, differ greatly in terms of oil wealth.[25]

However, it is important to note that both ships and aircraft have the legal right to participate in transit passage within the Strait of Hormuz. The sovereignty over this sea region is mostly vested in the governments that share a border with the strait. The Exclusive Economic Zone (EEZ) corridor, located at the eastern end of the Gulf, encompasses a limited distance of a few nautical miles. However, it is crucial to acknowledge that the straits regime continues to be enforced inside the maritime region connecting the coasts of Iran and the United Arab Emirates. The region in question includes the maritime territories of Abu Musa, Bani Forur, Sirri, and Greater and Lesser Tunb, all of which are currently under the jurisdiction of Iran.[26] The Traffic Separation Scheme (TSS) in the Strait of Hormuz also encompasses the waters located within the aforementioned islands under Iranian control.[27] According to Section 3(2) of the Iranian 1993 Act, the waters situated along the baseline of the territorial sea that is in closer proximity to the land, along with the seas connecting islands owned by Iran and positioned within a 24 NM radius of each other, are classified as internal waters of Iran.[28] Tunb, Abu Musa, Forur, Bani Forur, and Sirri are all located within a 24 NM radius of each other.[29] As a result, they

[25] ibid.
[26] See 'Iran' at Marine Regions.org: https://www.marineregions.org/eezdetails.php?mrgid=8469&zone=eez accessed 17 November 2023.
[27] Alexander Lott and Shin Kawagishi, 'The Legal Regime of the Strait of Hormuz and Attacks against Oil Tankers: Law of the Sea and Law on the Use of Force Perspectives' (2022) 53 Ocean Development & International Law 123, 129.
[28] 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea 1993'.
[29] Abu Musa, the farthest island from the Iranian coast, is situated approximately 24 nautical miles away from its nearest neighbouring island, Sirri. See Lott and Kawagishi (n 27) 132.

establish a continuous and uninterrupted territorial sea that extends from the Iranian coastline to the Gulf region. Iran's territorial sea is situated near the shore of the United Arab Emirates, notably on the Musandam Peninsula, which is located on the southern side of the Strait of Hormuz.[30]

The transit passage regime is purely applicable to the eastern portion of the Gulf due to the fact that the narrow EEZ corridor situated south of the Iranian-controlled islands does not possess similar navigational and hydrographical characteristics as the rest of the strait, as outlined in Article 36 of UNCLOS.[31] The EEZ corridor is unsuitable for the safe passage of Very Large Crude Carriers and Ultra Large Crude Carriers due to the shallower waters near the coastline of the United Arab Emirates. If smaller vessels were to opt for the lengthier route through the EEZ corridor, they would encounter a significant rise in both distance and cost while going to or from the central or western region of the Gulf.[32] In contrast, the primary maritime route connecting the Iranian-controlled islands of Abu Musa, Bani Forur, Sirri, and Greater and Lesser Tunb across the territorial sea is characterised by its directness and cost-effectiveness.[33] Additionally, the narrow width of the EEZ corridor increases the risk of collisions for ships and planes travelling through, especially if international vessel and air traffic is redirected to this restricted area.[34]

The point may be raised about why United Arab Emirates (UAE) is not discussed in this research. UAE is not discussed in this research because it is not properly considered as a coastal state with reference to the Strait of Hormuz. However, it does have a contested territory mentioned above namely Abu Musa, Greater Tunb, and Lesser Tunb which are at the approach

[30] ibid.
[31] UNCLOS (n 17) art 36.
[32] Lott and Kawagishi (n 27) 129.
[33] ibid.
[34] ibid.

to the entry point of the Strait of Hormuz. These islands are being occupied by Iran, so it renders it a moot point to consider any claims to the Strait of Hormuz itself, by the UAE.

The rest of this chapter proceeds as follows. The next section presents a literature review on key aspects of the focus of this thesis. The first part of the literature review examines the legal regime of international straits. This include the tracing of the development of the legal regime from the classic position which is reflected in the customary practices on to the codification of the legal regime of international straits culminating in UNCLOS. The review then moves specifically to the literature on the Strait of Hormuz and discusses among others, Iran's threat to close the Strait and the legal issues regarding the Strait. The chapter then concludes with an outline of the structure of the thesis.

LITERATURE REVIEW

This literature review is intended to analyse the scholarly sources that address the various aspects of the topic of this thesis. There are two reasons for conducting this literature review. First, it connects the thesis to the existing scholarly knowledge. Secondly, and more importantly, it identifies a research gap in the field. The review starts from addressing the international straits in general to understand the nature and development of international straits, and then moves to the Strait of Hormuz to highlight how it is situated within the legal context of the research on international straits to identify the research gap regarding this important strait.

To understand how the legal regime of international straits has evolved over time it is helpful to start from the pioneering work of Brüel, who is considered to have prepared one of the first comprehensive treatises on the status of straits under international law.[35] Brüel provided a

[35] Erik Brüel, *International Straits: A Treatise on International Law* (Sweet & Maxwell 1947).

summary of the customary practices and doctrines that have developed regarding the matter of the freedom of navigation in the context of international straits starting with the opinion of authors on international law between the seventeenth and twentieth centuries.[36] Brüel also considered the debates and proposals of the Institute for International Law and the International Law Association in the early 19th century in this regard.[37] Furthermore, his work covered the development of the topic between the Second International Peace Conference at the Hague in 1907 until the Montreux Convention in 1936.[38] In this work, Brüel acknowledged that the question of the legal position of international straits would appear to be one of the problems in international law that requires analysis to ascertain the underlying relevant legal principles.[39] Brüel put forward the view that "the right of passage in straits … which belong to the territorial waters of the littoral state, as well as in the remaining part of the territorial waters, is conditional upon the passage being harmless (inoffensive)".[40]

After the codification of the law of the sea internationally in 1958, there appeared extensive commentaries on the new Conventions in general.[41] At the same time, however, contributors like De Rocher concentrated on the specific aspects of the legal status of international straits. He discussed the 12 NM extension of the territorial sea and its implication on the international straits. He further addressed the impact of this on costal state, international commercial maritime and naval interests. Moreover, he illustrated the different claims that interplay within territorial seas, and to specifically tie them to international straits.[42] Truver, on the other hand, investigated the freedom of navigation through the strait of Gibraltar. He gave a special focus on the Third United Nation on the Law of the Sea Conference and the controversy over passage

[36] ibid.
[37] ibid.
[38] ibid
[39] ibid 11.
[40] ibid 101.
[41] See, for example, C. John Colombos, The International Law of the Sea (Longmans 1959).
[42] FG De Rocher, Freedom of Passage Through International Straits: Community Interest Amid Present Controversy (University of Miami Sea Grant Program, 1972).

through the Strait of Gibraltar.[43] In addition, the Third United Nations Conference on the Law of the Sea and the adoption of the UNCLOS increased the number of publications that have been produced regarding the legal status of straits within the remit of the International Law of the Sea as it has developed. It is to be noted that there are authors (like Moore, Caminos, Nandan and Anderson) that have analysed the new theoretical trends and practical developments of the international legal regime of straits. Moore traced the development of legal regime of international straits during UNCLOS conferences.[44] Caminos began with a historical perspective on the position of straits in international law before to 1958, and then he analyses the entire negotiation process that occurred during the Conference on the Law of the Sea. He additionally examines the regime of transit passage, a legal concept established by the 1982 Convention, and concludes with a discussion of the relationship between the new regime of passage through straits for international navigation and international custom.[45] Nandan and Anderson provided explanation of the provisions of Part III (which on straits used for international navigation) of UNCLOS. In addition, they presented a detailed analysis on the individual articles of this part.[46] However, there are also others (Reisman and Rothwell) that provided detailed accounts of the varying national approaches which have been undertaken by countries regarding the regime of straits that was developing around this period. Reisman while reaffirming the significance of the freedom of straits transit, he had questioned the negotiated straits regime's suitability for national security of United States purposes.[47] Rothwell on the other hand highlighted the challenge for international law to enforce legal definitions on

[43] Scott Curtis Truver, *International Straits--Conflict Or Cooperation? The Strait of Gibraltar and the Mediterranean Sea* (University of Delaware 1978).
[44] 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.
[45] Hugo Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea* (Martinus Nijhoff 1987).
[46] Satya N Nandan and David H Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982' (1989) 60 British Yearbook of International Law 159.
[47] W Michael Reisman, 'The Regime of Straits and National Security: An Appraisal of International Lawmaking' (1980) 74 American Journal of International Law 48.

geographical features, with the result that different legal regimes may apply depending on how the coastal state interprets and applies the law. The legal system of the coastal state or states bordering the strait might also result in additional complication being added to an area of the law supposed to facilitate rather than hinder international navigation, as in the case of Bass Strait of Australia.[48]

Sometime later, the debate regarding the legal regime of international straits moved towards dealing with separate specific issues, including the environmental aspects associated with the right of passage through the straits[49] and the peculiarities of the legal status of particular straits.[50] In addition, a broad array of publications have summarised the doctrinal debates developed in this regard (for instance the debate if the transit passage regime being considered as a customary international law),[51] or at least attempted to revise them from what was considered to be the contemporary perspective.[52]

Generally speaking, Jia provides an overview of the right of free passage as customary law that goes back to 1929 and beyond to the first regime of passage in 1949 when the International Court of Justice (ICJ) in *Corfu Channel Case*[53] acknowledged that all types of ships enjoyed a right of passage through straits 'used for international navigation'.[54] In doing so, Jia also recognised that this expression which was adopted by the ICJ is unqualified and contained in Article 16(4) of the 1958 Convention and also retained in Part III of UNCLOS.[55] Jia also considered that the UNCLOS III Conference had not clarified "the existing uncertainty in

[48] Donald R Rothwell, 'International Straits and UNCLOS: An Australian Case Study' (1992) 23 J. Mar. L. & Com. 461.
[49] Mary George, 'Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention' (2002) 33 Ocean Development &International Law 189.
[50] For example, Chrēstos L Rozakēs, *The Turkish Straits*, vol 9 (Martinus Nijhoff Publishers 1987).
[51] Bing Bing Jia, *The Regime of Straits in International Law* (Oxford University Press 1998); Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 102–17.
[52] Hugo Caminos and Vincent P Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge University Press 2014).
[53] Corfu Channel Case, 'Judgment of 9 April 1949' (1949) 35 ICJ Reports.
[54] Jia (n 50).
[55] ibid.

customary international law over the definition of 'straits used for international navigation'".[56] Furthermore, Jia acknowledged that foreign warships have long encountered difficulties in exercising passage in the territorial sea, and their passage has frequently been regarded as posing problems to the security and good order of coastal State.[57] Jia considered that the right of transit passage contained in the UNCLOS is not a codified rule of existing law. He reviewed the right of transit passage in states' practice across 36 States and concluded that there is no established "constant and uniform usage practised by the States in question".[58] Allied to this, Martín's work in this area is also important because it generally analyses the regulation of passage through international straits prior to the UNCLOS and the historical development during UNCLOS negotiations and after.[59]

On the historical aspect, Martín traced the development of the legal status of straits to looking at the slow development in the classical period with the work of Hugo Grotius in the 17th century asserting the right of the owner of land to "occupy gulfs, straits and those parts of the sea which can be seen from the coast".[60] According to Martín, the position in the classical era on navigation through straits is essentially that while all ships (merchant and military) have the right of way peace time, during periods of war, this right is curtailed in relation to military ships.[61] He traced the development of the codification of the legal regime of straits starting from the initial private efforts of the *Institute de Troit International*, through to the work of the International Law Commission as well as the first and second Conferences of the United Nations on the Law of the Sea held in Geneva, and the role played by the International Court of Justice in the cornerstone case of the *Corfu* case.[62] Martín also discussed the distinction

[56] ibid 57-58.
[57] ibid 84.
[58] ibid1171-202.
[59] Ana G López Martín, *International Straits: Concept, Classification and Rules of Passage* (Springer-Verlag 2010).
[60] ibid 2–3.
[61] ibid 4.
[62] ibid 4–19.

between the right of non-suspendable innocent passage and the regime of transit passage through international straits.[63]

Bordunov provided a review of the current position of the right of transit passage that is connected with the application of the UNCLOS by considering transits passage by sea and air to then draw together both their similarities and differences to have been recognised in this regard. UNCLOS considers transit passage through straits used for international navigation for both ships and aircraft. The legal basis for both types of navigation is the same: the right to transit through international transport routes that pass-through straits connecting one part of the high seas or EEZ to another. However, the fundamental principle of freedom of transit passage for aircraft has certain peculiarities rooted in the features of air navigation. [64]

Dyke also traced the disputes among the countries negotiating UNCLOS that was concerned the navigational rights of commercial and military vessels to pass through straits.[65] He argued that some countries, like the United States, have not ratified UNCLOS but have strongly argued that the regime of transit passage through international straits is now binding as customary international law.[66] Likewise, other countries such as (Chile, Denmark, Egypt, Greece, Iran, Italy, Indonesia, South Korea, Japan, the Netherlands, Oman, Malaysia and Spain) have, nevertheless, considered transit passage as emanating directly from UNCLOS and therefore not invocable by countries that are not parties to the convention.[67] Dyke also illustrated the extent to which coastal states can exercise controls over vessels engaged in transits passage through international straits and the limitation of their abilities to be able to enforce their regulations.[68]

[63] ibid.
[64] VD Bordunov, 'The Right of Transit Passage under the 1982 Convention' (1988) 12 Marine Policy 219.
[65] Jon M Van Dyke, 'Transit Passage through International Straits', *The Future of Ocean Regime-Building* (Brill Nijhoff 2009).
[66] ibid. 186.
[67] Nihan Ünlü, *The Legal Regime of the Turkish Straits*, vol 13 (Martinus Nijhoff Publishers 2002) 75.
[68] Van Dyke (n 64) 184.

Oral explored the primary obstacles that have influenced the development of the regime of straits used for international navigation, tracing its origins to the legal scholars of the 1900s. She analysed the factors that influenced the formation of the regime of straits in international law throughout history, ultimately resulting in the implementation of Part III of UNCLOS regarding the regime of straits. Subsequently, she evaluated existing obstacles that were not explicitly tackled within the framework of UNCLOS. These concerns pertain to the regulatory requirements for pilotage in environmentally sensitive straits that pose navigational hazards to ships. In addition, she evaluates inquiries that emerge from the melting of Arctic Sea ice caused by climate change and its effects on the condition of navigation and environmental preservation in the Northwest Passage. Finally, she analysed the Malacca and Singapore Straits, the Strait of Bab al Mandab, and the Strait of Hormuz as crucial bottlenecks for the transportation of oil that are currently at risk due to piracy, robbery, and terrorism.[69]

Mahmoudi in his article discussed the views of both the Omanian and the Iranian governments regarding the application of transit's passage through the Strait as well as the user states that are considered to be associated with its use. His work rather concentrates more on the passage of warships.[70] Mahmoudi pointed out that despite being a full party to the UNCLOS, Oman's position is that user states do not have a right of transit passage in the Strait of Hormuz. Iran on the other hand holds the view that non-parties to the UNCLOS do not have the right of transit passage in the Strait of Hormuz. He concluded that while the position of Iran is "understandable", that of Oman is "legally difficult to defend."[71] Furthermore, Brito and Jaffe traced the importance of the Strait itself historically and the challenges that developed regarding the freedom of navigation of its passage.[72] In addition, Brito and Jaffe also assessed

[69] Nilufer Oral, 'Navigating the Oceans: Old and New Challenges for the Law of the Sea for Straits Used for International Navigation' (2019) 46 Ecology LQ 163.
[70] Said Mahmoudi, 'Passage of Warships through the Strait of Hormuz' (1991) 15 Marine Policy 338.
[71] ibid 348.
[72] Dagobert Brito and Amy Myers Jaffe, '"Reducing Vulnerability of the Strait of Hormuz." Getting Ready for a Nuclear-Ready Iran' (2005) 15.

the nature of future risks against free navigation in the context of the Strait and went through several strategies for the purpose of reducing threats regarding the closure of the Strait itself arisen to date. [73]

Other articles have been written in this area to date have more specifically discussed Iran's threat to close the Strait which is a crucial subject to the dissertation. Talmadge's work examined the challenge arising from the closure of the Strait of Hormuz by Iran. It focussed on the international security implications, course and outcome of a United States- Iranian conflict arising from the threat by Iran to impose a blockade of the Strait. [74] Tamaldge argued that while it was legally wrong for Iran to blockade the Strait, it would also be wrong to assume that US 'operations in response to any action in the area would be short and simple.'[75] Pham similarly adopted a realist approach in international relations to assess the threat to the Strait from an international security perspective. He pointed out that there are concerns arising from provocative Iranian remarks and actions that suggest Iran may block this waterway. This may be done to gain an advantage in negotiations regarding their nuclear ambitions or as a response to any military action taken against their nuclear installations. The surge in petroleum prices caused by such an event might have disastrous consequences for global economies. Nevertheless, a meticulous analysis of Iranian capabilities leads to the deduction that while the threat should not be disregarded, it does not warrant any sense of panic or concern. This assessment is substantiated when one considers the repercussions that Iran could encounter if it were to deliberately instigate a crisis by seeking to obstruct the passage of vessels across the strait.[76]

[73] ibid.
[74] Caitlin Talmadge, 'Closing Time: Assessing the Iranian Threat to the Strait of Hormuz' (2008) 33 International Security 82.
[75] Ibid. 84.
[76] J Peter Pham, 'Iran's Threat to the Strait of Hormuz: A Realist Assessment' (2010) 32 American Foreign Policy Interests 64.

Furthermore, Oral discussed the Iranian threat from the perspective of the application of international law with specific reference to the UNCLOS and the 1958 Geneva Convention.[77] Oral only briefly touched on the applicable law regarding the passage regime in the Strait, (devoting barely two paragraphs when taken together to the issue)[78] before also proceeding to discuss the position of international law regarding the matter of the use of force.[79] In similar fashion, Wählisch provided a review of the opposing views expressed by the Iranian and United States government regarding the applicable legal regime to the Strait, and its closure from the perspective of international law.[80] Wählisch also doubted the legal basis for any blockade of the Strait by Iran in response to European Union and US sanctions, asserting that the position of UNCLOS on the matter is that there can only be a temporary closure if Iran is belligerent in the context of an armed conflict. He further advanced the view that while customary international law could provide some justification in the context of sanctions, still, these would still not be 'sufficient' justification for such a course of action.[81]

O'Grady, writing from an international economic law (international investment law) perspective specifically discussed whether Iran was capable of closing the Strait and, by reviewing those instances when Iran could do so, how long this was expected, and the risks that were expected to arise if the Strait were to be closed.[82] He pointed out that the price of oil would likely rise if Iran were to blockade the Strait. While the United States may likely prevail in the event of a blockade, the price rise may last for a considerable period.[83]

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[77] Nilufer Oral, 'Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers' (American Society of International Law 2012).
[78] The piece itself is only in 6 pages.
[79] Oral (n 76).
[80] Martin Wählisch, 'The Iran-U.S. Dispute, the Strait of Hormuz, and International Law' (2012) 37 Yale JIL Online 23-37. Available at < http://www.peacemediation.de/uploads/7/3/9/1/73911539/o-37-waehlisch-the-iran-u.s.-dispute_1_.pdf> Accessed: 12 August 2019.
[81] ibid. 23.
[82] Bill O'Grady, 'Iran Sanctions and Potential Responses: Part II' (2018), Advisor Perspectives, Available at <https://www.advisorperspectives.com/commentaries/2018/08/16/iran-sanctions-and-potential-responses-part-ii> accessed 12 August 2019.
[83] ibid.

Cordesman, in a briefing paper from an international strategic studies perspective also discussed the impact of the closure of the Strait regarding the operation of the international oil market and the resulting problems that it could bring about economically.[84] Similarly, in a three-page briefing paper for the United States Foreign Policy Research Institute Yoel, Schachter and Lindenstrauss have also discussed the impact upon the global energy market of the issues to have been recognised as arising with regard to the application of the transit passage regime through the Strait.[85] In addition, Ratner also wrote about the economic sanctions imposed against Iran and the Iranian reaction to the sanctions. Additionally, he discussed the Iranian options for the Strait and what could happen regarding the matter of oil prices.[86] There is also a need to recognise the fact that Khan looked to consider the issue regarding the environmental security in the region if Iran were to look to use mines in the Strait.[87] Finally, Katzman, Nerurkar, O'Rourke, and Ratner discussed the possible implications of Iranian threats, Iran's intention to apply the threats, the expected reaction, and the United States ability to keep the strait open.[88]

Few authors that are working on this area have attempted to address specific legal problems regarding the use of the Strait. By way of illustration, Amin discussed the issue of passage through the Strait and the application of transit passage. His article was published before the UNCLOS was adopted.[89] He advanced the position that the position of Iran and Oman that the Strait of Hormuz was subject to the legal regime applicable to the territorial sea was inaccurate

[84] Anthony H Cordesman, 'Iran, Oil, and the Strait of Hormuz' (Center for Strategic and International Studies 2007); Also see US Congress and Joint Economic Committee, *The Strait of Hormuz and the Threat of an Oil Shock* (Washington, DC, July (http://www house gov/jec/studies/2007/Straight% 20of … 2007).
[85] Yoel Guzansky, Jonathan Schachter and Gallia Lindenstrauss, 'Between Piracy and Persia: Mounting Threats to Maritime Chokepoints in the Middle East' [2011] Foreign Policy Research Institute.
[86] Michael Ratner, 'Iran's Threats, the Strait of Hormuz, and Oil Markets: In Brief' (Retrieved 2018).
[87] Sabahat Khan, 'Iranian Mining of the Strait of Hormuz: Plausibility and Key Considerations', vol 4 (Institute of Near East and Gulf Military Analysis 2010).
[88] Kenneth Katzman and others, 'Iran's Threat to the Strait of Hormuz' (Library of Congress Washington Dc Congressional Research Service 2012) R42335 Available at <https://apps.dtic.mil/docs/citations/ADA584459> accessed 31 July 2019.
[89] SH Amin, 'The Regime of International Straits: Legal Implications for the Strait of Hormuz' (1980) 12 Journal of Maritime Law and Commerce 387.

though both states may apply a qualified right of transit passage on the basis of national security of Strait States.[90] He advocated the need for a regional convention setting out the specific rights and duties of the coastal states and those of the littoral and non-littoral states in the Gulf Region.[91]

Kirchner and Salinaite examined the law of passage as it is applied to the Strait and whether the Iranian government could legally prevent this passage from the perspective of the international law.[92] They have examined the legality of both the actual act of closing the Strait of Hormuz and the mere threat to do so. Aside from the law of the sea, the application of general principles of international law and the law of armed conflict is also considered. The Iranian leadership's threats impinge upon the sovereignty of other states, and this aspect is given significant attention.[93] They also concluded that the threat as well as blockade by Iran each amount to violations of the international law of the sea.[94]

It is also to be noted that Milan considered the matter of the legal regime of the Strait that is deemed to lie within the 12 NM territorial seas that are claimed by Iran and Oman and its relationship to the rights of innocent passage under the rules of UNCLOS.[95] Essentially, Milan posited that both countries are allowed under international law to limit the right of innocent passage to maintain regional stability.[96]

Bagheri also discussed the legal regime that is considered to apply to the Strait and the sovereignty of the disputed islands, with a particular focus upon Iran's security practices.[97] In

[90] ibid 404.
[91] ibid.
[92] Salinaitė Birutė M. and Kirchner Stefan, 'The Iranian Threat to Close the Strait of Hormuz: A Violation of International Law' (2013) 20 Jurisprudencija 549.
[93] ibid.
[94] ibid. 562.
[95] Shapour S Milan, 'Innocent Passage through the Strait of Hormuz' 4 Rev. hellenique de droit int M1.
[96] ibid.
[97] Saeed Bagheri, 'Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective' (2015) 13 New Zealand Yearbook of International Law 83.

this context, he assessed the primary regulations pertaining to maritime law, encompassing both domestic and international legislation, conventions, and maritime agreements.[98] He conducted a detailed analysis of Iran's stance on international law of the Sea, specifically focusing on UNCLOS and the legal framework for passage through the Strait of Hormuz. The analysis covered the security and legal aspects of the Strait of Hormuz, the conflicting legal frameworks for passage through the strait, Iran's security strategies in the region, and the sovereignty disputes over the islands in the area. Additionally, the analysis examined the security of the Strait of Hormuz.[99]

Kraska addressed the legal regime that applies to the passage through the Strait with a particular focus on the United States and Iran dispute regarding the law that is considered to be applicable to foreign warships passage.[100] He pointed out that the complex legal dispute and stubbornness arising from the conflicting assertions in the Strait of Hormuz necessitates a thorough examination to provide valuable insights for academics and decision-makers.[101] He further concluded that a coastal State, like Iran, cannot choose a 12 NM territorial sea over waters that constitute a strait used for international navigation, abandon the navigational rules of transit passage, and instead require the enforcement of innocent passage, just as the United States cannot acknowledge only a 3 nautical mile territorial sea and then assert the right of transit passage within it. Ultimately, it is uncertain which of the two nations holds the dominant role in determining this legal framework. Both the 12 NM territorial sea and the right of transit passage through international straits have either been incorporated into customary international law or are about to be.[102] Moreover, Franckx and Razavi briefly analysed the legal regime that

[98] ibid.
[99] ibid.
[100] James Kraska, 'Legal Vortex of the Strait of Hormuz' (2014) 54 Virginia JIL 323–66323.
[101] ibid 324.
[102] ibid 366.

applies to the Strait.[103] Specifically, they have traced the practice in the area prior to UNCLOS period and beyond.[104] Franckx and Razavi illustrated the difference in the littoral states legal positions and recognise that it is submitted that, on a practical level, it is not possible to deny a certain amount of uniformity, even where it is to the opposite effect.[105]

Al-Sheddi provided an analysis of the Strait in terms of both its legal and political aspects internationally. [106] In particular, Al-Sheddi's work involves an evaluation of the Gulf States' policies towards the law related to passage through the Strait and their reactions regarding the UNCLOS.[107] Moreover, special attention is given to the practice of those countries that border the Strait that are included in their national laws.[108] Furthermore, Al-Sheddi conducts analysis of the law that applies regarding passage through the Strait in keeping with the prevailing international rules in this area of concern.[109] In doing so, Al-Sheddi completes a discussion of the principal sources of threats to (and the safety of) navigation through the Gulf Sea lanes, like that of the Strait of Hormuz.[110]

Abbas wrote an article about Sultanate of Oman Security and Defense Strategy regarding the Strait of Hormuz, since the British withdrawal from the region in 1968 until 1980, when he reviewed Oman's policy regarding the issue of security and defense in relation to the Strait.[111] He also traced the political and historical events, as well as the initiatives to have been introduced during that period to ensure the protection of the Strait as a viable right to passage.[112]

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[103] Erik Franckx and Ahmad Razafi, 'The Strait of Hormuz', *The Proceedings Of The Symposium On The Straits Used For International Navigation* (Turkish Marine Research Foundation, Istanbul, TURKEY, 2002) 11.
[104] ibid.
[105] ibid.
[106] Al Sheddi (n 20).
[107] ibid.
[108] ibid.
[109] ibid.
[110] ibid.
[111] Ali Abbas, *Estrategeat Alamn w Aldefaa Naho Madeeg Hormuz* 'Omani Security and Defense Strategy towards the Strait of Hormuz', (Journal of Research College of Basic Education, University of Mosel, Vol. 12, Issue (4), 2013).
[112] ibid.

Similarly, Al-Athary and Zafer wrote about the regional and international strategies regarding the Strait where they discussed Iran's strategy and the impact of Iran's nuclear program on its security and stability and that of the Arabian Gulf more broadly.[113] Al-Athary and Zafer also discussed the United States and Western strategy to have developed to date regarding the Strait and the scenarios for the future of the strategic situation in both the Strait and the Arabian Gulf, whilst also focusing upon the matter of geopolitics.[114] In addition, whilst the matter of the Strait legal regime of navigation was also considered by Mohammed, the majority of his study also focused upon the matter of geopolitics and international relationships between different countries.[115]

Further research has been completed in this area investigated the risks posed to global energy security where the Strait is closed and the regional and global consequences in this regard, although the study mentioned some points related to the freedom of navigation in the strait, most of it was focused on strategic and global energy security.[116] It is also to be noted that Al-Kaabi explored the importance and distinctive geographical characteristics of the Strait of Hormuz, and the impact on international politics. Even though the article discussed the passage through the Strait, the focus of the writer was on the geopolitics.[117] Allied to this, Al-Janabi's work has considered the Strait's significance and its maritime regulations, the dimensions and impact of oil exports and the possibility of closing the Strait under International Law. The

[113] Tghreed Al-Athary, Soadon Zafer, *Alestrategeaat Aleglemeah w Aldawleeah fi Madeeg Hormuz* 'The Regional and International Strategies in the Strait of Hormuz', (Journal of Geographical Research, University of Kofah, Vol. 14, 2011).
[114] Ibid. See also Lewis M Alexander, Navigational Restrictions within the New LOS Context: Geographical Implications for the United States (BRILL 2016).
[115] Rahal Mohammed, *Alsera'a Alaa Almadaeg Albahreaah (Derasat Halat Madeeg Hormuz),* 'The Conflict on the International Straits (Case Study of the Strait of Hormuz)', (University of Eshahid Hamma Lakhdar - Elwadi, 2016/2017).
[116] Veaan Mohammed, *Almamraat Almaeeah w Amn Altakah Alalam: Madeeg Hormuz Anmothagan,* 'Waterways and Global Energy Security: Strait of Hormuz As a Sample', (Journal of Literature, University of Baghdad, Issue 104, 2014).
[117] Hussein Al-Kaabi, *Almoqaa Algeografy le Madeeg Hormuz w Atharh fi Rasm Alsyasat Aldawleeah* 'The Geographical Location of the Strait of Hormuz and its Impact on the Drawing of International Politics', (Journal of the College of Basic Education, Al-Mustansyriah University, Vol. 21, Issue 88, 2015).

writer viewed that the applicable law to the strait is the transit passage according to the UNCLOS. Although the article is very recent, it did not discuss in depth the legal issues of the Strait.[118]

Montazeran wrote a brief examination of the legality of Iran opting to close the Strait to prevent maritime navigation and stated that Iran has signed the UNCLOS 1982 and did not ratify it so that the country does not have a legal obligation.[119] However, it is also interesting to note that Montazeran ignored the application of Article 18 of Vienna Convention on the Law of Treaties that obliges states that sign such agreements not to defeat the objectives and purposes of the Convention.[120] Allied to this, there is also a need to recognise that Montazeran has recognised that this goes with the view that the law that applies in the Strait is considered to be 'innocent passage'.[121]

Nasser also wrote a book about the Strait and the matter of the US-Iran conflict and its influence have been provided for in this regard.[122] This book focused on the importance of the Strait in the international economy and its impact upon both Iranian and American interests, as well as the importance of the Strait in international politics and its impact upon American and Iranian security.[123] Although the book included an evaluation of the legal regime involved with the Strait and the threats posed to its closure in the face of maritime navigation and its implications for the international economy, Nasser's focus was upon the interrelated matters of political, economic and military geography.[124]

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[118] Hadeel Al-Janabi, *Alnedam Alganoni Aldowly le Madeeg Hormuz w Ahmmytah fi Altigarah Alnfdyah*, 'International Legal Regulation of the Strait of Hormuz and its Importance in Oil Trade', (Route Educational and Social Science Journal, Al-Mustansyriah University, Vol. 6, Issue 2, 2019).
[119] Javed Montazeran, *Derasat Alwada'a Alganoni le E'ghlag Madeeg Hormuz Men Gebal Iran Bemogeb Alganon Aldawli*, 'The Legal Study of the Status of the Closure of the Strait of Hormuz by Iran under International Law', (Al-Bayan Center for Planning and Studies, 2018).
[120] ibid.
[121] ibid.
[122] Ali Nasser, *Madeeg Hormuz w Alsra'a Alamriki Alirani*, '*Strait of Hormuz and the American-Iranian Conflict*', (Dar Al-Farabi for Publishing, Beirut, Lebanon, 2013).
[123] ibid.
[124] ibid

Al-Akla also examined the legal system of the Strait by considering the fact that the applicable law regarding the matter of the Strait's transit passage is specifically set out under the UNCLOS.[125] In addition, it should be noted that Al-Akela addressed the Iranian threats to close the strait in the face of maritime navigation.[126] However, Al-Akela did not discuss the matter of whether the coastal states had signed and ratified the UNCLOS.[127] Nevertheless, the article have been produced by Al-Akela did not touch on the passage of aircraft through the Strait and, despite focusing on ships passage through the Strait, he failed to distinguish the difference between commercial ships and warships.[128]

Despite the sheer breadth of issues that other authors working in this area have covered with regard to the Strait and the fact that the specifics of the legal status of certain straits can be considered to be well-researched[129], scholarly work on the Strait of Hormuz has been sparse when one considers the significance of the strait. As it can be seen from the discussion of the literature, most of the existing publications appear to focus on the interrelated matters straddling political geography[130] and international relations[131] linked to the Strait. There has been little consideration of the specifics regarding the regime of passage through the Strait of Hormuz. This is surprising in view of the Strait's significance for international trade, along

[125] Wesam Al-Akla, *Alnizam Alqanuni Lilmudiq Aldawli: Dirasat Tatbiqia'a Ala Madeeg Hormuz fi Daw' 'Ahkam Alqnon Aldawli*, 'Legal Regime of the International Strait: A case study of the Straits of Hormuz in light of the provisions of International Law', (Journal of Economic and Legal Sciences, Damascus University, Vol. 27, Issue 4, 2011).
[126] ibid.
[127] ibid.
[128] ibid.
[129] For example, Raj Sativale, 'Transit Passage in the Straits of Malacca' [2003] MIMA Bulletin 1. Also see, Mohd Hazmi bin Mohd Rusli, Maizatun binti Mustafa and Wan Izatul Asma binti Wan Talaat, 'Replacing the Transit Passage Regime with Freedom of Navigation in the Strait of Malacca: A Case Study with Special Reference to the Korea Strait' (2013) 78 Ocean & Coastal Management 25. And see Yügel Güçlu, 'Regulation of the Passage through the Turkish Straits' (2001) 6 Journal of intenrational Affairs. And see William V Dunlap, *Transit Passage in the Russian Arctic Straits* (Ibru 1996).
[130] P Motjahed-Zade, *Security and Territoriality in the Persian Gulf: A Maritime Political Geography* (Routledge, 2013).
[131] RK Ramazani, *The Persian Gulf and the Strait of Hormuz* (Brill Archive 1979).

with the fact that this Strait is one of the busiest waterways for oil tankers globally.[132] The few works that have considered the issue like Oral and Milan have been sparse in their width and depth. This thesis looks to fill the gap that has been identified to then be able to provide the reader with a comprehensive account of the legal regime of transit passage through the Strait of Hormuz.

Research Questions, Aim, Objectives, and Methodology

The central question of this research is: what is the applicable legal regime for the Strait of Hormuz in international law? This is addressed through the following three sub-questions:

1. What are the historic claims and practices of States concerning transit passage in the Strait of Hormuz, and can these claims be satisfied within the existing framework of international law?
2. What are the existing and potential legal disputes around the regime of transit passage in the Strait of Hormuz?
3. How can the existing legal disputes be resolved?

The aim of this research is to establish the specifics of the application of the international legal transit passage regime to the Strait of Hormuz. Although there is no special convention governing the legal regime of the Strait (like the Montreux Convention, or the one for the Turkish Straits), there exist certain historic claims and disputes around Hormuz that complicate the application of the general international rules on the regime of transit passage through

[132] Manuel F Zamora and Linda Ramos Zamora, 'The Strait of Hormuz as a Global and US Security Concern: A Transportation and Maritime Security Case Illustration' (2014) 1 Journal of Homeland and National Security Perspectives 66.

straits.[133] The main objective of the research is to determine how these general rules apply to the Strait of Hormuz. To achieve that aim, the study sets out the following sub-objectives:

1. To outline the rights and duties of vessels and aircraft during the transit passage;
2. To trace the history of legal regulation and customary practices of transit passage in the Strait of Hormuz;
3. To analyse the legal positions of the coastal States with regards to the Strait of Hormuz;
4. To chart a viable approach to resolving disputes around the Strait of Hormuz towards the establishment of a sustainable legal regime of passage through the Strait.

Methodologically, this thesis will adopt a formalist, doctrinal approach utilising desk-based research derived from the analysis of international instruments, decisions of international courts/tribunals and the *travaux préparatoires* of the international conventions. Further elements of the research are resolutions of relevant international organizations, declarations made by States, and relevant domestic legislation. Supplementary factual data will be gathered from the open sources, including periodicals, journals, newspapers, and websites in both English and Arabic. The thesis will also use secondary sources namely relevant scholarly publications concerning the international legal regime of transit passage through straits. Special emphasis shall be put on the study of available publications on the legal regime of passage applicable to other international straits in the region namely Black Sea Straits.

[133] This Convention guarantees freedom of transit through the Straits for merchant vessels of all nations at all times. But there is no corresponding right of free overflight of the Turkish Straits. The Convention also contains certain restrictions on the transit of warships of both non-Black Sea powers and Black Sea powers, one of them being that the maximum aggregate tonnage of warships of non-Black Sea powers within the Black Sea at any one time must not exceed 45,000 tons. (Montreux, 20 July 1936; (1937) 173 LNTS 213).

Contribution to Knowledge

The Strait of Hormuz is of great importance as it is the gateway for the Gulf States maritime activities and in particular their oil and liquified natural gas exports to the rest of the world. About one fifth of the global oil supply passes through the Strait. The Strait is a potential source of violent conflict, and this was evident during the Iran-Iraq war in the 1980s. The issue of transit passage through this strait becomes more relevant considering Iran's recurrent threats to block the strait. Therefore, the significance of establishing a sustainable and peaceful legal framework for navigating through such straits cannot be over-emphasised. Yet, the critical issue of the legal regime of the Strait of Hormuz remains largely under-researched. Despite its relevance to coastal States, there appears to be a lack of contemporary research on this issue, either in English or in Arabic. This research aims to provide a comprehensive analysis of the legal regulation of the transit passage through the Strait of Hormuz. It examines relevant national legislation that paly critical roles in the competing claims of the coastal states within the framework of international law. Considering the strategic importance of the Strait for international trade, finding solutions for the problem is in the interest of other States and of the entire international community. The research shall be practically important for the national authorities, politicians, economic decision-makers, as well as for the scholars working over the problem of legal regime of transit passage through international straits.

Structure of the Thesis

This study consists of seven chapters. **This chapter** examines the literature review of the study, the research gab, questions, aim and objectives, methodology and contribution to knowledge.

Chapter 2 provides a historical account of the development of the regime of straits under international law. As each strait has individual features, this chapter provides a basic account

of the different categories of straits and an account of the historical development of the legal framework common to all straits. While the conventions that have been developed on international law did not provide a legal definition for straits, international law does refer to straits 'used for international navigation'; this issue also is considered in this Chapter. The Chapter also identifies the categories of straits under international law as stated in UNCLOS, and it examines the rights and duties of coastal States. The difference between the concept of innocent passage and transit passage is also discussed in this Chapter. In addition, the chapter examines the regime of transit passage in customary international law.

Chapter 3 begin by tracing the history of the Strait of Hormuz through last centuries. Then it will discuss the implications of this historical review on the importance of the Strait. This Chapter will go further to examine the Strait of Hormuz and Geopolitics. Finally, this chapter concludes that the strait played a key role in historical periods in linking East and West. Its location is in the middle of the Old World between Asia in the East and Europe in the West, which positions it between the resource-rich tropical region of South Asia and the consumption regions of Europe. It has become the vital artery that supplies the world with energy and returns prosperity and wealth to all countries bordering it that have outlets to it, such as the Arab Gulf countries.

Chapter 4 is divided into two main parts. The first part focuses on the propositions made by Iran and Oman during the negotiations of the 1958 Convention and the UNCLOS. It examines the Position of Iran and Oman during the Negotiation of the 1958 Convention. Then it will highlight Position of Iran and Oman during the Negotiation of UNCLOS. The chapter further traces the Gulf Coastal States views regarding the freedom of passage. The second part analyses the legal positions of Iran and Oman respectively, on the application of passage through the Strait of Hormuz following the adoption of both. The chapter examines in this part the Iranian municipal law on the territorial sea. After that it highlights then Iranian practice of the regime

of transit passage in the Strait of Hormuz. The chapter further highlights the Omanian Practice of the Regime of Transit Passage in the Strait of Hormuz.

Chapter 5 examines the legal regime of the Black Sea Straits to provide lessons to be learned for the Strait of Hormuz. The first section of the chapter traces the history of the legal regime of the Straits. The Montreux Convention is the most important legal instrument governing passage through the Black Sea Straits and is the focus of the next section. The next section examines the Turkish national regulatory framework of the Black Sea Straits. The chapter considers the disputes arising from the application of that framework and the position of the parties involved including the International Maritime Organization (IMO). The discussion then moves to recent developments of interest regarding the legal regime of passage through the Black Sea Straits with resonance for other international straits including the Strait of Hormuz.

Chapter 6 examines the implication of Iranian actions on the passage regime. This will include the disputed views regarding passage through the Strait. Then it considers the threat to impede passage in the Strait. The chapter further traces the territorial disputes around the Strait. Then it discusses the Sea Lines and Traffic Separation Scheme (TSS) in the Strait including the legal issues regarding the implementation of it. After that the chapter investigates some recent navigational violations in the Strait and its legal implications before highlighting possible solutions and applicable principles. It concludes that closing or even threatening to close the Strait is a violation of International Law.

Chapter 7 is the conclusion of the study. The history of the use of the Strait of Hormuz from the ancient times to the contemporary period demonstrates the significance of the Strait as a major point of passage for vessels involved in trade from one end of the world to the other. In the contemporary period, the geo-location of the Strait of Hormuz its use as a major route by oil and gas vessels, makes it a potential source of conflict. The legal status of the Strait

continues to be uncertain, further complicated by potential disagreements between the coastal states and the other Gulf States, as well as any states with maritime interests. The practice of states regarding the passage through the Strait has promoted unimpeded transit passage through tacit acceptance, hence UNCLOS did not disrupt this equilibrium but only formalised pre-existing customs. This practice might contradict the assertions made by the coastal states, so it does not possess the necessary *opinio juris* to be considered a rule established in customary international law. Therefore, the narrow-minded strategies employed by the coastal states, as shown in their local laws and reservations about certain provisions of UNCLOS, simply worsen the existing ambiguity surrounding the legal status of the Strait of Hormuz. The coastal as well as user states, and indeed the global economy, will be best served by certainty, openness, accommodation, and consistency offered by the robust provisions of UNCLOS on the right of transit passage in straits used for international navigation, like the Strait of Hormuz.

Chapter 2: The Regime of Straits in International Law: History, Nature, and Basic Principles

1. Introduction

As each strait has individual features which makes it distinct, this chapter provides a basic account of the different categories of straits and of the historical development of the legal framework common to all straits. Geographically, a strait may signify a contraction of the sea in the midst of two territories, having a given width and linked by two seas that are divided at that specific place by the territories in question.[1] There are a number of conventions on the law of the sea drafted by the United Nations Conferences on the Law of the Sea, however, none of them has defined the term 'strait'.[2] Its ordinary meaning is 'a narrow natural passage or arm of water that creates a link between two greater bodies of water.'[3] There are a number of straits that are very important for international communications like Gibraltar, Malacca, Bab AlMandeb, and Dover. In some places like Hormuz, Otranto, and the Turkish Straits where there is no other transportation route available, either physically or economically, these straits are essential for transport through the seas. Hence, there is the view that navigation through the straits should be free and should not be restricted without any valid reason.[4]

Straits have a wider implication for the international community as they serve as a highway of the seas. The countries close to the straits, as well as those that are far from it, are affected by

[1] Erik Bruel, *International Straits: A Treatise on International Law* (Sweet & Maxwell 1947).
[2] Namely the 1958 Geneva Conventions: The Convention on the Territorial Sea and the Contiguous Zone (CTS); the Convention on the High Seas (CHS); the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR); the Convention on the Continental Shelf (CCS); on the Territorial Sea and the Contiguous Zone (CTS), the 1982 United Nation Convention on the Law of the Sea (UNCLOS).
[3] Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999). 102.
[4] Bruel (n 1). 38; Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited*, vol 7 (Brill 1983).181.

straits due to their "geostrategic, communicative and economic importance".[5] This makes it necessary to carry out negotiations on navigation through the straits as there will necessarily be conflicting interests between States close to and those far from it like the Strait of Hormuz. States near to it wants to protect their international security and States far from it wants to have an impeded navigation. Hence, it is challenging to obtain solutions to the conflicting interests of the countries involved.[6]

Straits are of crucial economic and military importance particularly those that constitute strategic choke points.[7] The term "choke point" means that there is an opportunity for a State to cut off, or at least limit, the flow of ocean-borne traffic which is vital to a nation or nations in the case of a specific waterway.[8] Three issues may seem relevant in relation to choke points. The Strait of Hormuz is considered one of the world's strategic passages for oil and its by-products but is also considered a chokepoint that would have a negative impact on the global economy as many states rely on the oil and gas products exported through it, if disrupted.[9] First, if passage through the choke point is refused or prohibited, there is no readily accessible alternative waterway to use. This is because alternative waterways available, such as the Anegada Channel, linking the Caribbean to the Atlantic, would not be a prime choke point. Second, a choke point is relatively narrow and thus able to be blocked by mines, sunken ships, batteries on the ground, etc. Third, the waterway in question is of interest to any State or state's commercial and/or military traffic. Regarding this last point, a distinction may be drawn between "global", "regional" and "national" choke points. Gibraltar is a global choke point, of

[5] Saeed Bagheri, 'Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective' (2015) 13 New Zealand Yearbook of International Law 83, 105.
[6] David D Caron, '1 The Great Straits Debate: The Conflict, Debate, and Compromise That Shaped the Straits Articles of the 1982 United Nations Convention on the Law of the Sea', *Navigating Straits* (Brill Nijhoff 2014).
[7] Lewis M Alexander, '"International Straits" International Law Studies' 64 (1) 18. 104-5.
[8] ibid.
[9] Manuel F Zamora and Linda Ramos Zamora, 'The Strait of Hormuz as a Global and US Security Concern: A Transportation and Maritime Security Case Illustration' (2014) 1 Journal of Homeland and National Security Perspectives 66.

interest to many nations in the world; the Turkish Straits are more regional in nature, of particular significance to the countries bordering the Black Sea.[10]

Due to reliance on oil, fuel, and by-products for transportation, healthcare, energy, and even supporting military equipment and operations, conflict in the region would pose a threat to many countries around the world including the United States.[11] As a result, the topic of straits in international law has been developed while focusing on identifying a balance between the two conflicting concerns. On the one hand, concerns relate to the coastal states that are concerned about controlling shipping activities in these narrow pathways. On the other hand, concerns relate to the shipping states in making sure that there is unrestricted navigation through these crucial passages.[12] A former judge of the International Tribunal for the Law of the Sea, Hugo Caminos, claimed in his Hague lecture of 1987 that:

> "this scenario of competing interests in formulating a special legal regime for straits is similar to that existing 350 years ago as Grotius and Selden contested the pros and cons of wide coastal State jurisdiction."[13]

The way straits should be regulated continues, thus, to be debated due the concerns of the coastal States and those of the international community.[14]

Since the breadth of the territorial sea was three nautical miles in customary international law, and later extended to 12 NM by United Nation Convention on the Law of the Sea (UNCLOS) 1982[15] and this limit has become also customary international law[16], the power and regulation

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[10] ibid.
[11] ibid.
[12] ibid 11.
[13] Hugo Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea* (Martinus Nijhoff 1987). 20. Hugo Caminos and Vincent P Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge University Press 2014).1.
[14] Nilufer Oral, 'Navigating the Oceans: Old and New Challenges for the Law of the Sea for Straits Used for International Navigation' (2019) 46 Ecology LQ 163.
[15] United Nations, 'United Nation Convention on the Law of the Sea' (1982) 1833 U.N.T.S. Treaty Series 397. art 3.
[16] Leslie M MacRae, 'Customary International Law and the United Nations' Law of the Sea Treaty' (1983) 13 Cal. w. Int'l LJ 181, 181.

of the coastal States as given in the innocent passage regime becomes applicable to important areas that were subject to the regime of freedom the high seas. On the one hand, naval powers were not in favour of their loss of freedom of navigation in the high seas. [17] On the other hand, coastal States that were wary of foreign shipping activities taking place close to their coast wanted a higher degree of regulatory authority provided by the extension of the territorial sea.[18] The right of passage through international straits is one of the most significant legal issues debated during the third United Nations Conference on Law of the Sea.[19] The significance arose from the acknowledgement of the twelve NM territorial sea rule above mentioned. This will result in many straits now being regarded part of the territorial sea of one or more coastal States.[20]

UNCLOS is an important comprehensive Convention defining rights and obligations of states in maritime conduct. As its preamble sets out, the focus of UNCLOS is the 'desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.' The outcome of part III was one of its most important accomplishments, in which an extensive regime was developed for straits used for international navigation, such as a new regime of transit passage.[21] Furthermore, it maintained the regime of non-suspendable innocent passage for other straits.[22] The main issues that were the focus of the negotiations of the straits regime in UNCLOS were the rival interests of the coastal States for safeguarding the marine environment and also the maritime States, particularly the objective of the naval authorities to provide

[17] Jose Antonio De Yturriaga, *Straits Used for International Navigation: A Spanish Perspective*, vol 17 (Martinus Nijhoff Publishers 1991). 68–76.
[18] ibid.
[19] Om Parkash Sharma, *The International Law of the Sea: India and the UN Convention of 1982* (Oxford University Press 2009).
[20] ibid.
[21] UNCLOS (n 15) art 38.
[22] ibid art 45.

unimpeded passage to warships, specifically submarines.[23] The aim of Part III was to create a balance between these interests, since coastal States had certain regulatory powers to assign sea lanes for develop traffic separation schemes, after gaining the IMO's consent. In addition, it also sought to implement laws and regulations to avoid the release of oily substances and other toxic materials from ships.[24] In exchange for this, foreign shipping was given the right of unimpeded passage through straits subject to the transit passage.[25]

This Chapter will first provide a historical account of the development of the regime of straits under international law. While the conventions that have been developed on international law did not provide a legal definition for straits, international law does refer to straits 'used for international navigation', this issue also is considered in the first part. The next section will identify the categories of straits under international law as stated in UNCLOS, as well as examine the rights and duties of coastal States. The focus then turns to the difference between the concept of innocent passage and transit passage. Finally, the chapter will examine the regime of transit passage and Customary International Law.

2. Historical Background

Several debates in international law have focused on the subject of straits, extending for more than three centuries, starting from Hugo Grotius in the seventeenth century and going up to the twentieth century.[26] Straits were considered by Hugo Grotius and other early scholars of international law, like de Vattel, as being of common interest to the community all over the

[23] James Kraska, 'The Strategic Foundation of the Law of the Sea', *in Ocean Law Debates: The50-Year Legacy and Emerging Issues For The Years Ahead*, 181 (Brill Nijhoff 2018). 208-13.
[24] UNCLOS (n 15) Arts 21-22.
[25] Caron (n 6) 19-20.
[26] Caminos (n 13) 20.

world.[27] Nonetheless, all the littoral states[28] that bordered a strait did not share this opinion. The issues of straits were related to the littoral State's authority to regulate the navigation of foreign vessels since the earliest times. The historical rule of the Ottoman Empire is an eminent example. The Ottoman Sultan had unilateral authority to prevent foreign ships from passing through the Turkish straits[29]. The Danish/Baltic straits offers another example, where Denmark enforced tolls on ships for four centuries, until the Copenhagen Convention on the Sound and the Belts was signed.[30]

It is evident that before the nineteenth century, different perspectives were adopted by scholars. International law bodies and codification conferences provide a great deal of attention to the subject of straits, thus reflecting its significance under international law. Straits were evaluated by the Institut de Droit International from the year 1894 to 1912, where it also examined the likelihood of having a regime that was independent of the territorial sea.[31] The International Law Association (ILA) examined this subject between the years 1894 and 1910.[32] Subsequently, in the 1907 Hague Peace Conference, the legal regime of straits was reviewed with respect to the laying of mines, which was another topic explored by the ILA.[33] Several lectures on straits were made at The Hague Academy between 1923 and 1936, with the final one being given by Erik Brüel.[34] A committee of specialists was formed in 1924 under the League of Nations, with the aim of analysing issues pertaining to international law that were

[27] Hugo Grotius, *The Freedom of the Sea, Translated by Ralph von Deman Magoffin, New York* (Oxford University 1916). Emer de Vattel, 'The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury' [2008] B. Kapossy, R. Whatmore, Liberty Found Inc; Camions (n 8), 20
[28] Littoral state means a coastal state with land territory adjacent to a particular maritime area.
[29] Caminos (n 13) 24. *See also* Nilufer Oral, *Regional Co-Operation and Protection of the Marine Environment under International Law: The Black Sea* (Martinus Nijhoff Publishers 2013).
[30] Gunnar Alexandersson, *The Baltic Straits*, vol 6 (Martinus Nijhoff Publishers 1982). *See also* Alex G Oude Elferink, 'The Regime of Passage through the Danish Straits' (2000) 15 The International Journal of Marine and Coastal Law 555.
[31] Ana G López Martín, *International Straits: Concept, Classification and Rules of Passage* (Springer Science & Business Media 2010).
[32] ibid, 5-6.
[33] Caminos (n 13) 28–29.
[34] ibid. 35–39.

deemed to be suitable for codification.[35] Various subcommittees were established, with one of them being given the responsibility of evaluating how the laws of the territorial sea were related to straits.[36] The 1930 Hague Codification Conference was an outcome of the final report of the experts committee, in which discussions were carried out on three particular topics, including the issue of the regime of the straits in terms of the territorial sea.[37] The Second Committee of the Conference did affirm that in those waters of a strait which constituted territorial sea, it is essential to ensure, in time of peace in all circumstances, the passage of merchant ships and warships through straits between two parts of the high seas forming ordinary routes of international navigation.[38]

2.1. Corfu Channel Case

The international legal regime was not strongly established with regards to the right to navigate without any limitations through international straits until the *Corfu Channel Case*[39] in 1949. In this case it was stated by the International Court of Justice (ICJ) that ships have the right of non-suspendable innocent passage across such straits.[40] Two British ships (HMS Orion and HMS Superb) were passing through the North Channel of the strait of Corfu that separates the Greek island of Corfu from the Albanian mainland on May 15 1946, when it had to face attacks from Albanian artillery. No damage was caused to the warships.[41] However, protests were made by the UK. It was asserted by the UK that international navigation was permitted through

[35] United Nations (ed), *The Work of the International Law Commission*, vol 1 (Eighth edition, United Nations 2017).
[36] Caminos (n 13) 30.
[37] League of Nations, 'Acts of the Conference for the Codification of International Law' (19th August 1930), C. 351. M. 145. 1930. V. 133-34.
[38] ibid.
[39] Corfu Channel Case, 'Judgment of 9 April 1949' [1949] 35 ICJ Reports.
[40] On 9 April 1949, the ICJ recognized that warships had a non-derogable right to pass through the Corfu Channel. The court reasoned that the strait linked two parts of the high seas, and is actually used for international navigation, albeit not indispensable to it. *See* ibid.
[41] Malgosia A Fitzmaurice, 'The Corfu Channel Case and the Development of International Law' in Nisuke Ando and others (eds), *Liber Amicorum Judge Shigeru Oda* (Brill 2022) 120.

the waters, whereas according to Albania, it was in control of the waters of the straits and its permission had to be taken before sailing through these straits.[42] Following certain diplomatic communications between the two countries, the UK declared that it had the right to send warships through the straits, and warnings were given that if fire was opened on these warships they would retaliate.[43]

On October 22, 1946, a few months following the initial incident, a routine navigation was carried out by a British squad, consisting of the cruisers HMS Mauritius and HMS Leander and the destroyers HMS Saumarez and HMS Volage, through the north of the Corfu straits. Mines laid out in the straits exploded on the Saumarez and the Volage close to the Bay of Saranda and caused significant damage, killing 44 naval officers and critically injuring 42 others. The North Channel of Corfu was swept by numerous minesweepers of the Royal Navy, leading to the discovery of 22 more mines.[44]

It was suggested by the United Nations Security Council in a Resolution of April 9 1947 that the two parties (the UK and Albania) should present their dispute to the ICJ on the basis of Article 40(1) of the Statute.[45] A written request was submitted by the UK at the Court Registry.[46] Response was given by Albania to this request before the ICJ, in which it asserted that it did not agree with the provisions of the Security Council, which called for the two parties to form an agreement before putting forward their case to the Court.[47] By 15 votes to 1, the Court rejected Albania's disagreement with its jurisdiction on March 25 1948.[48] The case was presented by the two States to the Court on the same day through a Special Agreement.[49] It was claimed by the UK that Albania violated their rights of innocent passage across the straits

[42] Martín (n 31) 10.
[43] ibid.
[44] ibid.
[45] UNSC Res 1947 (9 April 1947) UN Doc S/RES/1947
[46] *Corfu Channel Case* [1949] ICJ Pleadings 20.
[47] ibid 21.
[48] ibid.
[49] ibid.

through which two parts of the seas are linked, and also did not adhere to the relevant laws on mine-laying formulated in the Hague Convention of 1907.[50]

It was stated by Albania that since the existence of a state of war between Albania and Greece, the navigation of foreign ships was not simply a matter of freedom of navigation, but rather this situation called for it to be considered as an issue of national security. Furthermore, it was claimed by Albania that two distinct kinds of straits exist, one that serve as an essential passage between two parts of the high seas and are of importance to the international community because of international trade, and the other that the international community does not essentially require for navigation.[51] Albania had no doubts that the North Channel of Corfu was geographically a strait; however, it was of the view that this Channel was not an international maritime Channel that allowed innocent passage through it. It believed that this strait was not of primary significance as it was only used for local navigation and did not constitute an essential link between the two parts of the high seas.[52]

The ICJ presented the following decision on April 9, 1949:

> It is generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such a passage through straits in time of peace.[53] As to the international character of a strait, the court held that 'the decisive criterion is its geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation.[54]

[50] ibid.
[51] *Corfu Channel Case* [1949] ICJ Pleadings 383.
[52] ibid.
[53] Corfu Channel Case, 'Judgment of 9 April 1949' (1949) 35 ICJ Reports, 4.
[54] ibid 28.

2.2. Geneva Conference 1958

The pre-1958 customary international law and then the Territorial Sea Convention of 1958 in Article 14 stated that the right of non-suspendable "innocent passage" through the straits essentially relied on whether the strait belonged to the high seas or the territorial sea.[55] In case they were part of the high seas, then foreign ships have the right to sail through it, free of coastal jurisdiction or control, in the same way as they could pass through other parts of the high seas. In other words, a non-suspendable right of innocent passage. However, if the strait overlapped with the territorial waters of one or more States, then foreign ships had 'only' a right to innocent passage through the strait. In other words, the right can be suspended by the respective territorial State. Article 16(4) abovementioned is reflective of this position.[56]

The United Nations Conference on the Law of the Sea opened for signature the Convention on the Territorial Sea and the Contiguous Zone (CTS) on 29 April 1958.[57] There was a significant effect of the Corfu Channel ruling on the considerations of the International Law Commission, which brought about a general agreement regarding maintaining a right of access to straits free of the arbitrary capability of the coastal States.[58] Article 16(4) of the Convention on Territorial Sea and the Contiguous Zone provides affirmation for this, stating 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.[59]

[55] Churchill and Lowe (n 3) 102.
[56] ibid.
[57] As recorded in the Final Act (A/CONF.13/L.58, 1958, UNCLOS, Off. Rec. vol. 2, 146).
[58] Sharma (n 19) 83.
[59] 1958 Geneva Convention art 16(4).

2.3. UNCLOS I

Creating a distinct regime of passage through international straits was an issue that was not discussed in the 1930 Hague Conference or in the First Law of the Sea Conference (UNCLOS I) that took place in 1958.[60] Rather, the debate concentrated on issues like the definition of innocent passage, if a coastal State was allowed to ask for prior permission from warships requesting passage, and the territorial sea's breadth[61]. The issue of offering wider freedom of navigation, like a high sea freedom, was not discussed between countries until the cold war when two superpowers emerged.[62]

2.4. UNCLOS II

The Second Conference of United Nations on the Law of the Sea was summoned following the Resolution 1307 (XIII) of the General Assembly, the purpose of which was to discuss the breadth of the territorial sea and the fishing zones. It was in Geneva that the Conference was conducted, from 17 March to 26 April 1960. Up until this time, the width of their territorial waters had been determined by 22 States at 3 miles, 16 had determined it to be between 4 and 11 miles, 13 States at 12 miles and 2 States at more than 12 miles[63]. Nonetheless, though all suggestions of the States on the territorial sea's width were more than 3 miles, the agreement needed was not attained by any of these.[64]

During the ultimate discussions of the Second Conference, it was emphasised by the sea powers that it was essential to have a regime of unrestrained route for ships and submarines through the straits, in addition to the liberty to the aircrafts to fly over these, not just in terms of

[60] Niliifer Oral, 'Straits Used in Intemational Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention' (2006) 20 Ocean Yearbook Online 561, 564.
[61] ibid.
[62] ibid.
[63] Martín (n 31) 42.
[64] ibid.

increasing the territorial sea to 12 miles, but also with respect to other questions, like the adoption of the idea of an exclusive economic zone (EEZ).[65]

2.5. UNCLOS III

On 1 November 1967, UN Ambassador to Malta, Arvid Pardo, asked the nations of the world to look around them and open their eyes to a potential war that could devastate the seas, the very survival of man's lifeline.[66] In a speech to the General Assembly of the United Nations, he spoke of the rivalry of superpower that spread to the seas, the competing legal arguments and their consequences for a stable environment and the rich potential that lay on the seabed.[67] Pardo ended with a call for "an efficient international regime beyond clearly established national jurisdiction over the seabed and the ocean floor".[68] "It is the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue", he said.[69] The urge from Pardo came at a time when many realized the need to amend the doctrine of freedom of the seas to take into account the technological changes that had altered the relationship between man and the oceans.[70]

It initiated a process that spanned 15 years and saw the formation of the UN Seabed Committee, the signing of a treaty banning nuclear weapons on the seabed, the adoption by the General Assembly of the declaration that all seabed resources outside the limits of national jurisdiction are the common heritage of mankind and the convening of the Stockholm Conference on

[65] ibid.
[66] The Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 'The United Nations Convention On Law of the Sea: a historical perspective' (1998) <http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third Conference> assessed 13 January 2020.
[67] ibid.
[68] ibid.
[69] ibid.
[70] ibid.

Human Environment.[71] What started as an exercise to regulate the seabed developed into a global diplomatic endeavour to govern and write rules for all ocean regions, all sea uses and all of their resources. Those were some of the factors that led to the Third UN Conference on the Law of the Sea being convened to write a comprehensive oceans treaty.[72] In 1973 the Conference was held in New York. Nine years later, in 1982 it concluded with the creation of a constitution for the seas - the United Nations Convention on the Law of the Sea. Throughout those nine years, shuttling back and forth between New York and Geneva, members of over 160 sovereign states sat down and debated the issues, mediated, and exchanged national rights and obligations during the marathon discussions that led to the Convention.[73]

Significant naval powers were kept one side and coastal States regulating narrow straits on the other in the issue of passage through straits in the Third United Nation Conference on the Law of the Sea.[74] It was declared by the United States and the Soviet Union that there should be unrestricted passage through the straits, which would provide the same legal status to the straits as the international waters of the high seas.[75] The concern of the coastal States was that the passage of foreign warships near their coasts may create a threat for their national security, and potentially give rise to clashes between external powers. Hence, they denied this demand.[76]

Rather, it was claimed by the Coastal States that the straits should be considered as a part of the territorial seas. In fact, they were willing to provide only the right of "innocent passage" to foreign warships, a term that usually signified passage "not prejudicial to the peace, good order or security of the coastal State".[77] This idea was refused by the significant naval powers since, according to the international law, a submarine that uses its right of innocent passage, for

[71] ibid.
[72] ibid.
[73] ibid.
[74] ibid.
[75] ibid.
[76] ibid.
[77] ibid.

instance, would have to rise to the surface and put up its flag, which the naval powers believed to be a highly intolerable form of security threat.[78] In addition, the aircraft of foreign States are not given the right of flying over waters by the innocent passage, when just this passage is guaranteed.[79]

The issue of passage through international straits was one of the foremost driving factors for the Third United Nation Conference on the Law of the Sea, when it was suggested by the United States and the Soviet Union to other Member countries of the United Nations that an international conference should be convened to handle the issues of straits.[80] A compromise was reached in the Convention, which is a novel concept that integrates the legally accepted stipulations of innocent passage across territorial waters and unrestricted navigation over the high seas. Concessions were required from the two sides in this new concept, which is known as "transit passage".[81]

3. The Regime of Transit Passage under International Law

As discussed above during UNCLOS III significant argument was related to the regime of passage through straits used for international navigation.[82] This led to the formation of a multi-tiered regulatory framework of passage that consists of a completely new "transit passage" regime.[83] According to Article 38 of UNCLOS, "'Transit Passage' would be established for 'straits which are used for international navigation between one area of the high seas or an EEZ and another area of the high seas or an EEZ,' except where the strait is formed by an island of the coastal state and a high seas or economic zone route of similar convenience exists seaward of the island." The limitation is that the transit must be continuous, and it must be expeditious.

[78] ibid.
[79] ibid.
[80] ibid.
[81] ibid.
[82] David D Caron and Nilufer Oral, *Navigating Straits: Challenges for International Law* (Martinus Nijhoff Publishers 2014), 1.
[83] UNCLOS (n 15), Part III, Section 2, arts 37-44.

Though it has been more than forty years since UNCLOS was adopted, there continues to be disagreements on the critical part performed by straits in the worldwide communications network in terms of the conflicting interests of the coastal states and shipping.[84] Hence, issues are still faced regarding the attainment of simultaneous worldwide objectives of safe passage of vessels and protection of the marine environment.[85] In this regard, Part I of UNCLOS sets out the terms and scope and, in particular, defines what constitutes pollution of the marine environment, i.e. the introduction by man of any substances, directly or indirectly, which have a damaging effect on marine life, poses a threat to human health and may affect marine activities such as fishing, and which may in any way impair the quality of sea water. It also points out what does constitute dumping of waste at sea, and what does not.[86]

As mentioned in the introduction, prior to UNCLOS, the breadth of the territorial sea was at most three nm. Nearly all strategic international straits are larger than 6 nautical miles; hence, ships and specifically warships could pass through the corridor of high seas in the middle of the strait without entering the territorial waters of the coastal states. Therefore, the ships and aircraft of all nations had the unrestricted right to transit through such strategically important straits as Gibraltar, Malacca, Bab AlMandeb, Hormuz and Lombok Regardless of their political unpopularity.[87] The breadth of the territorial sea then confirmed in Article (3) of UNCLOS as being up to 12 nm, which has modified the earlier situation of transit passage right in such straits. There are about 116 straits in the world, between six and twenty-four miles in breadth. With the territorial sea extending to twelve miles, the waters in those straits would become territorial waters and high-seas passages through such straits would be lost.[88]

[84] Caron and Oral (n 82) 1.
[85] ibid.
[86] UNCLOS (n 15) Part I, art 1.
[87] Tommy TB Koh, 'Negotiating a New World Order for the Sea' (1983) 24 Va. J. Int'l L. 761, 762–769.
[88] ibid 768.

There were various interlinked factors and developments in the law of the sea that determined the regime of transit passage in international straits: extending the territorial seas to 12 nautical miles, the difference between the right of innocent passage and high seas freedom of navigation.[89] There is no antecedent of the term 'transit passage' in international law. The 1958 Territorial Sea Convention did not use this term, nor was it is used in customary international law.[90] The British delegation to the conference introduced this term and included it in their draft articles on the territorial seas and straits.[91] It signifies a compromise between 'freedom of navigation' and 'innocent passage'. The phrase "freedom to navigation and overflight solely for the purpose of continuous and expeditious transit" differentiates the spirit of transit passage from that of innocent passage.[92] This difference between transit passage and innocent passage will be elaborated later in a separate section. It would not be an exaggeration to state that the new regime has turned into the 'heart' of the rule of passage through straits used for international navigation.[93]

The requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State. However, a 'Singapore' exception exists. A ship or aircraft passing through the straits of Malacca and Singapore may halt at Singapore and continue to use the regime of transit passage. The features of the regime of transit passage are as follows: (1) it pertains to all ships, including warships; (2) submarines may continue to be submerged while passing through; and (3) a ship, aircraft and submarine is offered

[89] Morris F Maduro, 'Passage through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea' (1980) 12 J. Mar. L. & Com. 65.
[90] Tommy Koh, 'Straits Used for International Navigation: Some Recent Developments', *The Regulation of International Shipping: International and Comparative Perspectives* (Brill Nijhoff 2012), 20.
[91] United Kingdom, "Draft articles on the territorial sea and straits," Doc. A/Conf. 621 (c. 2) L. 3, 3 July 1974, in Third United Nations Conference on the Law of the Sea, *Official Records*, Vol. III (New York, 1975), 183–186.
[92] Martín (n 31) 152.
[93] ibid.

uninterrupted passage through, under and over a strait used for international navigation. This is in line with Article 38(2) of UNCLOS.[94]

4. The Definition of so Called "Straits Used for International Navigation"

While the geographical definition of straits that provided earlier in this Chapter serves as a reference, it is not valid from the point of view of Public International Law as regards providing a legal term for this maritime area. Having regard to the fact that not all geographical straits fall within the limits of the particular regime laid down in Part III of UNCLOS, but only those straits used for international navigation, as specified in this third part.[95] According to Hyde there are straits more significant than others. [96] And only the straits 'used for international navigation' are classified as 'international straits', and only such straits fall within the specific regime laid down in Part III of UNCLOS. [97]

In fact, Part III of UNCLOS is titled: 'Straits used for International Navigation'. The use of these terms shows that UNCLOS clearly follows on from the 1958 Geneva Convention, which conventionally confirmed this expression following the ruling of the International Court of Justice in the 1949 *Corfu Channel Case*; although UNCLOS does so in conjunction with the amendments made to the Law of the Sea, such as those concerning the breadth of territorial waters or the emergence of new maritime areas such as the exclusive economic zone (EEZ) or the waters of archipelago. [98]

[94] UNCLOS (n 15), art 38(2), second sentence.
[95] Martín (n 31) 41.
[96] Charles Cheney Hyde, 'International Law, Chiefly as Interpreted and Applied by The United States' [1945] Vol. I, 640. 487.
[97] Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989). 63.
[98] Martín, (n 31) 42.

Nonetheless, UNCLOS has not only renamed the term 'straits used for international navigation,' but is also presented as the heir to 'definition,' or better, the 'indefinition' of the term throughout its articles.[99] According to J.N. Moore, "UNCLOS has not altered or clarified the existing uncertainty in customary international law over the definition of 'straits used for international navigation'".[100]

A temporal problem exists with the word 'used' in the phrase 'straits used for international navigations'. It was a subject of much debate during United Nation Conference on the Law of the Sea, and even controversy.[101] The 'use' test comes from the judgment of the ICJ in the case of Corfu Channel, and the review of the concept by the Court retains its value.[102] The equivalent term used for this in French is '*servant'*, a present participle, or 'serving', which indicates that what actually matters is use at the time when the question emerges.[103] If so, evidence of past use is of lesser significance, although relevant in showing a pattern. Normally, limited or short-term use would not be adequate; however, in particular situations limited use may arise, for example, an oil discovery may rapidly place a strait in the category of those that are used for international navigation. It seems that entirely potential use is not adequate: there needs to be actual use when the question cannot be answered. When English and French texts are considered together, it may be said that 'used' and '*servant'* should be in the present continuous.[104]

The Third Conference on the Law of the Sea elaborated on the need for a particular definition of the term 'used for international navigation', and though concern was shown by a few delegations for the lack of provision in this regard in the Convention, it was generally

[99] ibid.
[100] 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, 12.
[101] Satya N Nandan and David H Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982', *Law of the Sea* (Routledge 2017). 167.
[102] ibid.
[103] ibid 168.
[104] ibid.

acknowledged that it would not be simple to come to an agreement on an acceptable definition.[105] Proposals were put forward by a few states for a definition, however it was determined by the Conference that the Convention would not include a description of straits.[106] Nonetheless, it seems that a better approach is to identify a 'concept' that includes elements, instead of a 'definition'. These are legal, geographical, and functional elements that configurate any description or meaning of "international straits" or of "straits used for international navigation".[107]

5. Types of Straits under United Nation Convention on the Law of the Sea 1982 (or UNCLOS)

Six distinct types of straits were identified in Part III of UNCLOS which are discussed below.

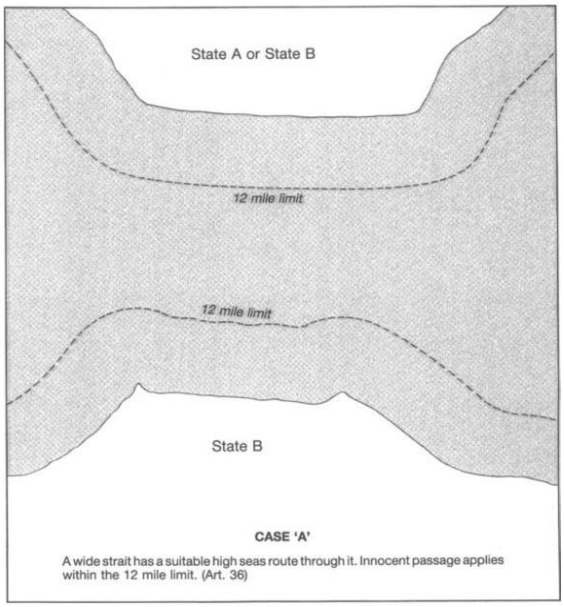
5.1. Type 1: High seas or EEZ corridor passing over the middle

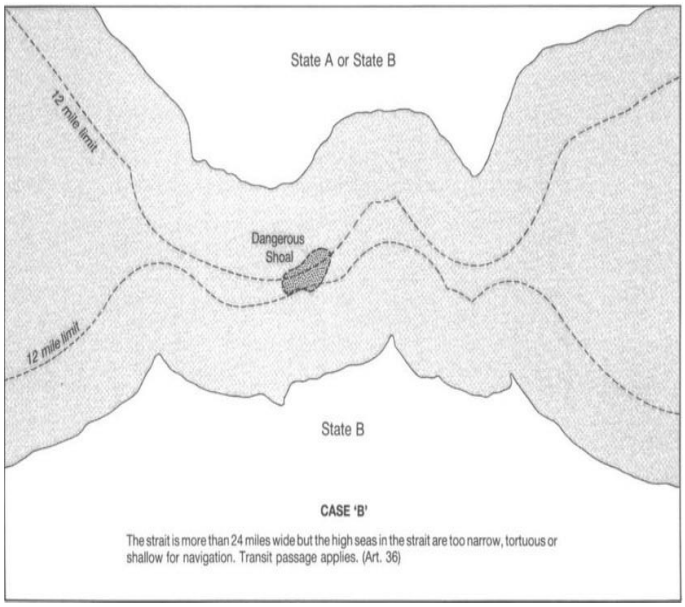
Case A and Case B[108]

Article 36 provides for straits used for international navigation, in which "a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait."[109] The other relevant parts of the Convention, including the provisions concerning the freedoms of navigation and overflight, apply in such cases.[110] The Bass Strait which separates Tasmania from the Australian mainland

[105] Caminos (n 13) 126.
[106] De Yturriaga (n 17) 3.
[107] For more analysis about these elements *see* Bing Bing Jia, *The Regime of Straits in International Law* (Oxford University Press 1998). 3-33; Martín (n 31) 41-64; De Yturriaga (n 17) 3-15.
[108] Taken from Nandan and Anderson (n 88) 41-46. Case A illustrates if a wide strait has a suitable high seas route through it. Innocent passage applies within the 12 nm limit. While in Case B the strait is more than 24 nm but the high seas route in the strait are too narrow, tortuous or shallow for navigation, in this case transit applies according to article 36 of UNCLOS. However, an examination of the charts of straits with high seas/EEZ corridors revealed no apparent instances of shallow waters, adverse currents, or other physical phenomena that would necessitate an alternative route through the strait; nevertheless, future use of the impacted waterways might reveal situations where certain modifications would be advantageous. See Lewis M Alexander, 'Exceptions to the Transit Passage Regime: Straits with Routes of "Similar Convenience"' (1987) 18 Ocean Development & International Law 479, 481.
[109] UNCLOS (n 15) art 36.
[110] ibid.

is an example of this kind of straits. The regime of non-suspendable innocent passage applies to such kind of straits.[111]



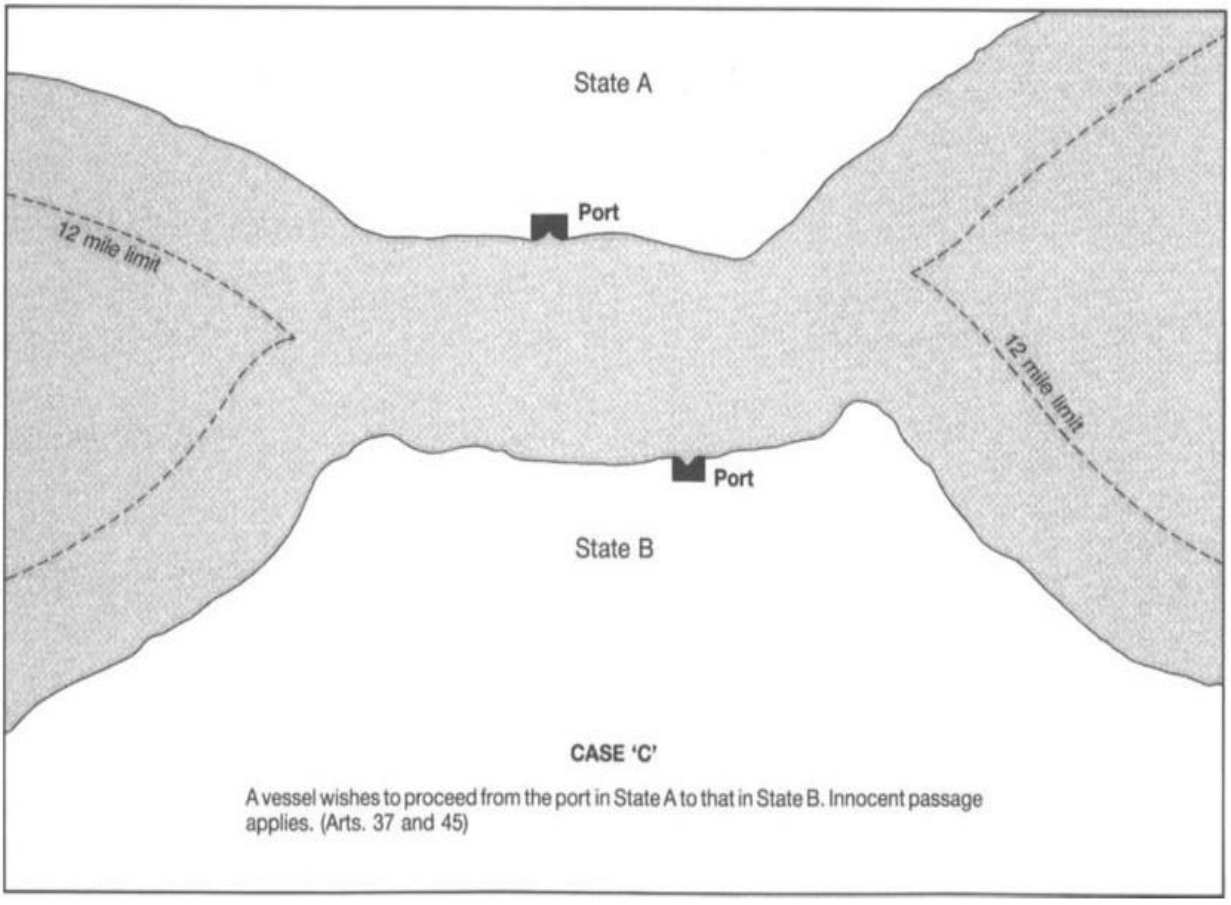


[111] ibid art 45.

5.2. Type 2: Formed by high seas or EEZ

Case C

Article 37 talks of "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."[112] The straits of Malacca and Singapore between the Malay Peninsula (Peninsular Malaysia) and the Indonesian island of Sumatra are examples of these kinds of straits. The regime of transit passage applies to this kind of straits.[113]

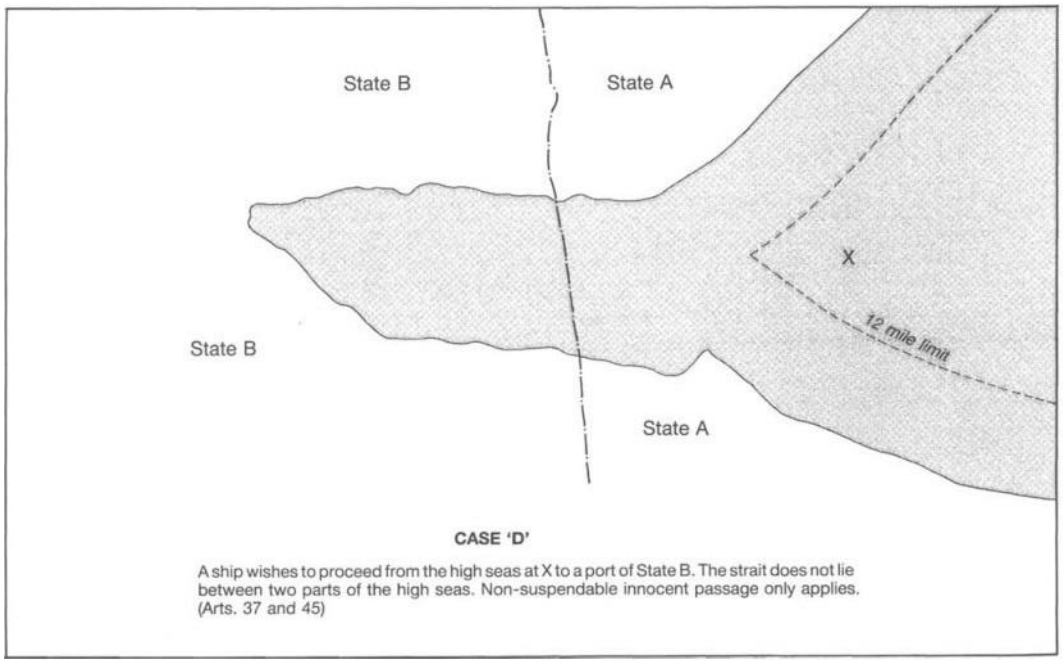


[112] UNCLOS (n 15) art 37.
[113] ibid art 37.

5.3. Type 3: Strait located between part of the high seas or an EEZ and the territorial sea of another state

Case D

Article 45(1) (b) governs straits used for international navigation situated between the high seas or an EEZ and the territorial sea of another state. The Strait of Georgia located between the United States of America and Canada is an example of this kind of strait. The regime of non-suspendable innocent passage applies to such category of straits.[114]



CASE 'D'

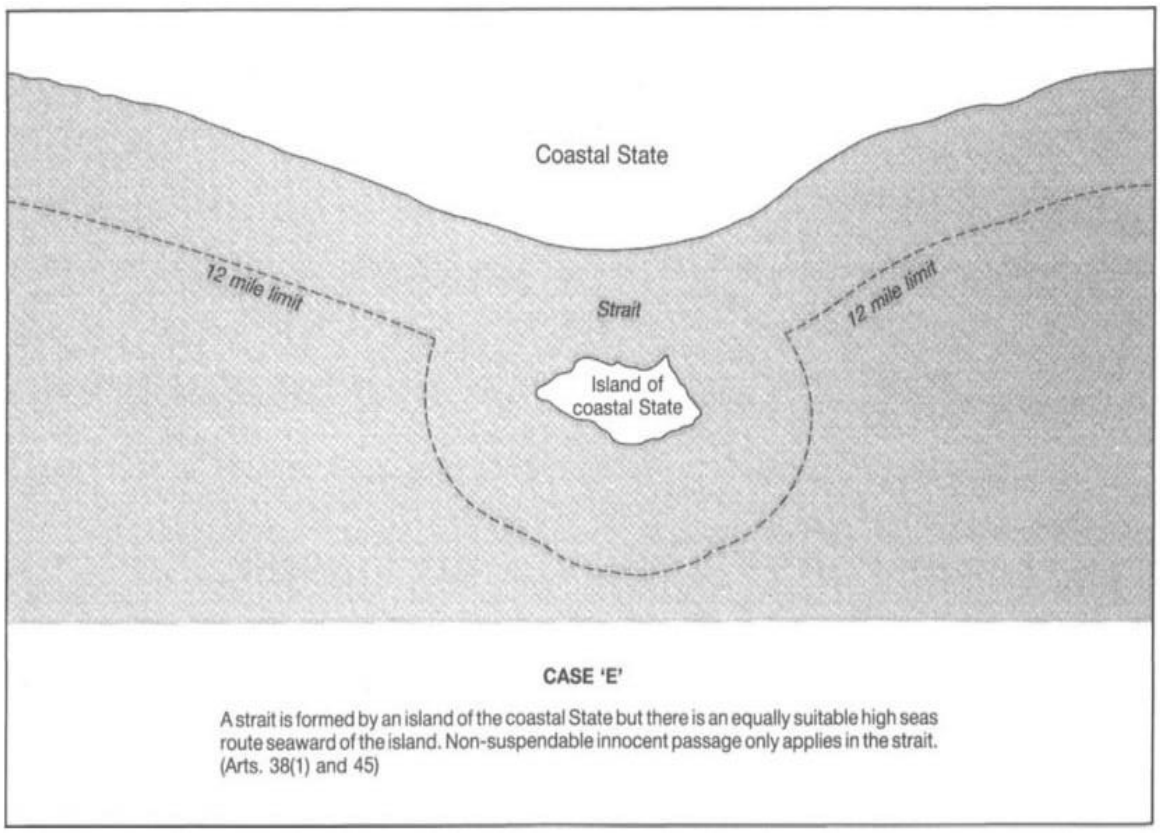
A ship wishes to proceed from the high seas at X to a port of State B. The strait does not lie between two parts of the high seas. Non-suspendable innocent passage only applies. (Arts. 37 and 45)

[114] ibid art 45.

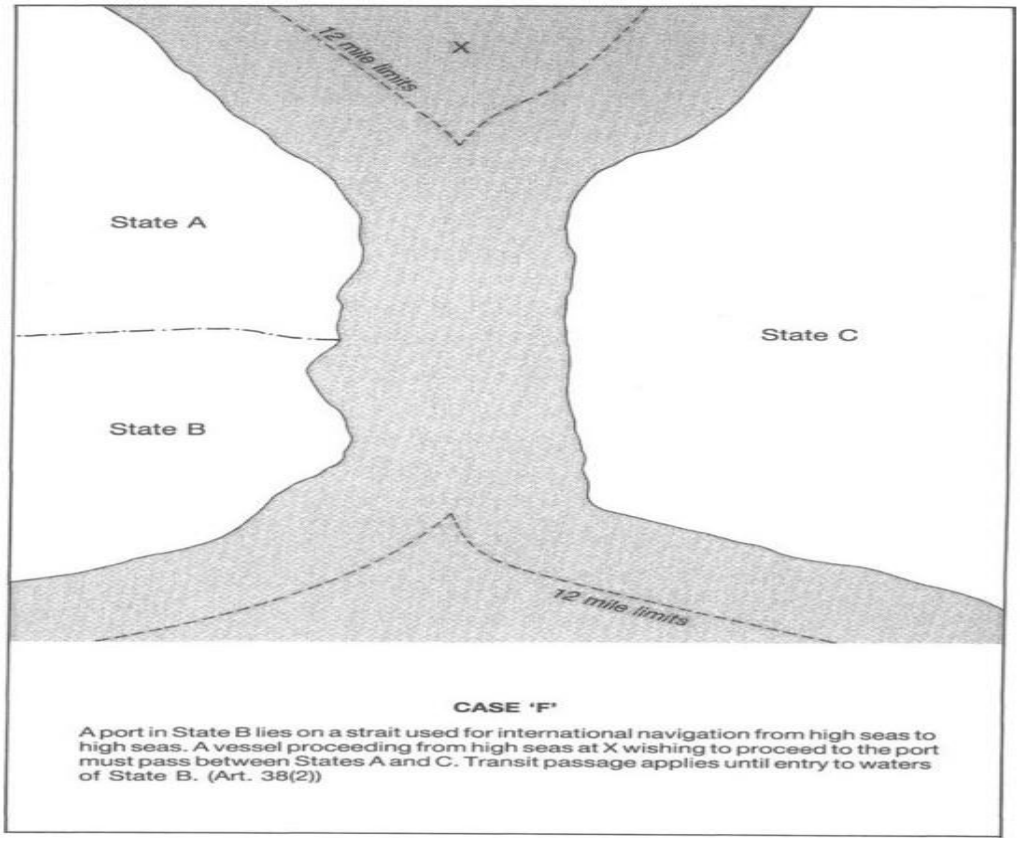
5.4. Type 4: formed by an island of strait state and its mainland

Case E and Case F

A strait encompassing a territorial sea that is created by an island of a state having borders with the state and its mainland and the seaward of the island where high seas or an EEZ is situated is recognized in Article 38(1) and Article 45. The strait of Messina between Sicily and Calabria in the south of Italy is an example of this kind of strait. The regime of non-suspendable innocent passage applies to this kind of straits.[115]Article 38(2) refer to the nature of passage that applies in straits used for international navigation which be positioned between one part of the high seas or EEZ and other part of the high seas or EEZ. The straits of Malacca and Singapore between the Malay Peninsula (Peninsular Malaysia) and the Indonesian island of Sumatra are examples of these kinds of straits. The regime of transit passage applies to this kind of straits.[116]



[115] ibid art 38(1).
[116] ibid art 37.



5.5. Type 5: Straits governed in whole or in part by long-standing international conventions

Straits that are regulated entirely or partly by long-standing international convention in force, particularly with respect to such straits, are recognized in Article 35(c). One example is the Montreux Convention[117] pertaining to the Turkish straits which create a series of international passages that connect the Aegean and Mediterranean seas to the Black Sea. They consist of the Dardanelles and the Bosphorus. The straits are on opposite ends of the Sea of Marmara. The

[117] This Convention guarantees freedom of transit through the Straits for merchant vessels of all nations at all times. But there is no corresponding right of free overflight of the Turkish Straits. The Convention also contains certain restrictions on the transit of warships of both non-Black Sea powers and Black Sea powers, one of them being that the maximum aggregate tonnage of warships of non-Black Sea powers within the Black Sea at any one time must not exceed 45,000 tons. See Alexander (n 8) 101.

straits are an example of this kind of straits.[118] This kind of straits is excluded from part III of UNCLOS.

5.6. Type 6: Straits that were earlier territorial seas

The straits used for international navigation when the waters of the strait were territorial sea in the past but are currently considered as internal waters following the creation of a straight baseline, are reflected in Article 35(a), along with Article 8(2). Australia's Geographe Channel is an example of this kind of straits. This kind of straits is excluded from part III of UNCLOS.

6. The Regime of Non-Suspendable Innocent Passage

Innocent passage refers to passage that is "not prejudicial to the peace, good order, or security of the coastal State".[119] The difference between the notion of innocent passage and transit passage will be elaborated later in this chapter. A non-exhaustive list of acts that would be taken as non-innocent is presented in Article (19) of UNCLOS, through which coastal States are permitted to intervene with the passage of the ships.[120] These are: "(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 defence or security of the coastal State; (d) any act of propaganda aimed at affecting the defence 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

[118] (Montreux, 20 July 1936; (1937) 173 LNTS 213).
[119] UNCLOS (n 15) art 19(1).
[120] ibid art 19(2).

coastal State; (h) any act of wilful and serious pollution contrary to this Convention; (i) any fishing activities; (j) the carrying out of research or survey 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."[121]

As mentioned above the non-suspendable innocent passage regime through international straits was established by the ICJ in the *Corfu Channel Case*.[122] In the territorial sea regime, the coastal State may by providing prior notification and without showing any prejudice in form or in fact, temporarily suspend the innocent passage of outside ships.[123] On the other hand, the coastal States are not permitted to suspend innocent passage in those straits that fall under the innocent passage regime.[124] The regime of non-suspendable innocent passage is applicable to straits where international navigation takes place between a part of the high seas or an EEZ and the territorial sea of a foreign State[125], generally known as "dead end" straits.[126] Furthermore, the regime of non-suspendable innocent passage is applicable to a strait used for international navigation if a route through the high seas or an exclusive economic zone of similar convenience in terms of navigational and hydrographic characteristics exists through the strait.[127] This is also referred to as "the Messina Clause".[128]

[121] ibid.
[122] Bernando Sepúlveda Amor, 'The International Court of Justice and the Law of the Sea' (2012) 1 Anuario Mexicano de Derecho Internacional <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/377> accessed 27 April 2020. 7
[123] UNCLOS (n 15) art 25(3).
[124] ibid art 45(2).
[125] Ibid.
[126] Martín (n 31) 100; Boleslaw Adam Boczek, *International Law: A Dictionary* (Scarecrow Press 2005). 313; James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press 2011). 128; Alexandros Ntovas, 'Straits Used for International Navigation', *The IMLI Manual on International Maritime Law Volume I: The Law of the Sea* (Oxford University Press 2014). 80.
[127]UNCLOS (n 15) art 36.
[128] Tullio Scovazzi, '6 The Strait of Messina and the Present Regime of International Straits', *Navigating Straits* (Brill Nijhoff 2014); Fabio Spadi, 'The Bridge on the Strait of Messina: "Lowering" the Right of Innocent Passage?' (2001) 50 The International and Comparative Law Quarterly 411; Martín (n 26). 93.

7. The Regime of Transit Passage

7.1. Rights of Coastal States During the Transit Passage

It is suggested by the transit passage regime that the strait is not part of the territorial sea anymore, and that coastal state powers in the strait are not the same as that in the territorial sea.[129] The transit passage regime for all states instantly provides unrestrained and extended freedom of passage to the user states.[130] The transit passage includes both the straits that at some point overlap the territorial seas of the bordering State or States and the straits through which a continuous high seas corridor or an EEZ is located.[131] The States bordering straits are under a duty not to hamper transit passage and shall give adequate publicity to any danger to navigation or overflight within or above the strait of which they are aware. Moreover, they must not suspend transit passage for whatever reason.[132]

There is the right with the strait States to specify sea lines and traffic separation schemes[133] that are consistent with international regulations acknowledged by international organisations (i.e. International Maritime Organization (IMO)), and which are accordingly presented on charts, as mentioned in Article 41 of UNCLOS, so that the number of accidents decrease and to improve the safety of navigation. This is only applicable when the following conditions are fulfilled: 1) the sea lines and traffic separation schemes are important to help safe passage of ships through straits; 2) these sea lines and traffic are consistent with "generally accepted international regulations"; and 3) the suggestions to specify lanes or schemes, or to replace either of them, have to be put forward to the "competent international organization" (i.e. IMO),

[129] Mary George, *Legal Regime of the Straits of Malacca and Singapore,* (LexisNexis 2008), 56.
[130] ibid.
[131] Alexander (n 7) 91.
[132] UNCLOS (n 15) art 44.
[133] G Plant, 'International Traffic Separation Schemes in the New Law of the Sea' (1985) 9 Marine Policy 134. *See also* Donald R Rothwell, 'Navigational Rights and Freedoms in the Asia Pacific Following Entry into Force of the Law of the Sea Convention' (1994) 35 Va. J. Int'l L. 587.

with respect to their adoption.[134] Such recommendations may not be accepted by the organization, unless they have been accepted by the States bordering the strait ("strait States").[135] In contrast, the concerning strait States may not specify or allocate the said lanes or schemes until the organization has adopted them.[136]

The UNCLOS has significantly restricted the powers of the state bordering a strait regarding safety of navigation and marine traffic regulation, in contrast to the competences identified with coastal States across other parts of their territorial sea. [137] Firstly, laws and regulations pertinent to the safety of navigation and regulation of maritime traffic may be accepted by the State having borders with the strait in just that strait.[138] Secondly, the State's regulatory authority extends further than just specifying sea lanes and the systems that the competent international organization has adopted.[139] The Convention only guarantees the strait State that the competent international organization will not be allowed to enforce a scheme without the consent of the former.[140]

Articles 41 and 42 of UNCLOS in the regime of transit passage asserts that the states should adopt, enforce and make known the municipal laws and regulations that offer secure navigation and regulation of maritime traffic, enforce and to fulfil international marine pollution conventions, adopt international rules in municipal laws for restricting pollution through oil and toxic substances, regulate fishing vessels, avoid fishing and manage stowage of fishing gear and handle the loading and unloading of any currency, commodity or individual. These

[134] De Yturriaga (n 17) 173.
[135] ibid.
[136] ibid.
[137] ibid 174.
[138] UNCLOS (n 15) art 41.
[139] ibid art 42.
[140] ibid art 41 (4); Moore (n 87) 105.

two articles have a limited scope; however, they offer adequate latitude to coastal states to intervene significantly with ships in transit.[141]

7.2. Obligations of the Coastal States during the Transit Passage

It is clearly stated by in Article 44 of UNCLOS that transit passage should not be 'hampered' by the Coastal States and relevant notifications should be made regarding any risks to navigation or overflight within or over the strait that they should know about, which would include cases of shipwreck obstructing parts of the strait or severe weather conditions.[142] The notification must be made as it becomes known and the situations in every case will determine the "appropriate way".[143]

The strait state is obliged not to 'hamper' transit passage, which indicates that no compulsions or requirements may be enforced on ships or aircrafts that puts a burden on them.[144] one traditional interpretation of this stipulation is that tolls or any other fees should not be enforced by the strait state in return for a right of passage.[145] Nonetheless, apprehensions have been raised by a few strait states regarding the financial burdens they experience while providing navigational assistance and other security and marine environmental protection measures in the waters of international strait without getting any compensation in return. They assert that they should receive charge tolls or at the minimum a fee-for-service that is directly related to the benefits they offer to international shipping that navigate through the strait.[146]

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[141] Karin M Burke and Deborah A DeLeo, 'Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea' (1982) 9 Yale J. World Pub. Ord. 389, 404.
[142] Donald Rothwell, 'International Straits', *The Oxford Handbook of the Law of the Sea* (2015), 123.
[143] Martín (n 31) 177.
[144] UNCLOS (n 15) art 44.
[145] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010), 241.
[146] Mark J Valencia and Abu Bakar Jaafar, 'Environmental Management of the Malacca/Singapore Straits: Legal and Institutional Issues' (1985) 25 Natural Resources Journal 195; Nazery Khalid, 'Burden Sharing, Security and Equity in the Straits of Malacca' (2006) 4 The Asia-Pacific Journal: Japan Focus 11.

Several duties are enforced by UNCLOS on coastal States regarding publicity. These states are supposed to provide "due" or "appropriate" publicity to their laws and regulations regarding transit passage.[147] In addition, they should also present the charts that demonstrate the sea lanes and the systems that the State has developed for separating traffic.[148] The choice of publicity method signifies the distinctive competence of the coastal State, and an appropriate method should be employed so that the information gets to the all the parties involved, which include those using the straits, flag and registration States of the ships and aircraft that pass through the strait and competent international organisms in this respect.[149]

It is necessary for strait states to formulate and enforce laws and regulations that do not hamper, deny, discriminate, prevent or cause any harm to transit passage rights.[150]

7.3. Cooperation between Coastal States and the States Using the Strait

According to Article 43 of UNCLOS:

> User States and States bordering a strait should by agreement cooperate:
>
> > (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships.[151]

The idea contained in this provision is that an issue to be settled between user States and the coastal State should be the compensation for the services rendered by the coastal State. The regime of Part III does not acknowledge any right for the coastal State to enforce levies for the

[147] UNCLOS (n 15) art 42(3).
[148] ibid art 41(1).
[149] Martín (n 31) 178.
[150] UNCLOS (n 15) art 42(2).
[151] ibid art 43.

services provided , as it happens in the innocent passage.[152] Though it is not prescribed in Article 43 how to carry out this cooperation, it may take place directly or through appropriate international organisation, which would be the International Maritime Organisation in this case, despite the fact that no international instruments are present for regulating this cooperation.[153] Furthermore, it should be also noted that this regulation has been formulated at an international level in a discretionary rather than imperative terms, in which obligation is not enforced and is employed for this purpose in various precepts of the Convention. Hence, it can be deduced that the cooperation between user States and coastal States of straits, as claimed in Article 43, is actually a declaration of principles instead of being legally binding provisions.[154]

The legal importance of Article 43 is that it requires cooperation and agreement. However, Article 43 is not the only, or even the primary, source in the Convention for an obligation to cooperate to promote navigation safety and protect the marine environment. Considering this, it is false to place a lot of emphasis on either the usage of the term "should" in the language of Article 43 or on the geographic extent of application of Article 43.[155]

If the term "should co-operate" is not equivalent to "shall co-operate," it is also not equivalent with "may co-operate." It is unclear how much difference (if any) it makes if one says "shall" or "should" when mandating cooperation and agreement. In other places, the Convention acknowledges this fact by using words such as "should", "shall seek to", "shall endeavour to", "shall promote" or "shall as appropriate". This is especially relevant when the purpose of the cooperation is a concern that, under the Convention, involves the rights of a coastal state. This is the practical situation with regard to navigation aids and other improvements in aid of

[152] Article 26 (2) for Charges which may be levied upon foreign ships in innocent passage reads: "Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination".
[153] Martín (n 31) 178.
[154] ibid 178-179.
[155] Bernard H Oxman, 'Observations on the Interpretation and Application of Article 43 of UNCLOS with Particular Reference to the Straits of Malacca and Singapore' (1998) 2 Sing. J. Int'l & Comp. L. 408, 409.

navigation in a straits state's territory or territorial sea: the straits state has the right to use them on its own if it wishes, subject to international technical standards and other obligations.[156]

Part XII of the Convention, which applies to the entire marine environment, contains the most direct statement of collective duties. It starts with Article 192 which include that "States have the obligation to protect and preserve the marine environment."[157] Where objective circumstances necessitate cooperation in order to protect and preserve the marine environment, a duty to seek cooperative means for achieving those ends is implicit in the basic obligation set out in Article 192 and further strengthened by the good faith and abuse of rights provisions of Article 300. This is made explicit in Part XII. It is rife with references to cooperation and collaborative action. In particular, Article 194, paragraph 1, states that "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source."[158] The third paragraph of the same article states that these measures "shall include ... those designed to minimise to the fullest possible extent ... pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels."[159]

Article 43 is not formulated to be the source of a regulatory framework for navigational safety or pollution prevention from ships in transit passage.[160] Other provisions contain a similar regime. Vessels in transit passage must abide by "generally accepted international regulations, procedures and practises" on "safety at sea, including the International Regulations for

[156] ibid 410.
[157] UNCLOS (n 15) art 192.
[158] ibid art 192.
[159] Similarly, Article 211 requires states, acting through the competent international organisation or general diplomatic conference, to promote the adoption, wherever appropriate, "of routing systems designed to minimise the threat of accidents which might cause pollution of the marine environment."
[160] Oxman (n 152) 415.

Preventing Collisions at Sea" as well as "the prevention reduction and control of pollution from ships."[161] Straits states may implement rules and regulations concerning "the safety of navigation and the regulation of maritime traffic," including designating sea lanes and prescribing traffic separation schemes, subject to approval by the relevant international organisation.[162] Strait states may also enact legislation and regulations "giving effect to applicable international regulations regarding the discharge of oil, oily wastes, and other noxious substances in the strait." If a violation of the straits state regulations causes or threatens significant damage to the straits' maritime environment, the straits states "may take appropriate enforcement measures".[163]

7.4. Enforcement by Coastal States

Article 233 of UNCLOS provides "Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section."[164] In the final negotiating sessions of UNCLOS carried out in 1982, a joint statement was presented by Malaysia, Indonesia and Singapore that: "States bordering the Straits may take appropriate enforcement measures in accordance with article 233, against vessels violating the laws and regulations referred to in article 42, paragraph 1(a) and (b) causing or threatening major damage to the marine environment of the Straits".[165] This statement defied the principle of unrestrained transit

[161] UNCLOS (n 15) art 39(2).
[162] ibid arts 41, 42(1)(a).
[163] ibid art 233.
[164] ibid.
[165] United Nations Office for Ocean Affairs and others, *The Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol 29 (New York: United Nations 1992), 144.

passage, but it was considered by the straits States to be essential to secure and protect their marine environment.[166]

According to the UNCLOS, there are limited abilities with the straits States to impose their regulations, as according to Articles 38(1), 42(2) and 44, they are not permitted to obstruct, hamper, damage, refuse or suspend the right of transit passage. However, Article 233 allows them to "take appropriate enforcement measures" when the regulations are violated by the transiting vessels such that they "causing or threatening major damage to the marine environment of the straits".[167] Part XII of UNCLOS outlines provisions for the protection and preservation of marine environment. All States are obliged to undertake measures to protect the marine environment and to control, reduce and manage pollution of the sea.[168] The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. One of these specified measures designed to minimize to the fullest possible extent: "pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels".[169] The provisions stress the importance of cooperation between States and the need for States to monitor the activities they allow or participate in to assess if these activities are likely to have significant adverse effects on the marine ecosystem and its various components.[170]

Under Article 233, enforcement actions are only applicable to "exceptional" cases[171]. However, Article 233 has been understood by the Malacca straits States as permitting them to take

[166] Jon M Van Dyke, 'Transit Passage through International Straits', *The Future of Ocean Regime-Building* (Brill Nijhoff 2009), 184.
[167] Jon M Van Dyke, '2 Rights and Responsibilities of Strait States', *Navigating Straits* (Brill Nijhoff 2014), 40.
[168] UNCLOS (n 15) arts 192 and 194.
[169] ibid art 194(3)(b).
[170] ibid art 204(2).
[171] Nandan and Anderson (n 88) 192.

relevant enforcement measures against ships moving through the straits that do not fulfil the (3.5) metre under-keel clearance requirement that has been established.[172] The most important aspects of this understanding are contained in the 28 April 1982 Memorandum[173], which are as follows: (1) The provisions imposed by the coastal States pursuant to Article 42 that include the requirement that vessels in transit through the strait bear a 3,5 m measuring probe under the keel. Malaysia, Indonesia, and Singapore had already accomplished that the IMO recommended this measure five years earlier in its Resolution A.375 (X) of 1977.[174] (2) If this requirement is not fulfilled, the coastal States may take the appropriate execution measures provided in Article 233, including measures to prevent the vessel from progressing, and this cannot be regarded as a denial, impediment, impairment or suspension of the transit passage. (3) Articles 42 and 233 shall not impact the rights or responsibilities of coastal States with respect to suitable execution measures for vessels not in transit through these straits.[175]

The functioning of Article 233 is inherently ambiguous. It applies terms like 'major damage' and 'appropriate measures' that might be interpreted in a variety of ways. It is feasible to argue that bordering States' enforcement measures do not include the prohibition on entering a strait, even if a vessel is likely to cause serious damage. Article 233, on the other hand, does not clarify what the 'enforcement measures' are. At this stage, it is possible and probably preferable to construe this provision as authorising coastal states to prohibit such vessels from passing through. In any event, Article 233 prohibits enforcement actions against ships and aircraft that are entitled to sovereign immunity, namely "any warship, naval auxiliary, other vessels, or aircraft owned or operated by a State and used, for the time being, only on government non-

[172] Mary George, 'The Regulation of Maritime Traffic in Straits Used for International Navigation' (2004) 44 Publications on Ocean Development 19, 19 and 34.
[173] The content of the Memorandum was officially confirmed by Australia, the United States, France, Indonesia, Japan, the United Kingdom and the Federal Republic of Germany. Doc.A/CONF.62/L.145, of 29 April 1982. See Martín (n 31) 173.
[174] Resolution A.375(X): Navigation through the Straits of Malacca and Singapore. (1977). London: International Maritime Organization. (Document Number Res. A.375(X)).
[175] Martín (n 32) 173-174.

commercial service" (Article 236). Even if such vessels or aircraft do cause significant damage to the marine environment, the coastal states' responsibility is limited to waiting, taking note, and presenting the bill to the flag or registry state, according to Article 42(5).[176]

A statement was presented by Oman after the signing of the Convention in 1983 that it understood that "the application of the provisions of the Articles 19, 25, 34, 38 and 45 of the Convention does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interests of peace and security".[177] It has been indicated by Scovazzi that the term "appropriate enforcement measures" should be interpreted "as allowing bordering States to forbid the passage of such ships".[178] He has condemned the immunity granted to warships as a "questionable exception to the principle that, in the field of protection of the environment, prevention is preferable to compensation."[179]

One of the key architects of UNCLOS and the former Secretary-General of the International Seabed Authority, Satya Nandan, has stated that apart from an Article 233 major damage context, "the only means of enforcing international standards or laws and regulations against passing ships is through the flag State unless the ship voluntarily enters the port of the strait State".[180] Opposition was made to the recommended passage of the Japanese plutonium ship through the Malacca straits by Singapore, Indonesia and Malaysia in 1992, which is an instance

[176] Tullio Scovazzi, 'Management Regimes and Responsibility for International Straits: With Special Reference to the Mediterranean Straits' (1995) 19 Marine Policy 137, 141.
[177] *United Nations Division of Ocean Affairs and the Law of the Sea, Convention on the Law of the Sea of 10December 1982 – Overview*, <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>, (accessed 13 Jan 2020)
[178] Scovazzi (n 173) 335.
[179] ibid 335.
[180] Satya N Nadan, 'Legal Regime for Straits Used for International Navigation', *The Proceedings of the Symposium on the Straits Used for International Navigation* (Istanbul: Turkish Marine Research Foundation, 2002).

of the situations where the straits States are not in favour of passage because of the risk of significant damage to the marine environment of the straits.[181]

8. Non-suspendable Innocent Passage versus Transit Passage

A lot of importance is placed on the distinction between the right of transit passage and the right of non-suspendable innocent passage, as they are both principal regimes of passage for vessels. Transit passage means "the exercise in accordance with Part III of UNCLOS of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit…"[182] Innocent passage means the passage that is "not prejudicial to the peace, good order, or security of the coastal State"[183]. This section adopts the parameters of definition, exceptions, and enforcement to compare the two types of passage.

Definition

In some circumstances, the right of innocent passage may be suspended. In addition, submarines are required to pass on the surface. However, it is not available to aircraft.[184] The right of transit passage may not be suspended; an aircraft may pass through, and the submarines submerged may also use this right.[185] These differences are explained by taking into account the fact that transit passages are available where an alternative route is not available, or any other of comparable convenience.[186] With respect to innocent passage, in accordance with Article 25(1) of UNCLOS, the coastal State is permitted to take steps against a foreign ship if

[181] Mariita Eager and Ian Stewart, 'Freighter Heads for Nuclear Shipment' (1992) South China Morning Post Wire Service. *See also* Jon M Van Dyke, 'Sea Shipment of Japanese Plutonium under International Law' (1993) 24 Ocean Development & International Law 399.
[182] UNCLOS (n 15) art (38)(2).
[183] ibid art 19(1).
[184] Nandan and Anderson (n 88) 169.
[185] UNCLOS (n 15) art 38(1).
[186] Nandan and Anderson (n 88) 169.

the passage is not innocent. An equal right is not provided to the coastal State by the provisions on transit passage.

Enforcement

A critical compromise was made in transit passage, whereby the States sharing borders with straits were permitted to take specific measures to improve security of navigation and also to prevent pollution in exchange for the right of expedited passage for ships. For instance, Part III of UNCLOS stated that it was mandatory for ships making a transit passage to conform to the generally accepted international regulations, processes and practices regarding safety at sea, such as the International Regulations for Preventing Collisions at Sea (COLREG).[187] In addition, it is also necessary for them to conform to the 'generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships'.[188] However, when compared to the non-suspendable innocent passage, the transit passage regime offers a significantly limited regulatory ability to the State sharing borders with the strait in order to manage the passage of foreign ships so as to offer protection to the environment, and ensure safe navigation. For instance, the passage becomes non-innocent when it knowingly gives rise to severe pollution in violation of UNCLOS.[189] Enforcement measures may be carried out by a coastal State after a passage has been deemed to be non-innocent. No parallel provision exists for transit passage.[190]

It is also vital to note that in accordance with the innocent passage regime, there is a wide prescriptive ability with the coastal State to include laws and legislations for, *inter alia*, safety of navigation and maritime traffic, maintaining the coastal State's environment, and avoiding,

[187] Article 39 (2) (a) of UNCLOS reads "Ships in transit passage shall comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea".
[188] UNCLOS (n 15) art 39 (2)(b).
[189] ibid art 19(2)(h).
[190] ibid art 19(2).

decreasing and regulating pollution.[191] It is also capable of adopting laws and legislations to preserve the living resources in the sea.[192] Furthermore, States bordering straits where there is applicability of transit passage may set up sea lanes and traffic separation schemes.[193] Nonetheless, they should adhere to the generally accepted international regulations that have been implemented by the competent international organisation.[194] Additionally, the approval of any other States that share a border with the specific strait should be obtained .[195] States bordering straits are permitted by Article 42(1)(a) to implement laws and regulations to ensure safe navigation and the management of maritime traffic, only as mentioned in Article 41.[196] Furthermore, States bordering straits are permitted by article 42(1)(b) to adopt laws and regulations pertinent to transit passage that give effect to relevant international regulations with respect to the discharge of oil, oily wastes and other toxic substances in the strait.[197]

Nonetheless, a coastal State in the innocent passage regime may require nuclear-powered ships, tankers and ships carrying very harmful or toxic substances to restrict their passage to sea lanes[198], as well as to transport documents, and adopt special precautionary measures,[199]. These provisions are not available in the transit passage regime.[200] Coastal states under innocent passage regime are allowed to enforce requirements in accordance with Article 22(2), like carrying documents or implementing precautionary measures without obtaining the IMO's approval.[201] However, the States bordering straits that fall under transit passage would have to

[191] Oral, 'Navigating the Oceans: Old and New Challenges for the Law of the Sea for Straits Used for International Navigation' (n 15) 174.
[192] UNCLOS (n 16) art 21.
[193] ibid art 22.
[194] ibid art 41(3).
[195] ibid art 41(4).
[196] Article 42(1)(a) states that "Subject to the provisions of this section, 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, as provided in article 41." ibid art 42(1)(a).
[197] ibid.
[198] ibid art 22(2).
[199] ibid art 23.
[200] ibid art 17–32.
[201] ibid.

obtain the IMO's approval for such measures. Obtaining the IMO's approval can take a lot of time, and often lead to refusal or a modified approval based on the distinct perspectives and interests of the IMO member States.[202] There is very little use of the existing regime of non-suspendable innocent passage for straits within the customary law, and in nearly every case, it is replaced by the transit passage regime.[203] However, the restricted regime of non-suspendable innocent passage still applies to international straits regulated by article 38(1) of UNCLOS (the "Messina exception") and article 45 (1) (b) (the "dead-end strait exception").[204] Both are considered below.

9. Exceptions to the Regime on Transit Passage

The provisions regarding the exceptions to applying the transit passage regime is an interesting element of UNCLOS articles that pertain to straits used for international navigation (Part III of the Convention).[205] Article 35(a) asserts that transit passage does not apply to the internal waters over a strait, except where the creation of the straight baseline causes the internal waters areas that had earlier been high seas or territorial sea to enclose. The comparatively few situations where there are internal waters within a strait are linked to juridical or historical bays, river mouths, harbour systems and roadsteads, and with straight baseline regimes.[206] For example, in the Corfu Channel, a juridical bay exists along the west (Greek) shore and serves to somewhat limit the belt width to which the transit passage regime applies.[207] The Sound strait, which separates Denmark and Sweden, is another example. In the case of the

[202] Oral (n 14) 175.
[203] William L Jr Schachte and J Peter A Bernhardt, 'International Straits and Navigational Freedoms' (1993) 33 Va J Int'l L 527. 534.
[204] ibid.
[205] Lewis M Alexander, 'Exceptions to the Transit Passage Regime: Straits with Routes of "Similar Convenience"' (1987) 18 Ocean Development & International Law 479. 479.
[206] Alexander (n 7) 102.
[207] ibid.

Sound Copenhagen's roadstead extends around three miles into the main passage, forcing traffic eastward towards Sweden.[208]

The transit passage regime is excluded from straits also by Article 35(c) of UNCLOS, whereby "passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".[209] The obvious reference here is to the Turkish Straits, which are regulated by the 1936 Montreux Convention.[210] Another waterway to which this article could apply is the Danish Straits (Little Belt, Great Belt and Oresund), which was the subject of a Copenhagen Convention of 1857 which lifted duties on ships transiting the Straits.[211] Since foreign warships were not subject to such dues at that time, some recent authors have argued that Denmark has no legal grounds to interfere with the passage of foreign warships through the Straits.[212] But a Danish Ordinance of 1976 requires advance notification of the passage of foreign warships through the Straits, demands that foreign submarines operate on the surface flying their flag, and notes that military aircraft can only overfly Danish territorial waters (including those within the Straits) when prior permission has been obtained.[213]

Article 36 asserts that the transit passage regime "does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics".[214] Through such a route, or "corridor," there would automatically be the high seas freedoms of

[208] ibid.
[209] UNCLOS (n 15) art 35(c).
[210] For more details See (n 78).
[211] Treaty for the Redemption of the Sound dues between Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and Denmark, March 14,1857, Clive Parry, *Consolidated Treaty Series* (Dobbs Ferry, New York: Oceana Publications, Inc., 1969), v. 116, 357.
[212] Alexandersson (n 30) 22; Alexander (n 7) 101.
[213] Alexander (n 7) 101.
[214] UNCLOS (n 15) art 36.

navigation and overflight.[215] If all States claimed a territorial sea of twelve miles, then there would be no such corridor for all straits with lesser widths than 24 miles. Any international strait, larger than 24 miles in width at least, would *ipso facto* have a high seas / EEZ corridor passing through it.[216] For example the Bering strait between the U.S and Russia is 44 NM width at the narrowest point.

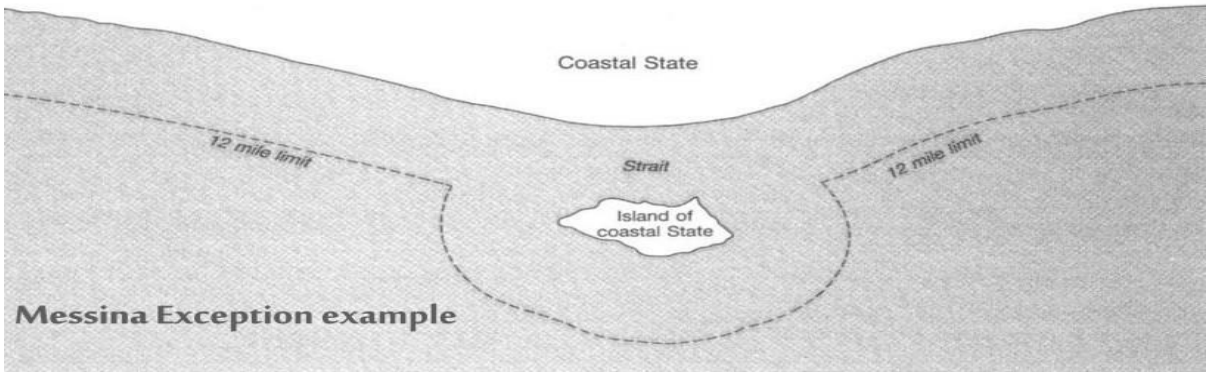
[215] ibid.
[216] Alexander (n 7) 100.

9.1. The Messina Exception

Article 38(1) of UNCLOS provides that the right of transit passage is excluded in a strait "if the strait is formed by an island of a State bordering the strait and its mainland" provided "there exists seaward of the island a route which through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."[217] As with many other articles of the Convention, it tends to be relevant to one specific situation. Efforts to apply it to other situations on the mainland/island should be carried out with great care.[218] The Article was incorporated in the convention as a reaction to Italy's apprehensions regarding the prominence of the Messina strait located between Sicily and peninsular Italy.[219] A surprising fact is that this is a unique kind of international waterway not present in any other part of the world, which splits a mainland country from such a huge and well-populated offshore island.[220] An exception is offered by the Article to the transit passage regime when the strait is created by an island belonging to a state bordering that strait and its mainland, and "there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics"[221]. There are some uncertainties about the article. First, what exactly does the term "of similar convenience" mean? Should the alternate waterway's fog, ice, channel depth, or travel distance be no worse than the original waterway's? In terms of distance, a vessel moving from Marseilles to Trieste through the Strait of Messina would save around 60 miles over a route that travelled around the island of Sicily.[222] Whatever the geographical situation, it appears from a reading of article 38(1) that a strait should be closed off at some point by overlapping

[217] UNCLOS (n 15) art 38(1).
[218] Alexander (n 200) 490.
[219] ibid.
[220] ibid 484.
[221] UNCLOS (n 15) art 38(1).
[222] Alexander (n 200) 484.

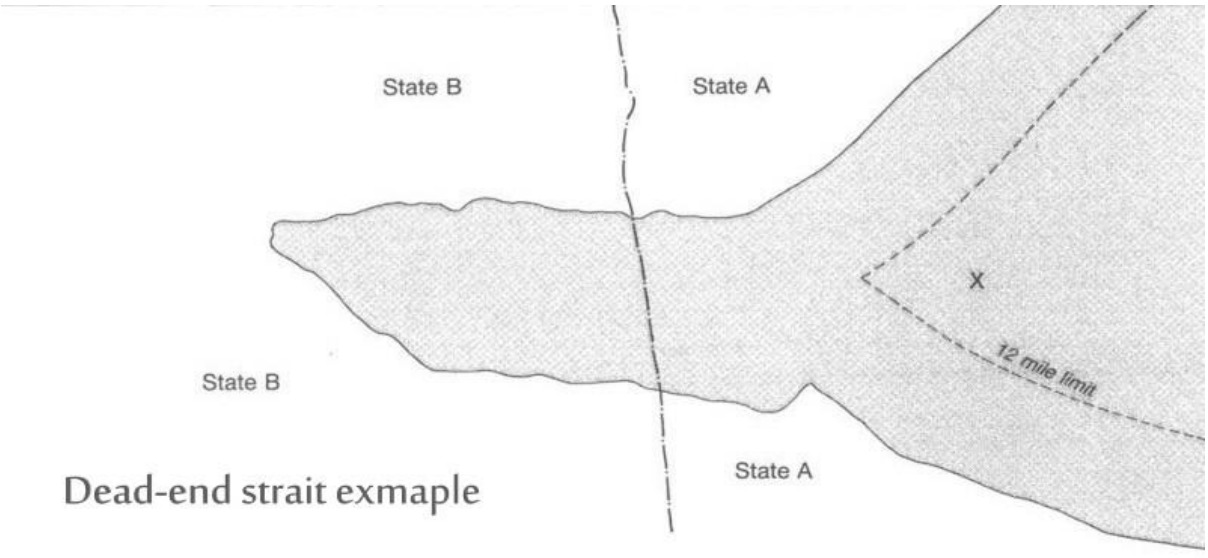
territorial seas in order to be excepted.[223] In addition, the alternate route must include a high seas or EEZ corridor. Given the proclivity of states to change their territorial sea claims, it is unclear which straits of the world might qualify as article 38(1) exceptions.[224]



[223] ibid.
[224] Alexander (n 7) 101.

9.2. The Dead-end Strait Exception

Another exception is offered by Article 45(1)(b) for the transit passage related to the straits used for international navigation between a part of the high seas or EEZ and the territorial sea of a foreign State (referred to as the dead-end strait exception). Navigation through the strait in the above two situations is regulated by a regime of non-suspendable innocent passage.[225] Examples of straits to which this provision may apply are Head Harbour Passage, leading from the Province of New Brunswick through Canadian waters to Passamaquoddy Bay, shared by New Brunswick and the State of Maine; Guatemala's Entrance to Bay d'Amatique; and the two small waterways in the Arabian Gulf; Bahrain-Qatar Passage leading to Saudi Arabia waters; and the Bahrain-Saudi Arabia Passage connecting with Qatar waters.[226]



[225] UNCLOS (n 15) Article 45 (3).
[226] Alexander (n 7) 102.

10. Duties of Ships During Transit Passage

The duties of ships and aircrafts with respect to transit passage are presented in the convention in Article 39. A few of these responsibilities are pertinent to ships as well as aircrafts, while the rest are either enforced on ships or on aircrafts. There are four duties that both ships and aircrafts have to fulfil: (1) the duty to proceed without delay through or over the strait; (2) the duty to abstain from any threat or use of force against the territorial integrity, sovereignty or political autonomy of States sharing border with the strait; (3) the duty to abstain from any activities apart from those taking place according to their normal modes of continuous and expeditious transit unless it is considered essential by force majeure or by distress; and (4) the duty to conform to other pertinent provisions of Part III of UNCLOS.[227]

Other certain duties have to be carried out by ships that emerge from practices that were being carried out prior to UNCLOS. [228] In Part III the incorporation of such other duties met with little difficulty. They may have been considered to reflect current practices, but they are part of the transit passage regime.[229]. For example, it is stated in Article 41(7) that 'ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this Article'.[230] According to Article 42(4), 'foreign ships exercising the right of transit passage shall comply with such laws and regulations'.[231]

Article 39(2) makes it imperative for ships in transit passage to conform to the generally accepted international regulations, processes and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea (COLREG).[232] In addition, ships in transit passage should conform to the generally accepted international regulations, processes

[227] UNCLOS (n 15) art 39(1).
[228] Jia (n 94) 152.
[229] ibid.
[230] See also UNCLOS (n 15) art 22.
[231] ibid art 21(4).
[232] *Convention on the International Regulations for Preventing Collisions at Sea*, London, 20 October 1972, 1050 U.N.T.S. 16.

and norms for restricting, decreasing and regulating pollution from vessels.[233] This Article uses the expression 'generally accepted', which is purposely used in a broad context so as to comprise of international agreements on this issue and the States that are involved, such as the customary regulations that are generally accepted in these issues and the agreements that consist of these.[234]

According to Article 40, "during transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorisation of the States bordering straits". This Article caters to the need of developing countries to control research activities within their territorial waters. However, this Article appears to be redundant as scientific research and survey activities are not related to the normal mode of transit passage[235], and passage that takes place along with such activities cannot be 'solely for the purpose of continuous and expeditious transit of the strait' (Article 38(2)). In addition, a general clause exists that the coastal State, 'in the exercise of their sovereignty, have the exclusive right to regulate, authorise and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State'.[236] In the case that Article 40 is violated, Article 38(3) becomes applicable which provides that "Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention".[237] This article is highly ambiguous, requiring the interpreter to determine the powers of the coastal State.[238]

[233] UNCLOS (n 15) art 39(2).
[234] Martín (n 31) 159.
[235] UNCLOS (n 15) art 39(1)(c). *See also* Caminos (n 13) 164.
[236] ibid art 245.
[237] ibid art 38(3).
[238] Caminos and Cogliati-Bantz (n 13) 218.

11. Duties of Aircrafts During Transit Passage

There are various duties mentioned in Article 39(3) that have an exclusive impact on the aircraft that passes over the straits used for international navigation and using their right to transit passage. The safety of air navigation is made certain by these obligations. An aircraft in transit passage shall:

> (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation.
>
> (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[239]

The primordial obligation of civil aircraft is clearly to adhere to the *Rules of the Air* of the International Civil Aviation Organization (ICAO). These Rules are included in Annex2 to the Chicago Convention of 1944 and includes global standards and practices suggested for the security and air traffic mandatory in the air space over and adjacent to the high seas.[240] The Chicago Convention now has 193 countries that have agreed to its terms, while the UNCLOS has 168 countries that have agreed to its terms as of December 28, 2023.[241] There are 36 States that have ratified the Chicago Convention but have not ratified UNCLOS.[242] Clearly, these

[239] UNCLOS (n 15) art 39(3).
[240] Martín (n 31) 160.
[241] ICAO, 'Current Lists of Parties to Multilateral Air Law Treaties - Default' <https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> accessed 16 January 2024. United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 16 January 2024.
[242] These states are: Afghanistan, Andorra, Azerbaijan, Bhutan, Burundi, Cambodia, the Central African Republic, Colombia, Congo, the Democratic Republic of Korea, Ecuador, El Salvador, Eritrea, Ethiopia, Israel, Iran, Kazakhstan, Kyrgyzstan, Lesotho, Liberia, Libya, Malawi, Niger, Peru, United Arab Emirates, United States, Venezuela, Ruanda, San Marino, Swaziland, Syria, Tajikistan, Thailand, East Timor, Turkey and Turkmenistan.

States adhere to the regulations outlined in the 1944 Convention, just as the States that are signatories to the Chicago Convention and these 36 States are obligated to adhere to the regulations of the Chicago Convention.[243] Four out of the 36 States deserve attention, as they are coastal States that are ruled by transit passage in straits. These states are United States, Venezuela, Iran and United Arab Emirates. Iran and the United Arab Emirates are both coastal states located along the Strait of Hormuz. The United States is a coastal state located along the Straits of Bering. The following are the names of the islands: Agattu, Tanaga, Unimak, Samaiga, Seguan, Adak, Kaulakhi, Kaiwi, Palolo, Alalakeiki, Kealaikahiki, Auan, and Kalohi. Venezuela is a coastal state that includes the Aruba-Paraguana Passage, Serpent's Mouth, and Dragon's Mouth.[244] Consequently, the territorial seas mentioned in the context are within the jurisdiction of these States, and any aircraft passing through must adhere to the requirements outlined in the 1944 Chicago Convention.[245]

There are five states that have ratified UNCLOS but have not ratified the Chicago Convention. In this scenario, the solution remains unchanged but in a reversed manner.[246] Specifically, the provisions outlined in the UNCLOS will be implemented with respect to the relationships between the parties involved and their relationships with States that are party to both Conventions. It is important to highlight that Dominica is an example of these states, which is a coastal State that encompasses two international straits, namely the Dominica Passage and the Martinique Passage. Without a doubt, the responsibilities mandated by the 1982 Convention dictate the utilisation of these straits.[247] The remaining 153 States that are signatories to both Conventions are obligated to adhere to the regulations outlined in UNCLOS in relation to their intergovernmental interactions, as this treaty supersedes the previous one.

[243] Martín (n 31) 163.
[244] ibid.
[245] ibid.
[246] Ibid.
[247] ibid.

In addition to the issues of international responsibility that may emerge from failing to comply with the duties of any of the Conventions, as defined in article 30(5) of the 1969 Convention on the Law of Treaties.[248]

Therefore, Article 39(3) essentially makes the rules of the high seas mandatory for flying over the straits regulated by transit passage, which remain part of the territorial sea.[249] This situation once again confirms the idea that has been repeatedly stressed that the new regime of transit passage considers the waters of the international straits to be somehow akin to the high seas in terms of navigation regime.[250]

Annex2 is extended by Article 39(2) to international straits that are territorial sea. Hence, the laws of the coastal State may overlap with those of Annex2. In addition, an exception is granted to State aircraft from the Chicago Convention, which consists of the *Rules of the Air*. Article 39(3)(a) includes the term 'normally' to comply with this rule. Nevertheless, the term is undefined.[251] However, it is uncertain to what degree and in what circumstances State aircraft are obligated by the inclusion of the term 'normally' to specify this requirement. The Convention does not provide a clear definition of the term 'normally' or specify who is responsible for determining whether a situation is 'normal' or 'abnormal'. Consequently, it can be reasonably inferred that the State where the aircraft is registered would be considered the determining authority. This would empower the pilot to exercise their own judgement in deciding whether a particular situation falls under the category of 'abnormal' and thus allows them to deviate from the *Rules of the Air*, which are part of the requirements for identification.[252] Without a doubt, this question is of utmost importance because the logical outcome of this specification, understood in the opposite sense, is that, in exceptional

[248] ibid.
[249] ibid.
[250] ibid.
[251] Jia (n 94) 156.
[252] Martín (n 31) 161.

situations, the aircraft State is not required to adhere to these *Rules of the Air*. The wording of article 39(3), which is considered absurd, arose from this problem.[253] It is contradictory because if the purpose of this provision is to ensure the safety of navigation, which is of utmost importance, why is it disregarded and excluded based solely on the description of a scenario as abnormal? The significance of this norm raises scepticism regarding the genuine 'supreme interest of transit passage of State aircraft through international straits, as it is evidently not primarily concerned with ensuring the safety of navigation. Rather, it aims to protect the specific interests of the dominant naval powers, and it is important to note that military aircraft are considered as State aircraft.[254]

As rightly highlighted by the Spanish representative in the Third Conference, it is clear that imposing an obligation that just has to be followed is essentially equivalent to not imposing any responsibility at all.[255] The simple categorization of a circumstance as 'abnormal' distinguishes these aircraft from all the restrictions, posing a risk to air navigation and the safety of coastal States and their populations. Due to the new requirements, Spain proposed a modification to article 39, specifically removing the term 'normally.' Nevertheless, the amendment was dismissed with 55 votes in opposition and 60 abstentions.[256]

Indeed, the crucial issue with this requirement is the determination of a situation's categorization as normal. Spain's interpretation declarations, made during the signing and ratification of the UNCLOS, serve to provide clarity on this contentious issue.[257] Spain maintains that the term 'normally' should be understood as "except in the case of force majeure or serious difficulty".[258] The purpose of this declaration is to address the potential issues that

[253] ibid.
[254] ibid.
[255] Doc. A/CONF.62/SR.182.
[256] Doc. A/CONF.62/SR.176.
[257] Martín (n 31) 161–162.
[258] ibid.

may arise from the extensive discretion given to a state's aircraft. During the transit of these theses through the straits, the uncontrolled passage of such aircraft poses a significant threat to the sovereignty of the coastal States in the straits. It is highly unlikely that the other States which are parties to the Convention will explicitly accept it.[259]

Article 39(3)(b) imposes a second obligation on aircraft regarding communication rules. Specifically, it requires them to continuously maintain the assigned radio frequency determined by the internationally designated air traffic control authority, or the corresponding international assistance radio frequency.[260] It is important to highlight that the usage of the disjunctive 'or' grants the aircraft the liberty to pick between different communication systems without having to present a justification. The inclusion of this disjunctive conjunction is a recent concession to aircraft engaged in transit passage, at the expense of the overflown State. This also raises an issue regarding the implementation of consecutive treaties related to this matter, as Annex 10 of the Chicago Convention mandates aircraft to have two frequency systems. Article 39 should have upheld the mandatory requirement to listen into both radio frequencies, as outlined in the Chicago Convention. However, this has not been the case and instead, it has been treated as an optional choice.[261]

In addition, this provision inadequately reproduces the rule stated in Annex 2. The rule specifies that an aircraft operating as a controlled flight must continuously monitor and communicate with the appropriate traffic control unit using the designated radiofrequency (rule 3.6.5.1). Article 39.3(b) does not provide this final information. The requirement to remain connected to the specific frequencies designated by the control tower of the governing authority

[259] ibid.
[260] UNCLOS (n 15) art 39(3)(b).
[261] Martín (n 31) 162.

being traversed is of limited value if the pilot fails to engage in communication with the air traffic controllers and neglects to adhere to their directives.[262]

However, as highlighted in the 1984 Report prepared by the International Civil Aviation Organisation (ICAO), this mistake has persisted from its initial drafting in 1977 and has not been rectified despite the ICAO's warning to the Draft Committee of the United Nations Secretariat. Practically speaking, this is a rather unimportant topic and does not create a conflict with the regulations of the ICAO. The rules of the ICAO are considered to be *lex specialis*, meaning they must be followed in cases involving the Convention.[263]

12. The Regime of Transit Passage and Customary International Law

The U.S takes the position that transit passage has become part of the customary international law[264], which has compelled Oscar Schachter to examine if a right of unimpeded passage exists within the public international law.[265] State practice on transit passage is considered by Malcolm Shaw as being unclear; hence it is not clear if this regime belongs to the body of customary international law.[266] It was decided by the International Court of Justice (I.C.J.) in the 1969 *North Sea Continental Shelf Cases* that a treaty provision could become part of the customary international law when the provision in question has an inherently norm-creating nature due to it creating the foundation of a general rule of law.[267] Hence, the legal relations

[262] ibid.
[263] ibid.
[264] United States Department of State Office of Ocean Affairs, Robert W Smith and J Ashley Roach, *United States Responses to Excessive National Maritime Claims* (US Department of State, Office of Ocean Affairs 1992).
[265] Oscar Schachter, *International Law in Theory and Practice* (Brill Nijhoff 1991). 286.
[266] Malcolm N Shaw, *International Law,* (Cambridge University Press 2008). 409.
[267] *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v *Denmark; Federal Republic of Germany* v *The Netherlands*) [1969] *International Court of Justice Reports* 3, 41–42.

that emerge from instruments determined during bilateral discussions do not have a customary nature as such; rather, they are contractual in nature.[268]

Jose Pastor states that the principle presented by the I.C.J. in the 1969 *North Sea Continental Shelf Cases*[269] should be followed if a conventional rule is to turn into a customary norm of general international law. It was asserted by the Court that an extensive and characteristic participation was not adequate on its own to demonstrate the emergence of a treaty provision as part of customary international law. Rather, the States most specifically involved with a provision in a convention should be parties to the convention and act in accordance with the convention before it can be considered as representing general customary law.[270]

Most of the States whose interests are particularly affected by the right of transit passage include the coastal States and the user States, and they are now parties to UNCLOS. These include Canada, Australia, Denmark, Bahamas, China, France, Djibouti, Greece, Indonesia, Honduras, Japan, Italy, Liberia, The Republic Korea, Morocco, Malaysia, Panama, The Russian Federation, Oman, Philippines, Spain, Singapore, UK, Sweden and Yemen. It was suggested by some that the State practice should be evaluated by examining the local body of legislations, bilateral and multilateral conventions and declarations.[271]

A few commentators indicated that the customary status of the UNCLOS transit passage regime is not established yet, due to "the attitude taken by a significant number of States which appear reluctant, either explicitly or implicitly, to accept the transit passage regime as a whole or some of its implications".[272] It has been asserted by certain Greek scholars that Turkey, for example,

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[268] Martín (n 31) 194.
[269] *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* (Merits) [1969] ICJ Rep 3
[270] Jose A. Pastor, "La convencion de 1982 sobre et Derecho del Mary los intereses de Espana" in *Curos de Derecho Internacional* (Vitoria-Caztez, 1983) as cited in Peter Tillman, 'Strait of Malacca and the Law of the Sea' (1994) 68 Australian Law Journal 885., 897.
[271] Caminos (n 13) 206.
[272] Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges* (Martinus Nijhoff 2000). 174. Űnlű emphasised that "a general right of transit passage has not yet been established in customary law." Nihan Ünlü, *The Legal Regime of the Turkish Straits*, vol 13 (Martinus Nijhoff Publishers 2002). 75.

would not have the right to impose the right of transit passage across the Aegean Sea (if claims would be made by Greece for 12 NM territorial seas in the vicinity of its (Aegean islands) as Turkey is not a party to UNCLOS.[273]

A prediction was made by John Moore where he asserted that "with or without a new convention … UNCLOS strait regime seems destined to serve as a powerful model for the development of a new customary law of straits transit".[274]

It has been asserted by Scovazzi that the "vital concern" of coastal States with respect to securing their marine environment is not sufficiently secured by the Convention.[275] The Convention only offers little power to the coastal States to impose their environmental laws. It does not develop a suitable liability regime, nor does it need prior notice of transit of ultra-hazardous cargoes, through which the coastal States would be able to secure their coastal resources and populations.[276] Because of these deficiencies, several coastal States have pronounced laws that seem to extend further than what the Convention allows.[277] It has been deduced by Scovazzi that "It is therefore possible to argue that UNCLOS transit passage regime is still far from fully corresponding to present customary international law".[278]

Nearly three decades following the entry into force of UNCLOS, there remains a lack of certainty on the alignment of the transit passage regime with customary international law. This

[273] George P Politakis, 'The Aegean Dispute in the 1990s: Naval Aspects of the New Law of the Sea Convention', *Greece and the Law of the Sea* (Brill Nijhoff 1997) 291–303. Anastasia Strati, 'Greece and the Law of the Sea: A Greek Perspective', *The Aegean Sea after the Cold War: Security and Law of the Sea Issues* (Springer 2000) 89–94.
[274] Moore (n 87) 121.
[275] Scovazzi (n 257) 174–175.
[276] ibid 175–177.
[277] ibid 177–187. Using the Malacca Strait, the Canadian Arctic Strait, the Turkish Straits, and the Russian Arctic Strait as examples.
[278] Scovazzi (n 173) 335.

uncertainty arises from the potential impact on states that have not ratified UNCLOS. The practice of states still uncertain on this matter.[279]

13. Conclusion

The current regime of straits emerges from negotiations of almost half a century.It is apparent that the regulation of straits used for international navigation have been a contested issue, not surprisingly due to their strategic relevance to the global trade, navigation and even war and peace. The contentions have been exacerbated by the forces of globalisation, glocalization, and sovereignty. That is likely to continue in the foreseeable future. Nonetheless, a balance must be struck between controlling and making accessible navigation through straits to make movement possible. That balance, it will be argued, has been provided by the UNCLOS. However, as it will become obvious in the next part of this thesis, the operation of UNCLOS remains challenged not only by non-signatories and non-parties, but also by signatories and party-States.

It remains uncertain whether customary international law has incorporated the right of transit passage. In the circumstances non-state parties to the United Nations Convention on the Law of the Sea (UNCLOS) can resort to the rights under customary international law of non-suspendable innocent passage when passing through Strait of Hormuz. Iran, being a signatory state to UNCLOS, is obligated to uphold the purpose and objectives of the treaty. As a party to UNCLOS, Oman is obligated to grant transit passage rights to other states in the Strait of Hormuz.

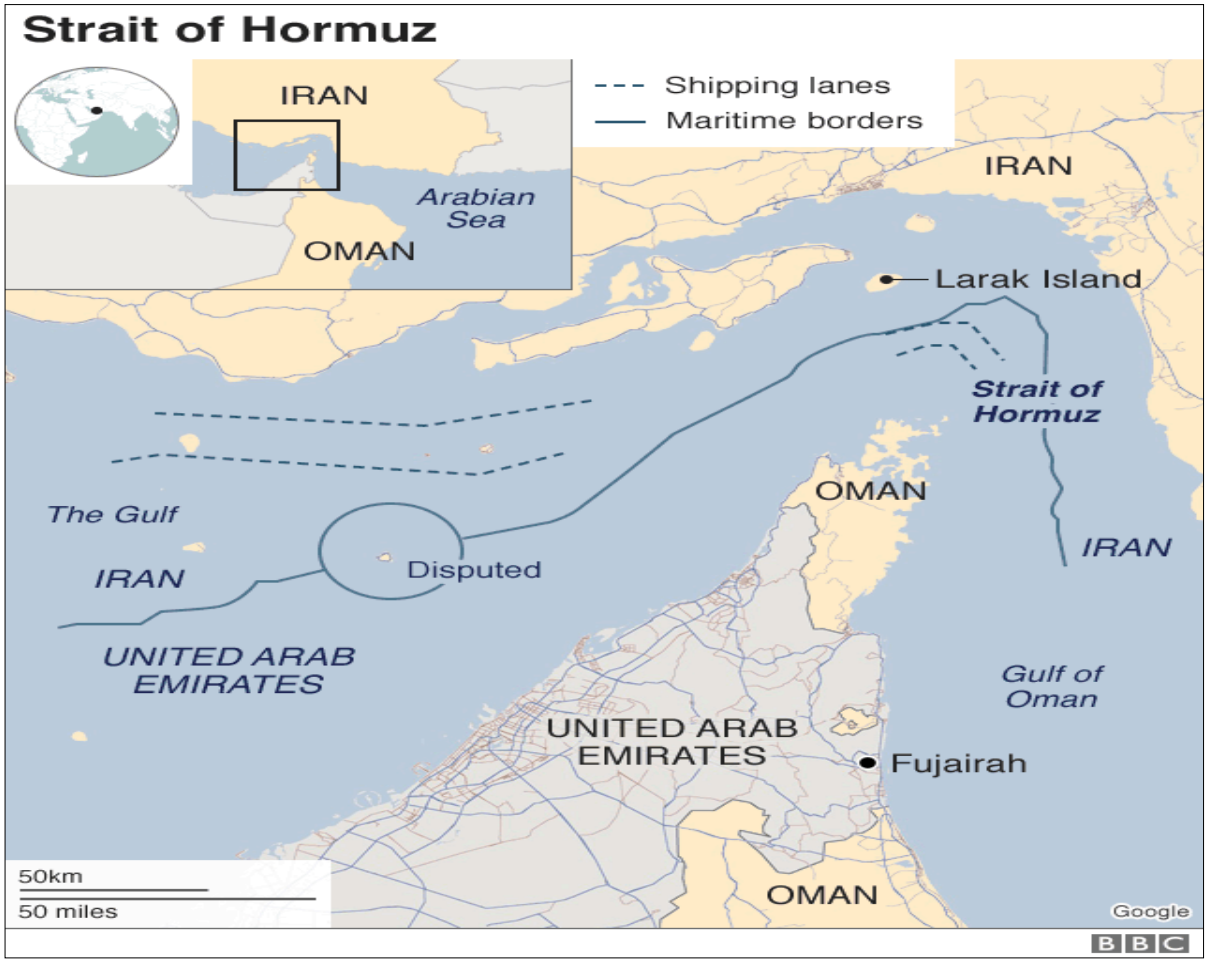
[279] Ida Caracciolo, 'Enforcing Sanctions on Iran at Sea: Tensions over the Interpretation and Application of the Law of the Sea' [2021] Nuclear Non-Proliferation in International Law-Volume VI: Nuclear Disarmament and Security at Risk–Legal Challenges in a Shifting Nuclear World 479, 496.

A transit passage regime is crucial to preserving world peace and order. The transit passage rules mitigate the danger that strait states will be drawn into international conflicts by relieving littoral states of the political burdens associated with the role of gatekeeper.[280] A framework is offered by Article 43 of UNCLOS for a cooperative system among coastal States and user States of straits, to support the former in bearing the maintenance expenses of the straits. The next part of this study adopts the view that the application of the spirit and letter of UNCLOS provides a sustainable and viable approach to resolving the contestations between users and coastal States of the Strait of Hormuz.

[280] ibid 531.

Chapter 3: History of the Strait of Hormuz

"If the world is a ring, the Strait of Hormuz is its pearl" - Raymond O'Shea.[1]



The map has been taken from the BBC News website[2]

1. Introduction

The last chapter sets out the regime of straits in international law. This chapter examines the history of the Strait of Hormuz. Due to its significance in planning the transport network in the sixteenth century, the Strait of Hormuz is referred to as the "Magical Door" (*Al-Bab Al-Sihri*)[3] and "Lion's Jaws" (*Fak Al-Asad*). It controls inward and outward movements in the Indian

[1] A strategic analyst and former officer in the British Navy. See, Rahal Mohammed, *Alser'aa Al'a Almthaaeg Al-Alalmia (Derasat Matheeg Hormuz)*, 'The Conflict over the International Straits (Case Study of the Strait of Hormuz)', (University of ELOued, Algeria, 2016/2017) 35.

[2] 'Iran Tanker Seizure: What Is the Strait of Hormuz?' *BBC News* (26 July 2019) <https://www.bbc.com/news/world-middle-east-49070882> accessed 29 January 2023.

[3] Hadeel Alganaby, *Al-Ned'am Alganoni Aldawli le Matheeg Hormuz w Ahmetah fi Altegarah Alneft'yah*, 'International legal regulation of the Strait of Hormuz and its importance in oil trade', (Route Educational and Social Science journal, Volume 6(2), Jan 2019) 118.

Ocean, West Asia, and the Near East Region as the Arabian Gulf's international outlet. The Arabian Gulf, the Sea of Oman, the Arabian Sea, and the Indian Ocean are all connected through the Strait of Hormuz.[4]

Explanations for the origin of the name of the Hormuz Strait vary across the sources; some link it to the region's classification as the Hormuz area. When the Sassanid kings and their rulers made this region a major centre, it was known as Hormuz, Hermes referring to the five kings of that time.[5] The second explanation regarding the name of this strait holds that Hormuz is the name given to the corridor, the islands, and the mainland since the reign of Persian king Quresh. Originally, the name of the strait was Hormuzd, but the "D" was later removed to make it easier to pronounce, and Hormoz is now pronounced in Persian.[6] However others propose that the word Hormuz dates back to Harbid, the clerical reader of supplications in the Zoroastrian temples in the Sassanid era, who had a great position at that time.[7] The name Hormuz was also given to the city on the coast opposite the island of Hormuz in a place now called Minab, which was built by King Ardeshir Babakan in the early third century AD, though it is no longer exist.[8]

The Kingdom of Hormuz (*Mamlakat Hormuz*) was one of the origins of the strategic Strait of Hormuz. The Kingdom of Hormuz was founded in the 10th century on the east coast of the Arabian Gulf, which was famous for its trade and wealth, and it became the maritime port for trade in the region Kerman and Sistan, in Iran and the west coast of the Arabian Gulf Al-Hasa North in Saudi Arabia to Ras Masandam in the United Arab Emirates. [9] Thus, Hormuz became a centre for collection of goods throughout the southern Arabian Gulf, and it was mentioned in manuscripts in the 11th century by a Russian businesswoman, Anastasia Nilistina, who stated

[4] Omaninfo, Sultanate of Oman, Available at https://www.omaninfo.om/mainsections/29/show/112.
[5] ibid.
[6] ibid.
[7] Ahmed Alholy, *3500 A'aam men omer Iran*, '3500 year from Iran age', (Kuwait University, 1979) 178-260.
[8] Loymer GG, *Daleel Alkhleej Alarabi*, 'Arabian Gulf Guide', (Geographical Section, Ali Press, Doha -Qatar). 1121.
[9] Rouhollah k. Ramazani, *The Persian Gulf and the Strait of Hurmuz*, (Brill Archive, 1979) 1.

that the Kingdom of Hormuz was a great trading city, to which people came from all over the world.[10] Hormuz was a translation of the Persian words "Ahora Mazada", the Zoroastrian god that was worshipped by most residents of the Kingdom of Hormuz.[11]

This Chapter begin by tracing the history of the Strait of Hormuz through last centuries. Then it will discuss the implications of this historical review on the importance of the Strait. This Chapter will go further to examine the Strait of Hormuz and Geopolitics. Finally, this chapter concludes that the strait played a key role in historical periods in linking East and West. Its location is in the middle of the Old World between Asia in the East and Europe in the West, which positions it between the resource-rich tropical region of South Asia and the consumption regions of Europe. It has become the vital artery that supplies the world with energy and returns prosperity and wealth to all countries bordering it that have outlets to it, such as the Arab Gulf countries.

2. The Strait of Hormuz through History

The Strait of Hormuz has a longstanding history of significance in world trade. Since ancient times the Strait of Hormuz has functioned as a strategic trade corridor, which has exposed it to the ambitions of other countries.[12] It has a focus for conflict and competition between neighbouring countries on the one hand and between foreign countries with vital interests in the region on the other.[13] The Strait concentrates the network of sea routes connecting the Far East (India, China and Southeast Asian countries) to the Mediterranean Sea, and it has been a

[10] Jean Oban, *Mamalakat Hormuz*, *Kingdom of Hormuz*, (translated by: Nadia Omar Sabri, Publisher: Documentation and Research Center, 2nd Edition, Abu Dhabi, United Arab Emirates, 2002) 17.
[11] Ahmed Al-Akkad, *Lematha Sommya Almatheeg been Iran w dwal al-khaleej b matheeg Hormuz*, 'Why was the strait between Iran and the Gulf countries called the Strait of Hormuz?', Available at http://ahmedalokad.blogspot.com/2012/07/blog-post_4709.html.
[12] Mohammed Hammoud, *Al-qanoon Al-Dawli li Al-Bih'aar*, '*International Law of the Sea'*, (House of Culture, Publishing and Distribution, 1st Edition, Amman – Jordan, 2008) 123.
[13] ibid.

crossing for convoys crossing the Arabian Gulf (the Gulf) and the Shatt al-Arab to continue overland to the shores of the Mediterranean, thence by ship.[14] This happened to European countries, before the construction of the Suez Canal. Through it and Mesopotamia the first communication links between East and West passed. This enabled contact between the civilizations of India and China and the civilizations of Mesopotamia, Greece and Rome.[15]

In view of the location occupied by the Strait, it became a focus for the ambitions of international powers extending from the Romans to the Portuguese, the Dutch, the British and the two great powers of the 19th century, namely the United States (the U.S.) and the Soviet Union.[16] This situation resulted in the first external invasion of the waters of the Gulf by Alexander of Macedonia, who invaded Persia, after discovering the real wealth existing in the East. He knew that seizure of the Strait meant controlling the most important keys to global trade. Persia was able to break free from the control of Alexander of Macedonia after his death. They return to take control of world trade by gaining control of the Strait and conquering the Gulf region in 750 CE and monopolized world trade for a period up to the advent of Islam.[17] The Kingdom of Hormuz dominated the Gulf in terms of all its strategic positions and essential sea-lanes for in excess of 200 years. From the fall of Baghdad to Ilkhanate Mongol forces in 1258 until its subjugation in 1507 by the Portuguese conqueror Afonso de Albuquerque (1453-1515); subsequently it became a powerful commercial centre controlling trade emanating from the Indian Ocean.[18]

[14] ibid.
[15] ibid.
[16] Zaman Tahmaz, *Al-Ahamiah Al-Estrategeah fi Al-Edrak Al-Estrategai Al-Erani*, 'The Strategic Importance of the Strait of Hormuz in Iran's Strategic Perception', (Al-Mustansiriya University, Iraq, 2017) 24-25.
[17] ibid.
[18] Thomas M Ricks, 'Persian Gulf Seafaring and East Africa: Ninth-Twelfth Centuries' [1970] African Historical Studies 339; René J Barendse, 'Trade and State in the Arabian Seas: A Survey from the Fifteenth to the Eighteenth Century' [2000] Journal of World History 173; Mohammed Hameed Salman, 'Aspects of Portuguese Rule in the Arabian Gulf, 1521-1622' (University of Hull 2004).

During the 15th century and with the aim of monitoring domestic and international trade and managing marine resources efficiently, the Hormuz rulers enforced regulations outlawing sea travel, trade and pearl fishing carried out in the absence of official permission. Not unexpectedly, the weaker Gulf sheikhs went along with this novel control over navigation and trade laws.[19] They were indeed unwilling to defend their free navigation and trade rights, and openly surrendered to the new reality, even though they passively resisted the restrictions imposed.[20] Nevertheless, some of them still sought ways to circumvent these moves. As a matter of illustration, traders in Oman decided to construct commercial centres and ports in Zhufar (*Dhofar*) and Mirba't (*Mirbat*) on the southwest coast of Oman, with the result that by the end of the fifteenth century, they had amassed sufficient power to mount a revolt against the Kingdom of Hormuz.[21] Without consultation, Hormuz kings imposed during the 15th century restrictions on access, limiting passage through the straits to licensed shippers, shipowners and traders and their agents, which stood in sharp contrast to the traditional Islamic custom of the sea.[22] Before the demise of the Abbasid Caliphate and subsequent split of the Gulf into independent political entities, the Hormuz governing authorities were expected to promote trade by sea and were prevented from taking any action that might impede freedom of navigation and trade routes through the Strait.[23] As a result at that time, foreigners and subjects of the Abode of Covenant[24] were able to sail unimpeded through this strategic waterway.[25]

[19] Hassan S Khalilieh, *Islamic Law of the Sea: Freedom of Navigation and Passage Rights in Islamic Thought* (Cambridge University Press 2019) 137.
[20] ibid.
[21] Ibrahım Khoury and Ahmad J. Tadmurı, *Saltanat Hormuz al-ʿArabiyya* 'Arabic Sultanate of Hormuz' (Ras al-Khaimah: Documentaries and Studies Center, 2000) 339–342.
[22] Khalilieh (n 19) 137.
[23] ibid 138.
[24] The Abode of Covenant/Truce is relevant to nations that rule over non-Islamic regions and give tribute to Islamic rulers. These nations typically uphold long-term trade and diplomatic agreements with Islamic governments and offer Muslims living within their borders the social, religious, and legal autonomy to conduct everyday business. For More information See ibid 55.
[25] ibid.

There is no mention in Arabic literature until the thirteenth century of any limitations on transit passage through the Strait of Hormuz. This suggests that both national and foreign ships were able to navigate through freely, as long as they did not disrupt public peace, order, or territorial integrity.[26] However, due to its role as a crucial route for Asian pilgrims travelling by sea and as the most direct and efficient waterway for East-West trade, the Strait of Bab el-Mandeb was probably more essential to the economy of Red Sea and Mediterranean regions than the Strait of Hormuz.[27] Prior to the exploration of Africa and the subsequent discovery of the Cape of Good Hope, a significant amount of spices and luxury goods from the East Indies were transported to Mediterranean and European markets through the Strait of Bab el-Mandeb. Cargo destined for Mediterranean and European markets had to be transported overland along caravan routes in Egyptian and Syrian borders.[28] Therefore, the strategic significance of water transportation through Egypt may be attributed to its central location.[29] The rulers established naval bases and fleets in important port cities and along vital trade routes. Their purpose was to safeguard ships from pirate attacks and to provide protection and assistance for trade between the Red Sea and other regions. Additionally, they aimed to ensure smooth passage through the Strait.[30] However, because to the inconsistent effectiveness of using force against human threats, merchants and shipowners were compelled to provide tribute in return for safe navigation and unimpeded transit.[31]

In 1513, Afonso de Albuquerque initiated two attacks on the port city of Aden with the objective of establishing a monopoly on the spice trade from the East Indies, displacing Muslim

[26] Khoury and Tadmuri (n 21) 115–134.
[27] ibid.
[28] ibid.
[29] Khalilieh (n 19) 138.
[30] Salim Abdulaziz, *ALbahar alahmar fi altarikh al-islami*, 'the Red Sea in Islamic History'(Alexandrea: Muʾassasat Shabab al-Jamia, 1990) 24-29.
[31] Timothy Power, 'The Red Sea Region during the 'Long' late Antiquity (AD 500-1000)' (Oxford University 2011). 296-297.

commerce in the Indian Ocean, and gaining control over the entry to the Red Sea.[32] These attacks were not successful, just like the attacks he initiated against other sites in the Red Sea.[33] Despite persistent attempts to block the Strait of Bab el-Mandeb, Muslim pilgrims and goods from Indian Ocean nations successfully navigated through the Strait to reach the Saudi and African coastlines of the Red Sea.[34] At times, the Portuguese occasionally hampered the Muslims' communication patterns, as well as the "cartaz" system[35] and naval activity. However, they never significantly hindered the passage of domestic and foreign vessels through the Strait of Bab el-Mandeb.[36] With the exception of a single reference from the 16th century and Ottoman Yemen, it seems that ships had been granted unrestricted access through Bab el-Mandeb since before the rise of Islam.[37]

Ensuring free passage through the straits of Hormuz and Bab el-Mandeb was of utmost importance to the Islamic religion. As a result, significant port cities situated near these straits flourished as important stops for maritime trade.[38] Merchant ships from the Indian Ocean frequently docked in large ports situated at the entrances of the Red Sea and the Gulf.[39] From these places, commodities were either transferred to other vessels or delivered on the same vessels to different destinations. The majority of the cargo was then transported by overland convoys to ports located on the Mediterranean Sea.[40]

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[32] Al-Tayyib ibn Abdullah Abu Ahmad Abu Makhrama, *Tarıkh Thaghr Aden* 'the Hisory of Thaghr Aldeen (Beirut: Dar al-Jıl, 1987). 24-25.
[33] Venetia Porter, 'The History and Monuments of the Tahirid Dynasty of the Yemen 858-923/1454-1517.' (Durham University 1992) 96–133; Salman (n 18) 184–185.
[34] Khalilieh (n 19) 138.
[35] 'Cartaz' is "a Portuguese word derived from Arabic *qirta's* or *qarta's*, which is originally derived from ancient Greek χάρτης (chártes), denoting a writing, book, scroll, document, paper cone, or cornet. It is a trading license issued by a Portuguese commissioner or competent authority to ships sailing in the Indian Ocean; a typical cartaz contains details regarding the place of origin of cargo, a vessel's destination, types of shipments, identities of crews, shippers, and passengers, etc." See ibid.
[36] Andreu Martínez d'Alòs-Moner, 'Conquistadores, Mercenaries, and Missionaries: The Failed Portuguese Dominion of the Red Sea' [2012] Northeast African Studies 1, 16–17; Salman (n 14) 109–110.
[37] Giancarlo Casale, *The Ottoman Age of Exploration* (Oxford University Press 2010) 44.
[38] Khalilieh (n 19) 139.
[39] ibid.
[40] ibid.

While the Dahlak ruler appears to have been the initial enforcer of toll payments in the mid-15th century, the Kingdom of Hormuz, and later the Ottoman governor of Kamaran, collected fees in return for ensuring the safe passage of ships through the Strait.[41] It is important to use caution when making assumptions about the justification of these historical taxes according to Islamic law. Contrarily, Islamic law grants upon all commercial vessels, regardless of their nationality, the privilege to navigate through near eastern straits without any cost. This freedom was crucial from an economic standpoint for the Abode of Islam and other nations.[42] Unrestricted access resulted in a higher level of maritime transportation, generated employment prospects, and bolstered economic and societal progress. It is reasonable to infer that if ships went directly to Red Sea destinations without stopping in the straits, they would not be required to pay taxes to the customs buildings located at the entrance to those straits.[43]

The Portuguese realized the importance of the island of Hormuz and the strait as the main source of their prosperity, and indeed the prosperity of the Gulf region in general, so they seized the island of Hormuz in 1507.[44] That year Commander Alfonso de Albuquerque sailed to become Viceroy of Portugal in India, and after Albuquerque's success in establishing a

[41] ibid.

[42] Jurists had varying opinions on what Abode of Islam was legally defined to mean. One group defined it as including the areas where Muslims lived in safety and peace; God's Law is superior and is upheld by a Muslim ruler, even if the bulk of the people under their control are not Muslims. According to a contrary viewpoint, the lands where Muslims may freely profess their religion were included in the Abode of Islam. It was described by a third perspective as a place where Muslims are safe and *harbis* are forbidden from entering. A fourth interpretation used the phrase to describe regions where Muslims live and Islamic law is in force. A fifth viewpoint covered any region where Sharia law is in effect. According to the final legal opinion, the phrase refers to any region where Muslims, whether they are the majority or a minority, are free to adhere to Islamic law and exercise their religious rites without interference from outsiders. For more information See Manoucher Parvin and Maurie Sommer, 'Dar Al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East' (1980) 11 International Journal of Middle East Studies 1, 4–5.

[43] Gerald R Tibbetts, 'Arab Navigation in the Red Sea' (1961) 127 The Geographical Journal 322, 329.

[44] Khaled Al-Asmar, *Geoseyaseat Al-Mathaa'g Al-Bahr'yaa w Ahtarha A'la Alseraa'a fi Al-Mashreq Al-Arabi, Derasat Mostagbal Al-Taqah fi Matheeg Hormuz w Bab-Almandab 2003-2018*, '*The geopolitics of the international straits and their impact on the conflict in the Arab East region, a case study of the future of energy supply in the Straits of Hormuz and Bab al-Mandab 2003-2018*', (1st Edition, Arab Democratic Center for Strategic, Economic, and Political Studies, Berlin-Germany, 2019) 98.

Portuguese presence in India, one of the main defining points for the eastern sea bases was to control the Strait and control the Gulf.[45]

Albuquerque laid out his plan to expand that influence and captured the Kingdom of Hormuz in 1507 forcing its ruler to become a vassal of the King of Portugal and pay an annual tax and allow Portuguese goods to predominate in his country.[46] The Portuguese controlled the Strait for about 100 years, and in this era the strait witnessed deterioration in its general conditions as a result of Portugal's control over its economy without tangible intervention by the kings of Hormuz.[47] They monopolized trade and controlled navigation in the Strait, the Gulf and the Indian Ocean. Thus, non-Portuguese ship could not enter the Gulf without permission from the Portuguese on the island of Hormuz. This is because the Portuguese wanted to monopolize trade, so obtaining a permit was very difficult.[48]

Portuguese actions targeted the traditional relations in the Gulf region. Especially following control of the Kingdom of Hormuz, which was the focus of all maritime activity in the region. They imposed an arbitrary policy through the use of excessive force, in order to impose taxes and control customs, obtaining money from ships transiting Hormuz.[49] The Portuguese monitored and imposed full control over the Strait and seaports by instituting military garrisons, maritime patrols and close monitoring of commercial traffic through the Strait.[50] During that period Gulf trade and its position as a maritime trade route hit a major recession,

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[45] Haidar Al-Tamimi, *Mamlakat Hormuz* (1500 AD- 1622 AD), 'Kingdom of Hormuz (1500 AD - 1622 AD)', (University of Basra, 2004) 35.
[46] Soumia Al-Dheeb and Fatima Tayype, *Al-Bo'ad Al-Goyobolоticly le Al-Mathaeeg fi Al-A'alagat Al-Dawliah – Derasat Halat Matheeg Hormuz*, 'The Geopolitical Dimension of Straits in International Relations - A Case Study of the Strait of Hormuz', (University of Larbi Tebsi, Algeria, 2020) 60.
[47] Salma Mohammed, *Matheeg Hormuz, Alwad'a Al-Geopoliticlay w Alsera'at Aleglymiah*, 'The Strait of Hormuz, The Geopolitical Situation and Regional Conflicts', (Gulf Magazine, Issues (3-4), University of Basra, 2009) 96.
[48] Abdulaziz Awad, *Derasat fi Tareekh Alkhleej Alarabi Alhadeeth*, 'Studies in the Modern History of the Arabian Gulf', (Al-Raed Scientific Library, Amman-Jordan, 1991) 108.
[49] Rui Ferri A.R. Andardi, *History of the Portuguese in the Arabian Gulf, the Day of the Fall of Hormuz Naval Commander Rui Verida Andardi*, (translated by: Issa Amin, Al-Ayam Foundation for Press, Printing and Publishing and distribution, 1996) 20.
[50] ibid.

as Portugal tried to divert international trade routes between Europe and Asia from the Gulf and Red Sea to the southern oceans and the Cape of Good Hope. The region did not regain its importance until the opening of the Suez Canal in the nineteenth century, and so for a century the Gulf remained Portuguese monitored, with control exercised by Portuguese ships.[51]

It seems there were two goals behind the arrival of the Portuguese to control the Strait. One of them is a religious goal, namely, to preach Christianity to the Near East and India. Second is a commercial goal, which was a basic economic motive, because the strait was a commercial centre in the Gulf.[52] These goals pricked Albuquerque's interest in the Strait, as he believed his attempt to seize it would enable him to control the entire Gulf, producing great profits.[53]

The Portuguese suffered a number of rebellions along the Gulf in addition to local resistance from Muscat and Hormuz.[54] This also involved the Ottomans, who arrived in the region after a period of Portuguese control, occupying Baghdad in 1534 and Basra in 1547.[55] In this way the Ottomans managed to extend their influence over the northern part of the Gulf, leading to war between the Ottoman Empire and the Portuguese, while the Ottomans tried to control the Strait. The Ottoman Sultan Suleiman the Magnificent sent his fleet, arriving on 19 April 1552, but the Portuguese were aware of this and plans to seize the Strait, so the Portuguese garrison of Hormuz with its 700 men was able to defend the strait and the castle of Hormuz.[56] Thus, the Ottoman fleet withdrew after its defeat and headed to Basra at the end of 1552.[57] Therefore, throughout the sixteenth century the Strait remained at the forefront of Portuguese economic

[51] Awad (n 48) 208.
[52] ibid.
[53] ibid.
[54] Dhafer Al-Ajmi, *Amn Alkhleej Alarabi, Tatwaratwh w Mashakeleh Men Mnthoor Alalaqat Aldawliyah Almahaliyah*, 'The security of the Arab Gulf, its development and problems from the perspective of regional and international relations',(Center for Arab Unity Studies, Beirut – Lebanon, 2011) 69.
[55] Tariq Al-Hamdani, *Tareekh Alkhleej Alarabi Alhadeeth w Alowaaer*, 'Modern and Contemporary History of the Arabian Gulf', (Adnan House and Library, Baghdad, 2015) 41.
[56] Essam Adwan, *Alera'a alothmany albortogali albhry fi alqarn alsades ashar,* 'Ottman-Portuguese Maritime Conflict in the 16th Century', (Journal of Al-Quds open University for Humanities and Social Studies, Palestine, 2019) 47-48.
[57] ibid.

activity.[58] It was a commercial centre in the Gulf. In fact, until the seventeenth century the Gulf played an important and prominent role in regional and international level. This contributed to trade revitalization and opening the region to the Portuguese and other European countries, especially Britain.[59]

In the early seventeenth century, a number of factors combined to weaken the Portuguese and reduce their influence in the Gulf: i) the Arabs' dislike of them due to the injustice and cruelty of Portuguese occupation and their monopoly of trade and navigation in the Gulf; ii) the change in Portugal's political status in Europe, when in 1581 it submitted to the Spanish throne, as Spain exploited Portugal's resources to its advantage, thus weakening the Portuguese; iii) the emergence of the Safavids in Persia and their growing power.[60]

These three factors were compounded by British expansion towards the Gulf following establishment of the English East India Company in 1600.[61] The establishment of the English East India Company occurred as a result of the commercial expansion of Britain in the first half of the sixteenth century and lead to a rush for new markets for their growing trade overseas.[62] Also with the rise of first Persia Shah Abbas managed to expel the Portuguese from the Strait in 1621 with the help of British forces after the outbreak of war between the

[58] ibid.
[59] Fadi Farhat, *Mathaeeg almanteqah alarabiah alestrategiah been shophat alesta'amar w atma'aa israel,* 'The strategic straits of the Arab region between the appetites of colonialism and the ambitions of Israel, (Islamic Unity Magazine, Lebanon, 2003) 5.
[60] Fathi Al-Jubouri and Ahmed Al-Jubouri, *Tareekh Alkhleej Alarabi,* 'History of the Arabian Gulf', (Dar Al-Fikr, Amman - Jordan, 2009) 56-57.
[61] Awad (n 48) 113.
[62] Sabri Al-Hamdi, *Alqelafat Aldawliyah fi Alkhleej Alarabi,* 'The International Conflict in the Arabian Gulf (1500-1958)', (Dar Al-Hikma, London, 2010) 38.

Portuguese and British.[63] Thus the Strait was fully captured, after the Portuguese forces were expelled and it was liberated from them on April 23, 1622.[64]

In 1623, the British and Persians welcomed Dutch ships to the Gulf. In 1624, the Dutch obtained an undertaking from Shah Abbas I to establish an agency for them on the island of Hormuz.[65] Nevertheless, they quickly transferred that agency to another location, Bandar Abbas. The English and Dutch occasionally cooperated in the war against the Portuguese.[66] This happened in the 1625 naval war near Bandar Abbas, when the British fleet and the Dutch succeeded in ousting the Portuguese fleet.[67]It appears that the Dutch ambitions were excessive, and so they were open to risks.[68] This was in contrast to the English, whose policy was cautious. This means they were averse to risk and sought to barter goods with the countries of the Gulf and facilitate their exchange, by establishing a commercial colonial empire. Hence, in 1641 the Dutch decided to resist British monopolies by selling European goods at prices below cost.[69] Their aim was to remove the British from commercial markets. At this time competition between the two countries increased to control the markets of Persia and the Gulf. Dutch sovereignty continued for nearly twenty years (1650-1670), and this was helped by the fact that the owners of Dutch companies were also the rulers of the country, so they were more receptive to war expenditure.[70] The Dutch companies enjoyed a complete monopoly, while the British

[63] Shah Abbas I: Born in the city of Herat in Afghanistan on 27/1/1571M. At the age of four His grandfather, Shah Tahmasp, appointed him governor of the Khorasan region, his father Shah Muhammad was weak in authority and personality because of health problems that prevented him from ruling an important area in the Iranian state such as Khorasan, and in 1587 AD Shah Abbas became leader of Iran at the age of 17 years. His father forced Shah Muhammad to step down. Shah Abbas, I continued his struggle against the Ottomans and was able to gain the support of the Europeans, in order to get rid of Ottoman control. See ibid. 40-49.
[64] Awad (n 48) 96-97.
[65] ibid.
[66] Alhamadani (n 55) 14.
[67] ibid.
[68] Aljubouri (n 60) 59.
[69] Sabri Al-Hiti, *Algoraphya Alsyasyah Ma'a Tadbeek Aljographya Aljeosyasyah,* 'Political Geography with Geopolitical Applications', (Dar Al-Safa for Publishing and Distribution, Amman – Jordan, 2000) 36.
[70] Alhamadani (n 55) 45.

East India Company was subjected to criticism. The government occasionally allowed groups and individuals to trade in the Indian Ocean, i.e. its monopoly on trade was not complete.[71]

From 1649, the Dutch increased their power and influence, controlling the Gulf. Their influence extended to the Indian coast and was especially true after the 1650 expulsion of the Portuguese from Muscat. This occurred when a Dutch merchant fleet of 11 ships arrived at the port of Bandar Abbas and succeeded in selling the goods. The commercial campaign was one of the first strong blows directed at the East India Company.[72]

Although the British and Dutch enjoyed a superior position in the Gulf at the end of the seventeenth century, they had important commercial interests. However, they did not enjoy the same degree of superiority as the Portuguese in the 16th century or the Dutch in the 17th.[73] The end of the 17th century witnessed new developments such as the emergence of weaknesses in the Safavid family and the increasing importance of the Arabs of Oman in the Gulf.[74] The Dutch exhibited signs of weakness as from the mid-18th century, and their control of the Gulf began to fade. They retreated in the face of attacks from the Arabs, who since 1695 had been attacking Dutch ships.[75] It reached a climax in 1753, when the Dutch company was forced to withdraw from Basra, leaving Bandar Abbas in 1759. In 1766 the Arabs eliminating their last fortified ports on Kharg island.[76]

French activity in the Indian Ocean region appeared later than the English and Dutch, but it did not contact the coasts of the Gulf before the 18th century. It was based on the French side, and contacts began early between Persia and the French. In 1626, the first French mission was sent to Persia. The purpose was to sign a treaty on the protection of Christians in Persia (Armenians),

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[71] ibid.
[72] Mustafa Al-Khatib, *Altanafos Aldawoli fi Alkhleej Alarabi 1622-763 AD*, 'International Rivalry in the Arabian Gulf 1622-1763 AD', (Egyptian Library, Beirut, Lebanon, 1981) 162.
[73] ibid.
[74] Awad (n 48) 220.
[75] Alhamadani (n 55) 46.
[76] Awad (n 48) 221.

by establishing trade relations between the two countries.[77] After the French Revolution of 1789, interest in the Gulf assumed a form beyond commercial competition, it became a line of defense for India, when the French campaign came to Egypt in 1898. Britain took the Gulf as a front line of defense of India. The British continued to adhere to this principle even after India's independence.[78]

The period between 1793-1809 is an important period in the Franco-British conflict in the history of the Gulf.[79] In the end, Britain gained important political privileges, and France's political position in the Gulf deteriorated. Thus, Britain succeeded in imposing its control over the Strait. They then focused on the Arab Gulf emirates (protection and trusteeship).[80] They exploited the terms of agreements with these countries on military bases and oil concessions. These concessions were in Iran, Iraq, Oman and the Emirates with the aim of increasing the global importance of this region, including the Strait.[81]

However, British control of the Gulf started with founding of the East India Company in 1600. But for several years the character of the company remained primarily commercial.[82] This company was destined to play a very dangerous role in British history.[83] The appearance of Arab naval forces in the Gulf such as the Qawasim threatened British interests. This prompted Britain to take military measures to destroy the Qawasim. They imposed unfair agreements on its sheikhs.[84] The name 'Qawasim' refer to the entire people living in the seaports of the north-

[77] Al-Khatib (n 72) 244-245.
[78] ibid.
[79] Al-Hiti (n 69) 38-39.
[80] ibid.
[81] Abdul-Amir Abdul-Karim, *Alahameeyah Alsyasyah w Alqanonyah w Aleqtesadeah le Alkhleej Alarabi w Matheeg Hormuz*, 'The Political, Legal and Economic Importance of the Arabian Gulf and the Strait of Hormuz', (Center for Arabian Gulf Studies, Basra, 1980) 40.
[82] Alhamadani (n 55) 182-183.
[83] ibid.
[84] Al-Hiti (n 69) 40.

west region of the United Arab Emirates as it exists now. The Qawasim are an Arab family, or a minor tribe, that constituted the ruling family in Ras al-Khaimah and Sharjah.[85]

Britain occupied Oman as a station to supply British ships with coal, water and supplies. They used it as a centre for resisting Muhammad Ali[86] and liquidating his influence in the Arabian Peninsula.[87] This was designed to protect its transportation route to the east through the Red Sea and the Arabian Gulf. Consequently, the British Navy tightened its control over Arab waters and united local and foreign naval forces in its colonial interests.[88] In addition, oilfields were discovered in the Gulf. Hence, this led diversion of international shipping lines from their main business in the Indian Ocean to the Arabian Sea. This was forming an important industrial transportation hub, which led to increased importance for this region.[89]

The importance of the Gulf to Britain rose throughout the 19th century from commercial to political and strategic.[90] It was reflected in its treaties with local emirates. During the First World War and in its aftermath Britain's interests were focused on oil, and its treaties aimed to achieve full control over oil.[91] In line with this purpose they had to ensure the independence of the Arab sheikhdoms under their influence and protect them. Then followed demarcation of

[85] Charles E Davies, *The Blood-Red Arab Flag: An Investigation into Qasimi Piracy, 1797-1820* (University of Exeter Press 1997) 57.
[86] Muhammad Ali: Governor of Egypt from 1805-1848, emerged during his reign modern Egypt, founder of the Alawite royal dynasty that ruled Egypt from 1805 to 1953, born in a village in Macedonia belonging to Greece, and his father Ibrahim Agha was the head of the road guards in his country and died as a boy, the governor of the city entered him into the army and then took care In the tobacco trade, he participated in the Battle of the Wilderness in 1799 against the French in Egypt, and then joined the Albanian battalion. Sent to Egypt in 1801, he showed a rapid progress. To the rank of major general after the departure of the French realized that power in Egypt is coveted by three parties, the Turks, the Mamluks and the English, and Muhammad Ali died in Alexandria in 1839, see Abdel Wahab Kayyali, *Mawosoa'ah Alsyasah*, '*Encyclopedia of Politics*', (Volume VI, Arab Institute for Studies and Publishing, Beirut - Lebanon, 1979) 92-93.
[87] Mahmoud Shaker, *Mawosoa'ah Altareekh fi Alkhleej Alarabi,* '*Encyclopedia of the History of the Arabian Gulf, Volume One*', (Dar Osama for Publishing and Distribution, Amman - Jordan, 2003) 272.
[88] ibid.
[89] Saadi Ghalib, *Geographyat alnaaqel w altigarah, 'Geography of Transport and Trade',* (Directorate of Dar Al-Kitab for Printing and Publishing, University of Mosul, 1987) 23.
[90] ibid.
[91] Abdulraouf Sinno, *Etifagyaat biritanya w moa'ahdatoha maa'a emarat alkhleej alarabi (1798-1916) fosool men alhymanah w altafteet,* 'British Agreements and Treaties with the Arab Gulf Emirates (1798-1916), Chapters of Hegemony and Fragmentation', (Journal of Arab and World History, Beirut - Lebanon, 1998) 8.

the political borders between those emirates in line with their interests, after paving the way, by tearing Gulf society apart from 1820-1916.[92]

Following Britain's domination of the Gulf, the U.S. appeared with its economic weight and large quantities of oil. They began to compete with Britain to obtain oil concessions in Persia and the Gulf.[93] The closing years of the 19th century and the early 20th were characterized by increased European activity in the Gulf and political and economic intensity.[94]After World War I the British government's interest in the Gulf increased.[95] This was confirmed by military campaigns and covert and overt agreements in which Britain and France divided the region between them.[96] The oil issue was addressed by the San Remo Agreement on April 24, 1920. Britain was able to settle its differences with France over oil, as well as on division of the Arab world.[97] The situation in Persia deteriorated after World War I and culminated in a military coup in February 1921 led by Colonel Reza Pahlavi,[98] who became Minister of War. In 1925 he declared himself as Shah of Persia, beginning the rule of the Pahlavi dynasty, which began to claim Bahrain and other islands (Greater Tunb, Lesser Tunb and Abu Musa).[99] In fact the

[92] ibid.
[93] Mahmoud Shaker, *Mawsoa'at tareekh alkhleej alarabai*, 'Encyclopedia of the History of the Arabian Gulf', (Dar Osama for Publishing and Distribution, Amman – Jordan, 2003) 622-623.
[94] Alhamadani (n 55) 159.
[95] ibid.
[96] ibid.
[97] Ali Abdul-Hussein, *Ammn alkhaleej alarbi fi dehl almotagyeraht aleqleemyah w aldawliah, 'The Security of the Arabian Gulf in Light of Regional Changes'*, (Dar Raslan Foundation for Printing and Publishing, Damascus - Syria, 2011) 52.
[98] Reza Pahlavi: Born in 1878 to a modest family, his father died when he was young, so he lived in the custody of his uncles and learned to read and write, and at the age of fifteen he entered the army and was promoted, reaching the rank of general in 1920. In 1921 Reza Khan staged a military coup, taking command of the army and the Ministry of War in the government of Ziauddin Tabatabai, and then assumed presidency of the ministry, and most importantly, on April 25, 1925, he forced the Iranian Council to crown him Shah of Iran. His reign was marked by dictatorship and after the occupation in 1941 exile to South Africa. He died in 1944 and was buried in Cairo, and in 1950 his body was transferred to Tehran. See Abdulhadi Salman, *Iran fi sanawat alharb alalamiah althalitha, 'Iran in the Years of World War II'*, (Center for Arabian Gulf Studies, Basra, 1986) 78. See also Arvand Ebrahimian, *History of Modern Iran*, (translated by: Majdi Sobhi, National Council for Culture, Arts and Letters, Kuwait, 2014) 273.
[99] Abdul-Razzaq Khalaf, *Alneza'aa alemarati alirani hawl aljoaor althalath tunb alkobra, tunb alsogra w abo musa*, '*The UAE-Iran dispute over the three islands of the Greater Tunb, the Lesser Tunb and Abu Musa*', (Dar Ibn Al-Atheer for Printing and Publishing, Mosul, 2009) 65.

claim to these islands dated back to 1887, but the claim is renewed.[100] The issue of these islands will be discussed in depth in chapter 6.

The U.S. emerged to compete with Britain in the name of the open-door policy especially after oil was discovered in the Gulf in 1928.[101] Thus, the American Oil Company entered the Gulf. After lengthy talks between Britain and the U.S. this company obtained 75% of the shares of the Turkish Oil Company[102], which was controlled by Britain.[103] With World War II came international transformation. One of the most important features of which was the decline of traditional colonial power and the emergence of the U.S. and Soviet Union. Interest in the Gulf oil occupied a prominent place in international relations as a result of huge discoveries of oil reserves.[104] Also, the increase in global demand for oil and the rise in total Gulf production from 72 million barrels in 1949 to about six times that in 1950.[105] This continued to rise at rates exceeding all major oil-producing regions of the world, leading to relocation of the oil transport hub from the Caribbean to the Gulf.[106]

During this period a US-Soviet conflict began in and around the Strait.[107] The effects of that conflict were huge in the adjacent lands and seas such as the Mediterranean Sea, the Indian Ocean and the Gulf. Extension of their influence in the past three decades has been directly

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[100] Muhammad Al-Nadawi, *Alsyasah aliraniyah ez'aa alkhaleej alarabi hta althamaninat, 'Iranian Policy towards the Arabian Gulf until the Eighties'*, (Dar Al-Hikma Press, Basra, 1990) 40.
[101] Open Door Policy: This is the policy pursued by the United States of America at the beginning of the twentieth century to ensure its economic interests in the Far East and in the Arab region, especially after the end of World War I and its return to the policy of isolation in its foreign policy. See Antoine Matta, *Alkhleej alarabi men alesta'amar albritani hta althowrah aliranyah (1798-1978)*, 'The Arabian Gulf from British Colonialism to the Iranian Revolution (1798-1978)', (Dar Al-Jeel, Beirut-Lebanon, 1993) 63.
[102] Turkish Oil Company: This company had oil concessions in Iraq since 1914 After the defeat of the Ottomans in World War I this company was monopolized by Britain, which continued its business in Iraq, until it obtained a large oil concession in Iraq in 1925, see Abdul-Hussein (n 97) 52.
[103] Fahad Suleiman, *alensehab albritani men alkhleej alarabi 1968-1971*, 'The British Withdrawal from the Arabian Gulf 1968-1971', (Journal of the University of Kirkuk, College of Education, Issue 1, 2010) 3.
[104] ibid.
[105] Alhamadani (n 55) 209.
[106] Abdul-Karim Musallam, *Alahamiah alestratigiah lekat almelahah fi almatheegh alarabiah: Hormuz- bab almandab- Gabaltareq*, 'The Strategic Importance of the Navigation Line in the Arab Straits: Hormuz - Bab al-Mandab – Gibraltar', (University of Baghdad, 1983) 57.
[107] ibid.

proportional to the decline in Britain's influence.[108] This is because the three conflict zones are uneven, overlapping and vast areas, being adjacent to the southern Soviet Union and the northern strip of the Middle East, the Eastern Mediterranean, Indian Ocean and Arabian Gulf countries.[109]

These circumstances along with the independence of some Arab Gulf countries and the expansion of foreign influence in Iran since the early fifties of the twentieth century. As well as the independence of Kuwait in 1961 destabilized British control over the Gulf.[110] At the same time after the independence of India and Pakistan Britain found that it did not need to maintain the security of the Gulf to protect its maritime transportation. Also did not have an interest in the Gulf other than preserving its own oil interests, as its companies owned 33% of Gulf production.[111] The U.S. were poised to take over in the Gulf, and Britain intended to withdraw from the Gulf before 1971. As a result, the decision to withdraw was issued in the House of Commons by British Prime Minister Harold Wilson[112], on January 16, 1968. This decision did not simply reflect that the Gulf was no longer considered important.[113] Actually the reality of the situation told the opposite story. The Gulf region remained equally important in the eyes of Britain, which explains Britain's still intervening in the region. This is to ensure its interests after withdrawal.[114]

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[108] Ali Nasser, *Matheegh Hormuz w alneza'aa alamriki alirani, 'The Strait of Hormuz and the US-Iranian Conflict'*, (Dar Al-Farabi, Beirut – Lebanon, 2013) 168.
[109] ibid.
[110] ibid.
[111] Mohammad Metwally and Mahmoud Abu Al-Ela, *Geographeyaht alkhaleej alarabi w khleej oman w dowal sharg aljazeerah alarabiah*, '*Geography of the Arabian Gulf, the Gulf of Oman and the Eastern Countries of the Arabian Peninsula*', (Al-Falaha Library, Kuwait 1985) 389.
[112] Harrold Wilson: Leader of the Labour Party and Prime Minister of Britain, Wilson began his political career as a Labour MP in the House of Commons 1945. Two years later he became Minister of Commerce and resigned in 1951 in protest against his party's financial policy and then became Minister of Finance, becoming Prime Minister in 1964. Wilson faced an economic crisis at home and the question of entering the European Common Market as well as the separation of Russia from Britain. He steered the battle for Britain's entry into the Common Market efficiently, but Britain's economic troubles forced him to give up leadership of the party and the Prime Ministership in 1976. For more information see Kayyali (n 86) 365.
[113] ibid., 389. See also Suleiman (n 103) 6.
[114] Khalaf (n 99) 85.

These interests can be summed up as the flow of oil, which constitutes some 40% of annual British oil imports and over 5% of annual oil imports to Western Europe, should continue to balance Britain's payments, benefiting from the estimated contribution of 20 million pounds annually in tax.[115] Additionally, British companies should still be enabled to benefit from their huge investments approaching some one billion pounds. Other British interests in the Gulf states should be safeguarded and, if possible, enhanced.[116] Thus, a page was turned in the history of the Gulf, but British withdrawal incited conflict between the Soviet Union and the U.S. That made the Gulf a sensitive area in the global power balance. Hence, withdrawal emboldened Iran to claim the islands again, but Britain did not respond. This prompted the Iranian forces to enter at half past five in the morning of November 11,1971 the three islands in the entrance of the Strait (Greater Tunb, Lesser Tunb, and Abu Musa).[117] However, military construction in the Shah Bahar region of the Indian Ocean adjacent to the border of Pakistan allowed Iran to tighten its control over strait security and freedom of navigation and transit.[118]

These events coincided with the October 1973 war and the Arab oil embargo, which for the first time threatened the strategic oil reserves of the U.S. International and Arab reactions to the use of force by the U.S. encourage the Americans to limiting the Soviet power within their borders.[119] This was to secure the import and pumping of oil and to secure the freedom of navigation for American ships and aircraft inside and outside the region.[120] Thus the policy of the U.S. was modified following the fall of Shah Mohammad Reza Pahlavi[121], the occupation

[115] ibid 389.
[116] ibid.
[117] Fethiye Al-Nabarawi and Muhammad Muhanna, *Alkhaleej alarabi: derasah fi tareekh alalaqat aldawleeah*, 'The Arabian Gulf: A Study in the History of International and Regional Relations', (Alexandria: Knowledge Foundation 1988) 417. See also Shaker (n 93) 898.
[118] Mohammad (n 47) 98.
[119] ibid.
[120] Alhamadani (n 55) 188.
[121] Shah Mohammad Reza Pahlavi: Born in 1919 In Tehran, studied in Switzerland, returned to Tehran and joined the military academy and graduated in 1938. With the rank of artillery lieutenant he was appointed inspector in the Iranian army. Mohammad Reza (then Crown Prince of Iran) married Princess Fawzia, sister of the King (Farouk King of Egypt), and Princess Fawzia was granted Iranian citizenship, so her children would have Iranian

of Afghanistan by the Soviet Union and the absence of a regional alternative to its role in the Gulf. This prompted the U.S. to escalate its military presence in the Gulf with the aim of protecting the flow of oil and keeping Soviet influence away from the region.[122]

As from January 23, 1980, the so-called 'Carter Doctrine' constituted an important strategic shift in American policy towards the region.[123] U.S. President Jimmy Carter stressed that the security of the Gulf affected American national security. Any attempt by the Soviet Union to intervene in the region would be opposed by America directly and quickly.[124] In the early eighties American policy was based on peace and stability in the region. In a stand against aggression against the Arab Gulf States the U.S. expressed more than once its intervention in the event of a threat to freedom of navigation in the Strait.[125] It can be said that U.S. policy towards the Gulf in the pre-nineties phase had three aims: i) maintain the continuity of oil supplies in peace and war; ii) prevent the Soviet Union from accessing the area by any means, even military; and iii) preventing the emergence of any Arab force over the affairs of the region, as well as protection for Israel.[126] This policy varied according to the circumstances serving the interests of the U.S. and perpetuating its military presence and political influence in the Gulf.[127] After the Iranian revolution in 1979, the Iraqi government sought to develop its relations with the Arab Gulf countries and was afraid of developments in the Iranian situation. At the same time Iranian relations became tense, so each side looked suspiciously at the other.

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father and mother. For more see: Mohammad Abu Moghli, *Aldaleel ela alshksyaht aliraniayh almoa'aaserah,* 'Guide to Contemporary Iranian Personalities', (Center for Arabian Gulf Studies, Basra, Iraq, 1983) 44-45. See also Ebrahimian (n 98) 274.

[122] Mohammad (n 47) 52.

[123] Carter principle: Under which the U.S. were authorised to confront by any means, including military force, any threat to their vital interests, and this principle is a continuation of the Truman - Eisenhower - Nixon policy, and under which the U.S. Congress delegated President Jimmy Carter authority to use military force to assist any country or group of countries under attack or requesting assistance. For more Information see Al-Ajmi (n 44) 407-411.

[124] Jawad Hattab, *Alsyasah alamrikiayh tejah alkhleej alarabi fi aqad altes'aenaat,* 'American Policy towards the Arabian Gulf in the Nineties', (Journal of Historical Studies, Center for Arab Gulf Studies, Issue 12, 2012) 178-179.

[125] ibid.

[126] ibid.

[127] ibid 179.

Despite welcoming the fall of the Shah's regime, which was linked to the West and the United States, Iraq was hopeful for the Iranian Revolution and the formation of Iran.[128]

In the light of Iraq's policy towards Iran and Iranian statements towards the Arab Gulf States and the three Arab islands. The Iraqi government announced it had carried out attacks on the Iran/Iraq border and submitted several notes of protest and clarification to international organizations.[129] However Iraqi efforts did not succeed in halting the deterioration in Iraqi-Iranian relations.[130] The U.S. saw in this war, which broke out in 1980, an opportunity to weaken and drain both Iraq and Iran. It would also be able to weaken the two political currents, namely the Arab current of Iraq and the fundamentalist religious current of Iran. Since these two countries were at war, Washington sought to boost its influence in the region.[131]

The Iran-Iraq war lasted eight years and ended with Security Council Resolution No. (598) its legacy was huge and weighed heavily on all the Arab Gulf countries.[132] Its aftermath created tensions between Iran and Gulf countries. This bolstered the U.S. military presence in the region, so it was able to maintain its presence in the region. Both Iraq and Iran were empty economically and financially, not to mention the debts imposed on Iraq. Human casualties of the war were estimated at about one million dead and wounded.[133]

It can be said that its location gave the Gulf and the Strait in particular double strategic significance. This affected the global economy, providing oil for Western industry and the Gulf economy. Which anticipated growing foreign trade for the region in light of the growing need of the world for Gulf oil.[134] It is fair to say that international interest in the Strait will be

[128] Abdul-Hussein (n 97) 113-114.
[129] ibid.
[130] ibid 114.
[131] Hussein Fayyadh, *Amirca w alkhleej alarabi fi daw'aa moatayat alqarn aleshreen,* 'America and the Arabian Gulf in the Light of the Data of the Twentieth Century', (Al-Mustansiriya University, Issue 22, 2012) 202. See also Hattab (n 124) 179.
[132] UNSC Res 598 (20 July 1987) UN Doc S/RES/598.
[133] Abdul-Hussein (n 97) 116.
[134] Musallam (n 106) 86.

maintained, as long as global demand for Gulf oil does not decrease. At the same time, the demand of Gulf States for goods and weapons through this strait will not diminish, given that it is the gateway to the Gulf.[135]

3. The Importance of the Historical Review of Passage through the Strait of Hormuz

The Strait is one of the straits of global economic and military significance, which comes from being the waterway carrying oil exports from the Gulf, as the most prolific production is closely linked to it. For this reason, the Strait is of particular importance to all countries of the world, and it is called a "strategic strait".[136]

The significance of the strait emerged in a study of its geographical and strategic location and its importance to international navigation as a commercial link between East and West.[137] It also became known as the bottleneck of the Gulf and because it extends from the Atlantic Ocean to the Indian Ocean, the Gulf and the South China Sea. This covers the whole navigational course of the Gulf as a semi-closed sea.[138] It has a serious impact on the global economic, social and strategic situation, being an important trade route.[139] It accounts for most of the tonnage transported by ship from the Atlantic Ocean past Gibraltar and north to western Europe, equalling the tonnage transported in the Indian Ocean.[140] The importance of the strait increased with the 1869 opening of the Suez Canal.[141] As the connection of the Red Sea with

[135] Mohammad (n 47) 113.
[136] Hamad Almo'aed, *Amn almamaraat alma'aayah alarabiah,* 'Arab Waterways Security', (Arab Writers Union Publications, Damascus - Syria, 1999) 60.
[137] Yasser Al-Salami, *Alwad'aa alqanoni le matheeg Hormuz fi daw'aa gawaa'aed alganoon aldawli aljadeed li albihar,* 'The Legal Status of the Strait of Hormuz in the Light of the Rules of the New International Law of the Sea', (University of Jordan, 1990) 105.
[138] ibid.
[139] Nabarawi and Muhanna (n 117) 428.
[140] Mohammad Azhar Al-Sammak, *Algeopraphya alsyasyah, osus w tatbeqat,* '*Political Geography, Foundations and Applications'*, (Dar Al-Kitab for Printing and Publishing, Mosul, 1988) 77.
[141] Suez Canal: The Suez Canal located in the north of the Bab al-Mandab Strait, the second port of the Red Sea, and a major gateway between East and West. The Suez Canal is one of the main sea routes globally, and the length of the Suez Canal (193km) and width between 300 - 350 km. The canal plays an important role in the global

the Mediterranean Sea was completed and the connection of the Tigris and Euphrates connected the Gulf to the Mediterranean Sea. Thus, the natural marine cycle linking the countries of three continents (Asia, Africa and Europe) was completed.[142]

By virtue of the strait's strategic location, it was one of the first regions in the world to establish international trade relations, being the result of termination of long conflict between the colonial countries aimed at controlling it for economic purposes.[143] The life of the inhabitants of the Gulf before the discovery of oil depended on traditional activities, especially diving for pearls and selling them. This trade represented the main source of income for most of the inhabitants, and the pearl trade continued for many years as a source of national income, as well as the fish this region was famous for.[144] However, this trade did not last long in the hands of the Arabs. This is because of the campaigns the Arabian Gulf region was subjected to by Portugal, the Netherlands, France and Britain, and the pearl trade collapsed completely at the beginning of the nineteenth century.[145]

There were several reasons for this: first, Japan's discovery of artificial pearls at prices competing with natural pearls despite the great similarity in quality; second, the risks to which fishing workers were exposed due to the primitive fishing methods used; third, the discovery of oil and companies' access to concessions, which created job opportunities absorbing large numbers of workers; fourth, the instability in the prices of pearls; fifth, large number of those interested in fishing went to work for government bodies, the authority and the army.[146] The first grant of oil concessions took place in 1872 in Persia, and Britain realised that obtaining an

economy, for more see: Felipe Siebel Lopez, *The Political Geography of Petroleum*, translated by Najat Al-Salibi Al-Taweel, (Abu Dhabi Tourism and Culture Authority, UAE - Abu Dhabi, 2013) 51.

[142] Abdul-Hussein (n 97) 40.

[143] ibid 40.

[144] Sabri Al-Hiti and Anwar Saleh, *Geographya alkhleej alarabi,* 'Geography of the Arabian Gulf', (University of Baghdad, 1986) 194.

[145] Mohammad Al-Feel, *Alahmeeah alestrategeah li alkhleej alarabi,* 'The Strategic Importance of the Arabian Gulf', (University of Kuwait, 1988) 18.

[146] Al-Hiti and Saleh (n 116) 196.

oil concession would work to skew the balance against Russia, under the Russian-British conflict for influence in Persia through concessions and loans.[147] Russia was promoting its war fleet in the Gulf, which prompted Britain to pay £ 20,000 in cash and a repeat of this amount for shares and 16% of net annual profits in pursuit of a concession. Oil investment valid for sixty years covered three quarters of the area of Persia under the agreement signed by Shah Muzaffar Al-Din on May 28, 1901.[148] Exploration began in southwestern Persia, and oil flowed seven years after agreement.[149]

Oil is consolidating its place among energy sources and will remain in demand, until it runs out. This is because oil is the cheapest source of energy and the most able to respond to all aspects of its use.[150] Also, oil ranks first in meeting human needs, constituting some 95% of the energy used in transportation.[151] In addition to that, oil has become essential to many industries that exceed the three thousand products. The industrialized countries in Europe and Asia urgently need oil as a raw material.[152] Given that the Gulf has huge reserves of oil, this region has attracted the world. It has become one of the most important areas of competition for oil resources.[153] As for the history of oil production in the Gulf area, Persia was the first, as its production began in 1908.[154] Iraq then became the theatre in which foreign companies competed for oil concessions. Competition between British, American and Turkish companies

[147] Hani Habib, *Alenft enstrategan w amneyan w a'aakrean w tanmawian masder althrwah w altagah w alazamt khyaar arabi,* '*Oil Strategically, Security, Military and Development: A Source of Wealth, Energy and Crises is an Arab Option*', (Publications Company for Distribution and Publishing, Beirut - Lebanon, 2006) 61.
[148] Shah Muzaffar Al-Din: The fifth Qajar king in Iran, born in 23 March 1853, he ruled Persia between 1896-1907 He is credited with drafting the Iranian constitution, and is the son of the Qajar ruler Nasir al-Din, who appointed him crown prince and governor of North Azerbaijan province in 1861, and died in 1861. 1907 at the age of 53. For more information, see this link: https://en.amheritance.com/genealogy/people/show/25632
[149] Habib (n 147) 61.
[150] Hussein Aziz, *Almoqe'a algeography le matheeg Hormuz w atharah fo rasm alsyasat aaldawliah*, 'The geographical location of the Strait of Hormuz and its impact on international policymaking', (Journal of the Faculty of Basic Education, University of Babylon, Issue 88, 2015) 448.
[151] ibid.
[152] Al-Feel (n 145) 20.
[153] ibid.
[154] Mohammad Metwally, *Hawdah alkhleej alarabi*, 'The Arabian Gulf Basin', (Volume II, Anglo-Egyptian Library, Cairo-Egypt, 1974) 189.

intensified in the states of Basra, Baghdad and Mosul.[155] Bahrain oil was discovered in 1932, but it was not produced commercially until 1934. Oil in Bahrain is of great significance, as this indicated the presence of oil along the coast. Exploration began in Saudi Arabia in 1932, but it did not result in the discovery of oil and work almost stopped until discovered in 1938.[156] The production of oil in Saudi Arabia did not begin until 1946 after World War II.[157]

After World War II U.S. focused on the region, by obtaining oil concessions in Bahrain and Saudi Arabia from British companies.[158] American influence grew rapidly at the expense of the British, as the U.S. controlled 55% of net oil production, while Britain's share declined to only 30%.[159] Oil reserves in the Gulf increased from 53% to 58% of the world's oil reserves, while the U.S. proportion reached 7% and the Soviet Union 14% in 1946.[160] The U.S. oil reserves increased by (56) million barrels and the oil reserves have been decreasing since 1966.[161] Reserves in the Gulf recorded a continuous increase as a result of the discovery of new fields and modern technology for oil extraction.[162] After Britain's withdrawal from the Gulf in 1968 the U.S. considered the Strait vital to its national security. This is due to the fact that securing freedom of navigation in the strait was an important international matter.[163] Protecting the security of this strait is vital to the entire global economy. Thus, the U.S. monitored it, especially following departure of Shah Mohammad Reza Pahlavi and the use of Carter's

[155] Al-Nabarawi and Muhanna (n 117) 2.
[156] Metwally (n 154) 189.
[157] ibid.
[158] Hussein Nada Hussein, *Alahmeeah alestrategeayh w alnethaam alqanoni li altareeq almelahy albahry fi alkkhleej alarabi*, '*The Strategic Importance and Legal System of the Maritime Shipping Route in the Arabian Gulf*', (Dar Al-Rasheed Publishing, Baghdad, 1980) 33.
[159] ibid.
[160] Ramazani (n 9) 26.
[161] ibid.
[162] ibid.
[163] Mohammad Ismail, *Alalaqat almsrayah alkhleejyah ma'aalem altareeq,* 'Egyptian-Gulf relations are milestones on the road', (Al-Arabi for Publishing and Distribution, Cairo - Egypt, 2010) 17.

theory.[164] The U.S. imports 11% of oil passing through the strait, Europe imports about 61%, Japan12%, China 7%, Africa 4%, South America1% and Australasia 39%.[165]

The Gulf had only small ports before the discovery of oil. This is because of its limited foreign trade from the shallow basins extending along the coast of the Gulf. Then, after the discovery of oil and the entry of its foreign trade into a new phase based on export of oil to the outside world, the Gulf Countries needed to establish new seaports, known as oil ports, and established a group of these on the coasts of Arabian Gulf states.[166]

As a result, the Gulf countries run two types of port:

First, *oil ports* are modern ports designed to export oil products from the Gulf, and what distinguishes these oil ports is that they are small in size and old in origin. There is no need to be based on shore. Therefore, it does not matter if the sea water is deep or shallow, due to the base in the open sea away from the shore, where the natural depth is suitable for docking giant oil tankers.[167]

Most of the oil from the Gulf region is exported from these ports. The most important being in Saudi Arabia, namely Port Saud and Ras Tanura, and in Kuwait with the ports of Ahmadi and Shuwaikh.[168] The latter receives huge ships. In Bahrain it is Sitra, and in Qatar um Said, and in Iraq Al-Faw, Khor Al-Amaya, Al-Bakr and in Oman Fahl. Fatih in the Emirate of Dubai and another port is Rashid, which receives huge ships and is one of the latest and largest ports in

[164] Lopez (n 141) 51.
[165] Nasser (n 108) 82.
[166] Metwally and Abu Al-Ela (n 111) 489.
[167] Jamal Abdul-Karim, *Alaba'ad algeostrategeah li egalag matheeg Hormuz derasah fi algeografia alsyaseah* 'Geostrategic Dimensions of Closing the Strait of Hormuz: A Study in Political Geography', (Omar Al-Mukhtar University 2011) 13.
[168] ibid.

the region.[169] While in Iran there are Kharg, Bandar Abbas and Abadan, and the latter is the largest oil refinery in the world.[170]

Second, *ports of commercial commodities* are located on to the coast, as they must be provided with berths to load and unload goods and provide the necessary services to passengers. These ports can only be built at moderate depths on shore and need provide stores and warehouses to receive goods. Often some facilities and factories are next to them, so Basra ports were larger and had the most need for various services unlike the oil ports.[171] Through these ports Gulf countries import most of the goods they need, and the most important examples of these commercial ports are Basra, Kuwait, Dammam, Bahrain, Abu Dhabi and Dubai.[172]

The Strait represents the Western industrial lifeline and the outlet of oil to the outside world. More than half of the needs of Western Europe pass through it, and the Arab Gulf countries ship from it two-thirds of their oil production, so it is a corridor monitored by major countries.[173] It is referred to as a red line, as it transports more than 40% of the world's oil at a rate of 20-30 tankers per day, which is a rate of one tanker every 11 minutes at peak hours.[174] Therefore it is the most important transit point in the world in terms of quantity, transporting hydrocarbons to the U.S., Europe, Asia (China, Japan and South Korea).[175]

Most Gulf countries export their oil through the Strait. In addition, the container trade carrying goods transports to the Gulf countries through it. About 20% and loads weighing more than two and a half billion tons of tons annually traverse the strait. Trucks of primary commodities such as grain, iron ore and cement account for 22% of cargo transiting the strait annually.[176]

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[169] Aziz (n 150) 419.
[170] ibid.
[171] Abdul-Karim (n 167) 13-14.
[172] ibid.
[173] Nawar Hashim, *Almamaraat almaayah w amn altaqah alalami*, 'Waterways and Global Energy Security: A Study in Political Geography', (Dar Al-Kutub Al-Ilmiyya, Baghdad, 2011) 81.
[174] ibid.
[175] Lopez (n 115) 51.
[176] Aziz (n 150) 446.

27% of trucks transiting crude to oil tankers, and this rises to 50%, when calculating natural gas and Liquefied Petroleum Gas.[177] In 1973 (5.18) million barrels of oil were transported daily through the Strait to world markets. So 9 million barrels went daily to Western Europe, which imported 70% of its oil from the region, and Japan is the largest importer of Gulf oil at 90%.[178]

From the foregoing it should be clear the importance the world attaches to the Gulf and the Strait. An international strategists point out that "if the world is like a powder keg, the Strait of Hormuz defuses this barrel and threatens to blow up the world."[179] The quantities of oil exports to the world have increased, consequently the income from oil exports has increased after 1973 (the year of the economic boom).[180] The demand for materials necessary for economic and social development and requests for weapons increased. As did demand for imports to meet the need of the local market, which was mainly based on keeping navigation through the Strait open without obstacles.[181] The revenues of the Gulf countries from oil imports rose.[182] In 1975 the revenues of the thirteen oil exporting countries (OPEC) were 115 billion dollars.[183]

Since the Arab Gulf countries contributed such a large share of total OPEC production, it can be seen the vital importance of the Strait for the main oil-consuming countries.[184] Japan sources approximately 90% from OPEC, Western Europe 80% and the U.S. 70%. Although the U.S. is the largest single oil producer in the world (its production is 10,3 million barrels per day), it is

[177] ibid.
[178] Ramazani (n 9) 30.
[179] Abdul-Karim (n 81) 67.
[180] ibid.
[181] Al-Salami (n 37) 107.
[182] ibid.
[183] OAPEC: The Organization of Arab Petroleum Exporting Countries (OAPEC) was established in 1968 and includes in its membership eleven countries (Algeria - Iraq - Kuwait - Libya - Qatar - Saudi Arabia - United Arab Emirates - Bahrain - Egypt - Tunisia - Syria) and this region aims to coordinate and unify the petroleum policies of member states and find ways of stabilizing prices and defending the interests of producing countries to obtain a stable return of income. For more information see Institute of Banking Studies, Black Gold, (Illuminations Magazine, Kuwait, Issue 6, 2013) 4.
[184] Group of Authors, *The Indian Ocean in International Politics*, translated by: Jalal Muhammad Mahdi, (Centre for Arab Gulf Studies, University of Basra, 1999) 17.

at the same time the largest consumer of oil in the world, with oil consumption of 19 million barrels per day in 1997.[185]

The high revenues made the countries bordering the Strait a hub of attraction for workers, which led to a huge population flow. This had a significant impact on the increase in import and export movement. This has led to an increase in maritime transport and thus to a rise in the national income of the countries of this region.[186] The high incomes of the Arab Gulf countries from oil and their transformation to countries with great wealth. Although the region complains about underdevelopment in all economic areas as a result of colonisation, imports have increased to significant levels in all Gulf states.[187]

At the end of the 1970s, the Arab Gulf countries were exporting about 18 million barrels per day through the Strait. An amount equal to 90% of their production and about a third of the total global production of 60 million barrels per day.[188] During this time the strategic importance of the Strait became evident, especially in the period called the oil tanker war, when Iranian officials threatened to close the strait to international navigation.[189] Kuwaiti oil tankers were under American protection and the Iranian threats were taken seriously at in international level. Navigation in the Gulf was indispensable, and after the outbreak of the Iran-Iraq war, the U.S. developed a strategic consensus and rapid intervention force with the aim of occupying oil sources.[190] Escalation of the war led to the increase of foreign fleets in Gulf waters,

[185] ibid.
[186] Fakhri Muhanna, *Alnetham alqanoni li almelahah albahreah fi almathayag aldawliah w tatbeeqh ala matheeg Hormuz*, 'The Legal System of Navigation in the Straits and its Application to the Strait of Hormuz', (University of Baghdad, 1978) 223.
[187] Musallam (n 106) 81.
[188] Abdul-Karim (n 81) 19.
[189] Macro D. Tomasi, 'Water-borne IED Threats and the Strait of Hormuz', (global Information research center (girc), 2006) 2.
[190] Hosam Swailem, *Matheeg Hormuz fi boa'rat alsera'aa alirani alamriki* 'The Strait of Hormuz at the centre of the Iranian-American conflict', (Iranian Anthology Magazine, Al-Ahram Centre for Political and Strategic Studies, Cairo, Issue 82, 2007) 5.

sometimes on the pretext of ensuring freedom of navigation in the Strait and at other times to protect oil tankers.[191]

4. The Strait of Hormuz and Geopolitics

The last three decades have witnessed a radical shift in the theories of geopolitics, especially those related to the middle of the world.[192] After the European continent was seen at the beginning of the twentieth century as the middle of the world. At the end of the twentieth century the Gulf became the middle of the world.[193] Despite this strategic importance, it is closer to a closed sea, it has only one outlet linking it to the major oceans, the Strait of Hormuz.[194] Hence the Strait is one of the most important straits and waterways in the world, as it connects the Gulf on the one hand, and the Gulf of Oman, the Arabian Sea and the Indian Ocean on the other. Therefore it is considered the only sea port for countries bordering the Gulf only, such as Iraq, Kuwait, Bahrain and Qatar, and it is also the main port for both the Kingdom of Saudi Arabia, which overlooks the Gulf on the east and the Red Sea on the west, and the United Arab Emirates, which overlooks the Gulf and the Gulf of Oman, and the Sultanate of Oman, which overlooks the Gulf, the Gulf of Oman, the Arabian Sea, and Iran, which itself overlooks the Gulf, the Gulf of Oman and the Arabian Sea.[195]

A person looking at the world map is clearly aware of the role of straits in connecting parts of the world; through these straits global maritime navigation takes place and its multiple means of transport, which are at the forefront of transportation in today's world.[196] They are also aware of the special geographical situation of the straits, which enables them to control maritime

[191] Hashem (n 144) 86.
[192] ibid.
[193] ibid.
[194] Mohammad Hammoud, *Alnethaam alqanoni li almelahah fi matheeg Hormuz,* 'The Legal System of Navigation in the Strait of Hormuz', (Symposium on Transportation in the Arab World, Beirut, 1982) 257.
[195] ibid.
[196] Shehap Mufid, *Droos fi alqanoon aldawli ala'aam w alqanoon aldawli aljadeed li albehar,* 'Lessons in Public International Law and the New International Law of the Sea', (Dar Al-Nahda Al-Arabiya, Cairo, 1985) 45.

navigation and gives them a special strategic and legal status as a result of the convergence of their coasts and the disappearance of international waters.[197]

This geographical position, which enables the states bordering the straits to control them has made the world maritime powers race to impose their influence and control over these straits of special importance and legal dimensions.[198] The geographical importance of the straits cannot be understated, because they provide control of the coastal state over traffic and control the strait during crises and wars. In addition, the importance through the constant thinking by the invaders to control such straits, such as the Treaty of Utrecht between Britain and Spain in 1713 to control the Strait of Gibraltar.[199]

The Strait of Hormuz is the only sea route between the Gulf and the seas of the world. Its location constitutes a zone of separation between two linguistically disparate regions, the Arabian Peninsula and Iranian territory.[200] Then, by virtue of its tropical location, its climatic conditions make it navigable throughout the year. The importance of the Strait of Hormuz, ancient and modern, appeared as some attempted to control it.[201] The Portuguese came to the region with the aim of eliminating commercial competition that was led by the Gulf Arabs, the means being to ride the sea through the Strait of Hormuz. The Omani Arabs of AlYa'ariba and Al-Bu'Said defended their maritime glories, heritage, and civilization, in order to keep the Gulf and the Strait of Hormuz under their sovereignty.[202] The Strait importance was increased by the discovery of oil in the region. Energy experts and international shipping companies have described it as "the main neck of the world", since every eight minutes a tanker sails from the Gulf, through which the global needs of crude oil pass.[203] The oil shipments that cross this

[197] ibid.
[198] Hammoud (n 193) 257.
[199] ibid.
[200] ibid.
[201] ibid.
[202] ibid.
[203] *Magalat Al-Mostagbal,* 'Future Magazine', (Issue 167, 31 May 1980). 14-15.

strategic corridor cover two-thirds of the world's oil production.[204] The Strait represents Gulf state interests on the one hand and represents the interests of the international community on the other hand, as the Strait is one of the important international sea routes.[205]

The Strait is the main outlet for countries bordering the Gulf, with the exception of Saudi Arabia, which has ports on the Red Sea, and of the Sultanate of Oman, whose ports are located on the Gulf of Oman. The United Arab Emirates recently modernized and expanded the port of Khorfakkan, fearing closure of the Strait of Hormuz.[206]

Despite the strategic importance of the strait for all countries bordering the Gulf, its importance varies from one country to another. Firstly Iraq, Bahrain and Qatar value the strait as the great gate and the main road to the international seas. Then Saudi Arabia comes in second place. Although its eastern coasts have no sea outlet other than the Strait of Hormuz, its western coasts have spread over most of the western coast of the Red Sea. Finally, are Iran, Oman and the United Arab Emirates.[207] Iran overlooks the strait from its eastern bank and extends its sovereignty over part of the western coast of the Gulf of Oman. As for the Omani coasts, they extend from the Strait to the Arabian Sea through the Gulf of Oman. The United Arab Emirates, most of which is located on the southeast of the Gulf.[208] The ports located on this part are Abu Dhabi, Dubai, Sharjah, Ajman, Ras Al Khaimah and um Al Quwain, all having their sea outlet at the Strait.[209] Accordingly the Gulf countries export collective production of about 62% of the world's oil supply, on oil tankers destined for many countries of the world, through the

[204] ibid.
[205] Hussein (n 130) 90.
[206] Khorfakkan is located in the Emirate of Fujairah, overlooking the Gulf of Oman, which is to be used by the GCC countries in the event that navigation is not possible in the strait, especially with regard to securing foodstuffs imported by these countries by sea, see: Sadaqa Fadhil, *Dwal magles altaawn w sabab tafadi khatar ea'aadaht almelahah fi matheeg Hormuz,* 'GCC countries and ways to avoid the risk of re-navigation in the Strait of Hormuz', (Council for Gulf and Arabian Peninsula Studies, Issue Fifty-six, Fourteenth Year, Kuwait, October 1988) 168.
[207] ibid.
[208] ibid 152.
[209] ibid.

Strait.[210] These countries also export quantities of natural gas to meet the needs of Western countries from it by sea and through this strait as well.[211] Therefore the Strait is a lifeline for countries bordering the Gulf.[212]

On the other hand, the Gulf States were aware of the dangers to which the Strait may be exposed, leading to its closure.[213] They accelerated their solidarity and cooperation, which led to the establishment of Gulf Council of Cooperation (GCC) in 1980.[214] The objectives were to prevent the obstruction of navigation in the Gulf and its gate, the Strait of Hormuz. This is to ensure the flow of oil exports to importing countries, especially Western countries.[215] With which they had vital mutual interests represented in the dependence of the West on Gulf oil.[216] In addition, the dependence on the West of the Gulf states to meet their needs for required investment and military commodities.[217]

Researchers agreed that the following cases could be the weaknesses of the strait or the risks it may be exposed to, which will cause all sorts of international escalation, including:

> The shallowness of the waters of the Gulf and the narrowness of the waterways of the Strait itself, making it vulnerable to obstruction by laying mines.[218] It seems that since the era of President Nixon the U.S. administration has expressed its fear of this situation. Robert Kumer, U.S. Secretary of Defense for Political Affairs, stated, "We have conducted a good study of the issue of planting or destroying mines and removing them from the entrance to the Gulf. We do not think that this issue is one of the most serious problems facing us, as we consider it a situation that can be addressed and

[210] ibid 150.
[211] ibid 154.
[212] Ali Hussein Ali, *Amn alhleej alarabi*, 'Security of the Arabian Gulf', (University of Baghdad, Iraq, 1982) 200.
[213] ibid.
[214] Fadhil (n 168) 360.
[215] ibid.
[216] ibid.
[217] Mohammed Jassim, Arabian Gulf Security - A Study in the Struggle of the Two Great Powers in the Arabian Gulf (1968-1979), (University of Baghdad, Iraq, 1986) 161.
[218] ibid 252.

overcome. We believe that the price we bear for laying mines and closing the Strait of Hormuz with oil tankers is a very exaggerated estimate."[219]

The possibility of exposure of oil tankers located in the waters of the strait to various types of armed offensive operations, which may come to them from inside or outside the Gulf region.[220]

A clash and tension erupts between the U.S. and Iran, exposing the region to large-scale military action.[221]

However, this international interest in the Strait is almost matched by interest from the Gulf states. Considering their dependence on importing consumer and other goods, energy sources, weapons, and other services from the outside world.[222]

In sum, the advent of the age of aviation, space travel and communication technology has proved to be a significant factor in shaping new concepts in international relations. In line with these technological and ideological changes that the world has seen, geopolitical theories have changed. As a result, the international arena has become full of many practical and realistic models of problems related to disputed borders, lands, geographical locations, and waterways. The world is covered with oceans and seas, and the countries of the world are linked by maritime shipping lines in addition to air navigation. Nevertheless, maritime shipping lines remain the most important, because they facilitate a lot of resource and trade exchange. We might highlight especially the role of shipping lines in transporting oil supplies from production and export areas to areas of use and consumption, requiring the presence of corridors and straits providing seaports, where these ports are linked by channels and waterways.

Furthermore, the Middle East, by virtue of its geographical location, which mediates Europe, Asia, and Africa, as well as its location on sea bodies and straits of great importance, controlling

[219] ibid 252-253.
[220] Ali (n 173) 252.
[221] ibid 200.
[222] ibid 250.

international trade routes and global energy supply routes, has become a geopolitical fulcrum. This applies to the strategic thought of major countries, which aspire to impose hegemony and control over this location in return for the huge reserves of energy sources contained in its land and the great importance of its location. This enables the county in the middle east to control the most important seaports, straits and strategic channels that affect commercial and energy supplies, whether north-south or east-west. A good example is the Strait of Hormuz, the subject of the study being the only sea lane between the Arabian Gulf and the rest of the other seas of the world.

5. Conclusion

Throughout history the importance of the Strait of Hormuz is evident in the fact that it is an international oil corridor in economic terms. In addition, it is an international safety valve that controls the political security of the U.S., Western Europe and Japan. International attention to the security and safety of navigation in the Strait will continue, as long as the global demand for the Gulf oil continues without any decrease in return. Likewise, the demand of the Gulf States for goods and weapons from international markets through this strait, which is the gateway to the Gulf, does not diminish. This international interest may be translated into the intensification of the military and political presence of these major countries in it. The strait can easily be closed in the event of an escalation of direct conflict between those major countries. Thus, the Strait of Hormuz has become a centre of tension and continuous conflict between them.[223]

[223] Salma Mohammed, *Matheeg Hormuz: Alhalah algeosyaseah w alneza'aa aleqlimi: derasah syasyah,*'The Strait of Hormuz: The Geopolitical Situation and Regional Conflicts: A Political Study', (University of Basra, Basra and Arabian Gulf Studies Center, Volume III, Issue IV 94-116, 2009). 113.

Straits on waterway routes acquire great strategic importance. An example is the English Straits of Dover, which stood between the German army and the English forces during World War II. The Strait of Messina, which separates Sicily from the Italian mainland, also played an important strategic role in the same war, as the armies of the allied countries crossed it on their way to Germany. Among the waterways of global strategic importance are the Strait of Malacca, which separates the islands of Sumatra belonging to Indonesia and the modern state of Malaysia. As well as the Turkish Bosphorus and Dardanelles Straits that connect the Black Sea to the Mediterranean. The Strait of Hormuz is the subject of a study that considers the Arabian Gulf and the Gulf of Oman, which played a pivotal role throughout ancient and modern history leading up to the first and second Gulf Wars.[224]

The strait is the only sea passage between the Gulf and the seas of the world. Its location forms a separation zone between two distinct regions of, the Arabian Peninsula and the Iranian region. Then, by virtue of its tropical location, its climatic conditions make it navigable throughout the year.[225] The importance of the strait is confirmed, if we realise that all exports and imports to and from the ports of the Gulf pass through it. In addition, a large proportion of international oil trade passes through it, and indeed that its countries represent the majority of global production and reserves. The strait played a key role in historical periods in linking East and West. Its location is in the middle of the Old World between Asia in the East and Europe in the West, which positions it between the resource-rich tropical region of South Asia and the consumption regions of Europe.[226]

Today, the Strait of Hormuz is a focus of world attention due to its historical importance, both strategic and economic. It has become the vital artery that supplies the world with energy and returns prosperity and wealth to all countries bordering it that have outlets to it, such as the

[224] ibid 56.
[225] ibid 57.
[226] ibid.

Arab Gulf countries. Also overlooking the largest area of the strait, such as Iran, which uses it as a pressure play on major countries in the event of economic sanctions and imposition of more international economic sanctions on it. In terms of physical contiguity to the Strait of Hormuz, two countries in particular, Iran and Oman take primacy. It is thus important in the investigation of the application of transit passage regime in the Strait to examine the position of the two States on the matter. This is even more compelling if there are differences in the approach of each of them to the issue. The next chapter focuses on the divergent legal regimes of Iran, Iraq, the Gulf Cooperation Council Countries**,** regarding transit passage in the Strait of Hormuz.

Chapter 4: Iran, Iraq, the Gulf Cooperation Council Countries, and the Strait of Hormuz: Divergent Legal Regimes of Transit Passage

1. Introduction

In the previous chapter we discussed the history of the Strait of Hormuz demonstrating the significance of the Strait over the centuries, even before the discovery of oil. This chapter investigates the positions of Iran, Iraq, and the Gulf Cooperation Council Countries (GCC). There is more discussion on Iran and Oman as their territories are contiguous to the Strait of Hormuz. It is worth noting that all countries bordering the Gulf which include Saudi Arabia, Kuwait, Qatar, Bahrain, Oman, and Iraq have ratified UNCLOS, except for the United Arab Emirates and Iran who are signatory-states to the Convention.[1] As Iran has not ratified UNCLOS, it will be useful to address the legal framework that governs Iran's maritime areas.[2] Suffice to say, given the absence of any agreement covering the Strait of Hormuz, Iran promulgated its "Act on the Marine Areas of the Islamic Republic of Iran in the Gulf and the Oman Sea" in May 1993, to regulate exceptions to innocent passage rights.[3] This Act outlines an extensive set of maritime claims to Iranian territorial waters, contiguous zone, exclusive economic zone, continental shelf, and jurisdictional claims within those areas. Nevertheless, significant elements of these claims such as the right of passage do not fit in with the rules of international law reflected in UNCLOS. However, Iran justifies its regulations by the need to protect regional stability.[4] Oman, the other state whose territorial waters border the Strait of

[1] United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 16 January 2020.
[2] It is also worth noting here that according to VCLT art 18(a) if a state is a signatory to a treaty, it has an 'obligation to refrain from acts which would defeat the object and purpose of the treaty'.
[3] Martin Wählisch, 'The Iran-U.S. Dispute, the Strait of Hormuz, and International Law' (2012) 37 13, 25.
[4] ibid.

Hormuz, is a party to the UNCLOS, and therefore there exists no question about the applicability of UNCLOS provisions in Omani territorial waters.

The Arabian Gulf and Strait of Hormuz are traditionally classified as sea areas open to international navigation acting as access route for ships of other states to reach the high seas.[5] The Strait of Hormuz is the world's most significant oil transit chokepoint, through which 40% of global oil trade is channelled.[6] However, the despite being one of the most important shipping lanes in the world the Strait of Hormuz measures only some 20¾ nautical miles (NM) at its narrowest point.[7] This presents a problem as the two states bordering this Strait, namely Iran on the north and Oman on the south, lay claim to 12 NM of territorial waters each.[8] The result of this extension to 12 NM is that the Strait of Hormuz has lost its central belt of high seas, just like 115 other straits around the world.[9] The consequence of this action is that the Strait of Hormuz is now located entirely within Omani and Iranian territorial waters and indeed, within an area of overlap between the two in the middle. The 12 NM territorial waters limit was codified in 1982 by UNCLOS, however, this extension had already been pre-empted by Iran and Oman who had claimed it in advance of UNCLOS entering into force.[10] So, given that both Iran and Oman claim 12 NM of territorial waters within their municipal legislation, it now becomes questionable what regime of passage should be applied in the case of the Strait of Hormuz with specific reference to these two states.

[5] ibid.
[6] Ahmad Razavi, *Continental Shelf Delimitation and Related Maritime Issues in the Persian Gulf*, vol 29 (Martinus Nijhoff Publishers 1997) 56–57.
[7] Rouhollah K Ramazani, *The Persian Gulf and the Strait of Hormuz* (Brill Archive 1979). 1.
[8] United Nations, Office for Legal Affairs, National Legislation and Treaties Relating To The Law Of The Sea, UN Doc. ST/LEG/SER.B/16, (1974), 10-11 and 23.
[9] Morris F Maduro, 'Passage through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea' (1980) 12 J. Mar. L. & Com. 65. 69.
[10] Robert W Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (Martinus Nijhoff Publishers 1986). 7.

Iran has argued that the Strait of Hormuz, runs through its territorial seas but this has been the subject of numerous arguments in international law of the sea.[11] As Bagheri points out, the topic of these debates can be divided into two categories.[12] On the one hand, there are legal scholars who, like the Iranian government, connect passage through the Strait of Hormuz with Iran's national security, and hence see Iran as justified in enforcing the innocent passage regime.[13] On the other hand, some scholars contend Iran's behaviour in this area is inappropriate due to the suspension of the transit passage regime.[14] It is thus relevant to establish the nature of the right of passage in the Strait of Hormuz.

This chapter is divided into two main parts. The first part focuses on the propositions made by Iran and Oman during the negotiations of the 1958 Convention and the UNCLOS. It examines the Position of Iran and Oman during the Negotiation of the 1958 Convention. Then it will highlight Position of Iran and Oman during the Negotiation of UNCLOS. The chapter further traces the Gulf Coastal States views regarding the freedom of passage. The second part analyses the legal positions of Iran and Oman respectively, on the application of passage through the Strait of Hormuz following the adoption of both. The chapter examines in this part the Iranian municipal law on the territorial sea. After that it highlights then Iranian practice of the regime of transit passage in the Strait of Hormuz. The chapter further highlights the Omanian Practice of the Regime of Transit Passage in the Strait of Hormuz. It concludes that by emphasising the application of innocent passage to the Strait of Hormuz while yet requiring prior authorization this Omani position is difficult to be justified in law. While, on the other hand, the Iranian position to circumscribe the advantage of transit passage right merely to states party to UNCLOS is logical.

[11] Saeed Bagheri, 'Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective' (2015) 13 New Zealand Yearbook of International Law 83, 83.
[12] ibid.
[13] ibid.
[14] ibid.

2. The Position of Iran and Oman during the Negotiation of the 1958 Convention

Iran is a signatory to the 1958 Geneva Convention which regulates passage through straits used for international navigation.[15] Article 16(4) of the Convention. provides "There shall be no suspension of 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".[16] For this reason, in 1959 Iran understandably extended its territorial sea to 12 NM.[17] The extension of the Iranian territorial sea to that limit was mainly motivated by economic and security factors. However, it did not have any legal implications for the status of the Strait of Hormuz, as Oman had not yet extended its own territorial sea to 12 NM at that time.[18] In the Geneva Convention negotiations, the British delegate stated that the United Kingdom would not be prepared to recognise unilateral claims to territorial seas wider than 3 NM, according to international law.[19] In response to this protest by the United Kingdom, Iran stated its request for the 12 NM extension of the territorial sea was needed for national security.[20] The Iranian delegates to the 1958 and 1960 United Nations Conferences on the Law of the Sea insisted that the strategic and political interests of the coastal states constituted *"highly important psychological factors"*.[21] According to Amin, these arguments made by Iran at the negotiation of the 1958 Geneva Convention clearly shows the Iranian reluctance to agree to an unqualified right of passage of foreign warships through the Strait of Hormuz.[22]

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[15] United Nations, 'Convention on the Territorial Sea and the Contiguous Zone' (1958) 516 U.N.T.S. Treaty Series 205.
[16] ibid art 16(4).
[17] United Nations Documents, A/CONF.19/5. 15.
[18] Charles G MacDonald, 'Iran's Strategic Interests and the Law of the Sea' (1980) 34 Middle East Journal 302. 308-309.
[19] United Nations Documents, Second United Nations Conference on the Law of the Sea, Geneva 1960, A/CONF.19/C.1/SR.17. 102.
[20] ibid, 103.
[21] ibid, 104.
[22] SH Amin, 'The Regime of International Straits: Legal Implications for the Strait of Hormuz' (1980) 12 Journal of Maritime Law and Commerce 387. 389.

Iran maintains a regime of innocent passage through the Strait of Hormuz, which can be suspended.[23] Thinking of unilateral important strategic and political implications of the Strait of Hormuz, the Iranian representative at the 1958 Geneva Convention challenged Article 16(4) and argued that they would only accept the regime of innocent passage, rather than nonsuspendable innocent passage, for the Strait of Hormuz.[24] This claim clearly intended to make reference to Article 16(3), which permits any coastal state to temporarily forbid foreign ships navigating through its territorial waters.[25]

Oman, the second coastal state of the Strait, did not significantly diverge from the position adopted by Iran, saying that with a view to its national security, the regime of innocent passage within its territorial seas should apply to the strait as well.[26] It claimed that article 16(4) did not apply to the Strait of Hormuz, because the Strait was located within its territorial sea.[27] Oman was quite particular in its request for prior authorization in the case of specific types of foreign vessels, particularly warships. As a result, Oman did not sign or ratify the 1958 Geneva Convention.[28] It is worth noting that at that time Oman had not yet extended its territorial sea to 12 NM, however it should be noted the traffic lanes lay within Oman's territorial sea.[29]

3. The Position of Iran and Oman during the Negotiation of UNCLOS

In contrast to their attitude towards the provisions of the 1958 Geneva Convention, coastal states of the Straits of Hormuz actively participated at the Third Conference on the Law of the Sea.[30] During the course of the Conference, Iran's stance towards passage through straits used

[23] ibid.
[24] ibid.
[25] ibid 397, Article 16(3) states that "Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published".
[26] Amin (n 22) 397.
[27] ibid.
[28] ibid 398.
[29] ibid 398.
[30] Myron Nordquist, *United Nations Convention on the Law of the Sea 1982, Volume VII: A Commentary* (Brill 2011) 262.

for international navigation was unclear.[31] During the Conference sessions held in Caracas, two conflicting views had been put forward by states, quoting rights of 'innocent passage' and 'transit passage'.[32] During the second session of the third United Nations Conference on the Law of Sea the Iran delegate stated: "when it comes to straits used for international navigation two divergent but logical arguments have been proposed: the first acknowledges that foreign vessels possess a right to innocent passage, and indeed the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone outlawed any interference in this passage; the second calls for freedom of passage and is based on the concern that the coastal states should not be able unilaterally to render passage of vessels from one part of the high seas to another subject to arbitrary considerations."[33] The delegation argued that an acceptable solution might be reached that did not counter the legal integrity of the territorial sea.[34] It was their opinion that regulations could be devised to guarantee freedom of passage for foreign vessels, while at the same time respecting aspects such as security of coastal states, protection of the marine environment and control of passage of vessels through sea routes.[35] This statement implies that Iran was prepared to respect free passage through the Strait of Hormuz, provided this stance did not run counter to its legislation and sovereignty over its territorial sea and its rights to monitor passage of foreign vessels.[36]

The Iranian delegate suggested that any proposed rules impinging upon passage through straits should take due account of the existing rules with emphasis on those contained in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[37] According to him, the

[31] Abdullah Al Sheddi, 'The Legal Regime of International Straits: A Case Study of the Legal and Political Implications for the Strait of Hormuz' (University of British Columbia 1991) 52.
[32] ibid.
[33] United Nations Office for Ocean Affairs, *The Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol II (New York: United Nations 1992) 2. 281.
[34] ibid.
[35] ibid.
[36] Amin (n 22) 400; Ramazani (n 7) 82.
[37] Office for Ocean Affairs (n 33) 38. 365.

width of the territorial sea, whether three, six or twelve nautical miles, did not in itself affect passage of ships using the navigable channels of certain straits.[38] He maintained the system for separating traffic drawn up by International Maritime Organization disclosed that the navigable channels of certain straits in fact comprised 3 nautical miles or less from the coast.[39] In addition, at least in peacetime, coastal states had rarely resorted to restrictions on transit through straits used for international navigation.[40] His delegation expectedly opined any draft articles in the matter of straits should pay due attention to the coastal State's sovereignty over its territorial sea, without prejudice to its security and stability; but they pointed out that, while certain exemptions to the sovereignty of a coastal state might be appropriate to promote international trade and communication, draft articles should certainly not alter the status of the territorial seas making up the straits.[41]

On the other hand, Oman has repeatedly endorsed to the regime of innocent passage through territorial seas and straits used for international navigation forming part of the territorial sea of adjacent states. The Omani delegate considered that there was no reason to impose specific rules upon straits, because they composed part and parcel of the territorial sea.[42] The main thrust of the argument was that legislation adopted by a coastal state should be respected and implemented.[43] Reference was made to the draft proposals draft on navigation through the territorial sea, including straits used for international navigation[44] and the delegate ran over a number of basic principles. 1. Navigation through the territorial sea and straits used for international navigation should be dealt with together, since the straits under consideration overlapped territorial seas. 2. Navigation rules covering straits should strike an appropriate

[38] ibid.
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid 10. 322.
[43] Ibid.
[44] United Nations Documents, A/CONF.62/c.2/L.16.

balance between the specific interests of the coastal state and those of international navigation. 3. Any regulations should safeguard international maritime navigation and enhance the security of coastal states. These aims should indeed be achieved by normal and adequate implementation by the coastal state of its right to control navigation through its territorial sea. 4. Any regulation should be considered in relation to economic realities and recent scientific and technological developments, and indeed it should draw up reasonable rules in regulation of navigation by ships having special characteristics. 5. Any regulation should make up for any deficiencies in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, especially when it comes to passage of warships through territorial sea and straits.[45]

At the ninth session of the third United Nations Conference on the Law of the Sea, the Iranian delegate stated if a strait used for international navigation represents the one and only route for transit passage between two components of high seas, the passage of warships should only be allowed in consideration of the sovereignty of states adjacent to the strait.[46] His delegation spoke out against inclusion in Part III of the negotiating text of overflight rights and freedoms impinging upon the territorial sea, since international law provided that airspace above that portion of a coastal state should be subject to that state's sovereignty.[47] The Omani delegate pointed out he harboured serious reservations about the provisions governing passage through straits used for international navigation, since they did not achieve a universally acceptable agreement.[48] He maintained that his delegation had made a number of concessions and had constantly demonstrated preparedness to cooperate.[49] However, a number of states bordering straits, including Oman, had, in his opinion, not been accorded just treatment.[50] He continued by saying that the concerns of those states were of great consequence and should not be

[45] Office for Ocean Affairs (n 33) 56. 390.
[46] ibid 119. 505.
[47] ibid.
[48] ibid.
[49] ibid.
[50] ibid.

disregarded in a convention elaborating the rules of international law of the sea. His main concern was that, if the text were not amended, it might constrain applicability of any future convention, and as a result he suggested it should be amended.[51]

At the Eleventh session of the third United Nations Conference on the Law of Sea, the Omani delegate mentioned that on previous occasions his delegation had expressed reservations referring to articles 34 to 43 on the passage of all ships through straits used for international navigation, since the articles appeared not to adequately consider security concerns of the coastal states.[52]

The Iranian delegate proposed that he would not expect objections to measures implemented by a coastal state in straits used for international navigation if these were designed to protect that state's security.[53] He stated that Iran acknowledged the importance of straits of this nature in international trade and navigation and accepted the measures imposed on it. It suggested, however, that measures adopted to promote the international community should not jeopardize a coastal state's security.[54] He stressed that passage through straits has to be literally innocent. Iranian policy was to assure passage exclusively to vessels not threatening its security. It did not feel able to authorise an unconditional guarantee of freedom of navigation, although some straits used for international navigation opened on to enclosed or semi-enclosed seas.[55]

At the close of the eleventh session, delegations were permitted an opportunity to restate their views in a plenary session, and a number of them touched on the subject of straits used for international navigation. The cogent parts of those statements are as follows:

> Iran stated that: "it is … the understanding of the Islamic Republic of Iran that, notwithstanding the intended character of the Convention as one of general application

[51] ibid 120. 508.
[52] ibid 133. 533.
[53] ibid.
[54] ibid.
[55] ibid 138. 552.

> to legislation, certain provisions are merely quid pro quo and do not necessarily codify existing customs and established practice regarded as obligatory. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties that only states who are parties to the United Nations Convention on the Law of the Sea should be entitled to benefit from the contractual rights thereby created. The above considerations pertain specifically but not exclusively to the following: the right of transit passage through straits used for international navigation – part III, section 2, article 38…".[56]

Oman, upon ratification of UNCLOS in 1989, declared instead that: "It is the understanding of the government of the Sultanate of Oman that application of provisions of articles 19, 25, 34, 38 and 45 of the Convention does not preclude a coastal state from taking such appropriate measures as are necessary to protect its legitimate peace and security interests.".[57]

The Iranian delegate to the Third United Nations Conference on the Law of the Sea adopted what might be called a Third World stance on such important issues as the width of the territorial sea, marine scientific research, and implementation of the concept of the common heritage of mankind.[58] For instance, he called for a reinforced International Sea-Bed Authority, with extended powers.[59] Ever since this time, Iran has been claiming that UNCLOS only considers the interests of developed countries, especially the U.S. UNCLOS advances U.S. interests as a global maritime power, guaranteeing the right of the U.S. military to use the world's oceans in pursuit of national security.[60] He pointed out that it achieves this by outlining navigation regimes for innocent passage in the territorial sea and transit passage through straits used for international navigation.[61] In this view Iran argues that passage through straits used for international navigation should not affect the legal status of the territorial sea if the straits

[56] ibid 152. 607.
[57] ibid 155. 623.
[58] Bagheri (n 11) 86.
[59] ibid.
[60] ibid.
[61] Scott Gerald Borgerson, *The National Interest and the Law of the Sea* (Council on Foreign Relations 2009) 49.

are situated within the territorial sea of one or more states.[62] Practically, UNCLOS rules concerning transit passage through international straits have produced clashes between the right of the coastal state to manage and utilize its territorial sea and international rights to enjoy unimpeded freedom of navigation and overflight. In this respect, Iran asserts that states non-party to UNCLOS, such as the U.S., do not enjoy the right of transit passage through the Strait of Hormuz.[63]

Iran criticized various aspects of UNCLOS during different United Nations Conferences on the Law of the Sea. As mentioned above, the most significant provisions criticized by Iran regarding UNCLOS are "innocent passage of warships through territorial waters" and "the right of transit passage of warships through international straits".[64] According to Iran both these passage regimes are very significant, when it comes to Iranian national security as a coastal State[65] and, indeed, disputes over legal rights in the Strait of Hormuz could have strategic implications transcending national and regional security and affecting global peace and security.[66] As a result, Iran refused to ratify the Convention for the reasons mentioned above. Nevertheless, one could argue that the Iranian delegate's objections expressed at the Third Conference were not substantial enough to hinder Convention ratification by Iran.[67]

4. The Gulf Coastal States Views Regarding the Freedom of Passage

In the inaugural session of the United Nations Conference on the Law of the Sea in 1973, the delegates from Kuwait presented their views in subcommittee II regarding the issue of straits.[68]

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[62] MacDonald (n 18) 113.
[63] Bagheri (n 11) 86.
[64] ibid. 87
[65] See for more information Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 59–97.
[66] James Kraska, 'The Legal Vortex in the Strait of Hormuz' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2246016 325 <https://papers.ssrn.com/abstract=2246016> accessed 31 July 2019.
[67] Bagheri (n 11) 87.
[68] United Nations Office for Ocean Affairs, *The Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol 29 (New York: United Nations 1992) 82. 201.

They believed that it was crucial to establish regulations that govern the freedom of passage in straits. This was seen as necessary not only to protect the interests of coastal nations but also to guarantee unhindered passage through straits used for international navigation.[69] It was necessary to establish a clear differentiation between marine navigation and aerial navigation due to the application of various criteria and considerations to each.[70] The Seabed Committee had jurisdiction over maritime navigation, whereas agencies like the International Civil Aviation Organisation (ICAO) primarily focused on aerial navigation. The concept of freedom of navigation did not encompass the concept of freedom of overflight.[71]

During the second session in 1974, several delegations especially addressed the issue of straits used for international navigation. The United Arab Emirates representative asserts that there should be unrestricted freedom of navigation in international straits, without any prejudice towards foreign flags.[72] The Saudi Arabian representative affirmed his country's endorsement of unhindered navigation in international straits that link different parts of the high Seas.[73] The Iraqi representative emphasised the need of preserving and ensuring freedom of navigation in straits that have historically used for international navigation and connect two parts of the high seas.[74] The Kuwaiti delegate argued that, although the right of innocent passage was sufficient to safeguard navigation in the territorial sea, it was not feasible in the context of straits due to the subjective determination of passage innocence by the coastal State.[75] Merchant ships should always have the right to freely pass through straits used for international navigation, whereas warships should be subject to specific requirements to ensure the safety and security of the coastal State. The treaty provisions regarding straits utilised for international navigation must

[69] ibid.
[70] ibid.
[71] ibid.
[72] ibid 8. 313.
[73] ibid 9. 314
[74] ibid. 319.
[75] ibid.

not undermine the provisions of the United Nations Charter regarding the right to self-defense and national security.[76]

The Kuwaiti representative, speaking on behalf of Iraq, the United Arab Emirates, Saudi Arabia, Qatar, and Kuwait itself, emphasised that the phrase "straits used for international navigation" should only refer to straits that connect two parts of the high sea. Due to this perspective, the Governments for which he was representing did not agree to the 1958 Convention on the Territorial Sea and the Contiguous Zone.[77] They objected to the interpretation of Article 16(4) of the Convention, which regarded all straits equally. The inclusion of the provision was driven by political motives to cater to specific interests in a specific region.[78]

Representing his delegation, he observed that states' attitudes towards the issue of straits were primarily influenced by geographical factors and political circumstances, which categorised states into three main groups: states that share borders with straits, smaller nations with significant stakes in commercial navigation through straits, and major powers that not only have interests in commercial navigation but also assert special privileges for warships and military aircraft.[79] The state has the legitimate entitlement to ensure the safety, organisation, and safeguarding of its coastal areas from contamination and various risks. The international community should acknowledge the lawful entitlement of merchant vessels to unrestricted and unhindered passage in straits designated for international navigation.[80]

According to him, the determination of innocent passage is currently based on the subjective judgement of the coastal State.[81] This means that the coastal State has the authority to decide

[76] ibid 11. 325
[77] ibid 63.
[78] ibid.
[79] ibid 399.
[80] ibid.
[81] ibid.

without any specific criteria whether a passage is harmful to peace, order, or security. It is necessary to establish certain standards that ensure unrestricted passage for all commercial ships, while also protecting the fundamental interests of the country with a coastline.[82] However, warships and military aircraft should be subject to distinct standards due to the inherent dangers associated with their transit. The notion of previous notification could function as a middle ground solution.[83]

He advocated for prioritising the issue of States that solely rely on straits for access to the ocean.[84] The commercial navigation of those States relied entirely on the principle of unrestricted passage. It is imperative to safeguard the economic interests of states that are at a geographical disadvantage.[85]

The Iraqi delegate affirmed his delegation's endorsement of unrestricted passage through the straits that link two parts of the high seas.[86] He presented the draft articles that his delegation had filed.[87] He stated that article 1 emphasised the crucial issue of unrestricted passage via straits that are commonly used for international navigation and connect two areas of the open ocean. An essential aspect of the draft was the prioritisation of the high seas, regardless of whether they were fully open or partially confined.[88] There were countries next to partially enclosed seas that were considered part of international waters, and these countries had no direct access to other areas of international waters except through narrow passages known as straits. Consequently, the coastal States and the global community, required unhindered access to navigation in the partially confined waters.[89]

[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid 399.
[86] ibid 34. 361.
[87] A/CONF. 62/C. 2/L.71
[88] Affairs (n 68) 68. 406
[89] ibid.

In the latter half of the eleventh session, the Iraqi representative emphasised the significance of unobstructed navigation in semi-enclosed seas. These seas, characterised by multiple islets, are surrounded by numerous coastal States and experience significant international maritime traffic. All states that share borders with these waters have a vested interest in collaborating to maintain the freedom of navigation in those areas.[90]

During the concluding phase of the eleventh session, delegations were granted a final chance to express their perspectives in a plenary setting. Several of them addressed the issue of straits used for international navigation.[91] The United Arab Emirates delegate stated that "The interests and political aspirations of the United Arab Emirates make it necessary for us to disagree somewhat with some of the provisions of the Convention, especially those relating to the equal rights of innocent passage and transit passage through straits by warships and other vessels such as merchant, private or research vessels ...".[92] The delegate of Iraq stated that "The Convention constitutes a true framework for peace on the seas and the appropriate implementation of its provisions would be a true guarantee for the protection of the interests of peoples and for overcoming all negative factors. For example, the application in good faith of the regime of navigation in international straits, and the extension of that regime to access to straits and their islands, could make of such straits a channel for cooperation and for peace among nations.".[93] Bahrain stated that "Nothing better proves the lofty purpose and universality of this Convention as one of the legislative sources of international maritime law than the diversity of the issues with which it deals and the fact that it does so in a very delicate and well-balanced way, taking account of the interests of the coastal, land-locked and geographically disadvantaged States, in accordance with the possibilities and the circumstances of each group

[90] ibid 138. 551.
[91] ibid.
[92] ibid 148. 591.
[93] ibid 149. 594.

of States. The matters dealt with in this Convention are vast and diverse, including ... transit passage in international straits ...".[94]

All Gulf States have ensured the preservation of freedom of navigation when enacting national laws or asserting their sovereign rights over offshore resources beyond the outer boundary of their territorial waters. This freedom is crucial for their access to international trade, upon which they heavily rely. As exclusive economic zones are established and fishery zones are transformed into exclusive economic zones, the entire Gulf will be divided among the coastal states. Consequently, the concept of high seas within the Gulf will no longer be applicable.[95] However, the fundamental principle of free navigation continues to be applied.[96]

Throughout the armed confrontation between Iran and Iraq, the Gulf States voiced their fundamental concerns regarding the meticulous adherence to the right of free passage in the Gulf region.[97] In order to address the issue, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates urgently requested a meeting of the United Nations Security Council on May 21, 1984. The goal of the discussion was to discuss the Iranian attacks on commercial ships to and from the ports of these states.[98] In accordance with this initiative, as stated in resolution 552 dated 1 June 1984, the Security Council urged all countries "to respect, in accordance with international law, the right of free navigation" and reaffirmed "the right of free navigation in international waters and sea lanes for shipping *en route* to and from all ports and installations of the littoral States that are not parties to the hostilities".[99]

[94] ibid 151. 602.
[95] ibid.
[96] United Nations. Office for Ocean Affairs, the Law of the Sea, United Nations. Division for Ocean Affairs, and the Law of the Sea., *The Law of the Sea: Practice of the States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, vol 29 (New York: United Nations 1994) 96.
[97] ibid.
[98] ibid.
[99] UNSC Res 552 (1 June 1984) UN Doc S/RES/552.

The navigation rights in the Gulf are carefully regulated, considering the high volume of maritime activity and the specific hydrographic features of the area.[100] The Gulf has designated several traffic separation schemes and sea lanes in accordance with the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG) and resolutions of the IMO Assembly. These include the area of Tunb and Farur Islands, in the Strait of Hormuz, in the approaches of Ras Tanura and Juaymah terminal on the Saudi Arabian coast, and off the coast of Abu Dhabi between the oil fields of Zaqqum and Umm Shaif near Das Island.[101]

5. The Position of Iran and Oman Post the Adoption of the Conventions

The regime of transit passage through international straits foreseen in Article 38 of UNCLOS is in fact a right of entry into the territorial waters under consideration.[102] The fundamental principle of transit passage over international straits is that it should be unimpeded by the coastal state, and it should also be continuous and expeditious.[103] Furthermore, it is required that ships or aircraft in transit refrain from any threat or use of force against the coastal state and may proceed through the strait in their normal modes of transit.[104] According to UNCLOS Article 37, the regime of transit passage applies to 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 exclusive economic zone.[105] This leads to the conclusion that a strait with these features is an international strait. In this connection one hypothesis is that the Strait of Hormuz is a strategically international strait.[106] According to alexander, Article 37 includes both "straits at some point overlapped by the territorial seas of bordering states and straits containing a

[100] Affairs (n 97) 96.
[101] ibid.
[102] United Nations, 'United Nation Convention on the Law of the Sea' (1982) 1833 U.N.T.S. Treaty Series 397. art 38.
[103] ibid art 38(1)(2).
[104] ibid art 39.
[105] ibid art 37.
[106] John A Clemons, *Recent Developments in the Law of the Sea 1983-1984* (1985) 807; Tommy TB Koh, 'The Territorial Sea, Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea' (1987) 29 Malaya L. Rev. 163, 182.

continuous corridor of high seas or an exclusive economic zone".[107] In accordance with this view, it can be inferred that the Strait of Hormuz is one of the geographic straits foreseen in article 37, but it would be false to say it is the only access way from Iran and Oman to the high sea (Indian Ocean).[108] However, Iran and Oman, who are the coastal states here, argue that the Strait of Hormuz does not connect one part of the high seas to another. Therefore, it should be subject to the legislation covering the territorial sea.[109]

Conversely, under the regime of transit passage through international straits, UNCLOS makes clear that "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage".[110] The Convention also bestowed on coastal states authority to establish sea lanes (traffic separation schemes) in straits, subject to agreement from other states bordering the strait, and after submission to competent international organization, such as the International Maritime Organization and adoption of the scheme.[111] Additionally, the Convention foresees obligations for ships and aircraft. According to article 39(1) of the Convention, ships engaged in transit passage should proceed without delay; refrain from activities except in their normal modes of continuous and expeditious transit, unless these are rendered necessary by force majeure; refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of states bordering the strait; refrain from acting in violation of the principles of international law in the U.N. Charter, and refrain from activities other than those in their normal modes of continuous and expeditious transit, unless these are necessary by reason of force majeure or distress.[112] Thus,

[107] Lewis M Alexander, '"International Straits" International Law Studies' 64 (1) 18, 91.
[108] Bernard H Oxman, 'The New Law of the Sea' (1983) 69 ABAJ 156, 158.
[109] SH Amin, 'The Regime of International Straits: Legal Implications for the Strait of Hormuz' (1980) 12 Journal of Maritime Law and Commerce 387, 397.
[110] UNCLOS (n 103) art 44.
[111] ibid art 22.
[112] ibid art 39(1).

it is logical that the main reason for providing the transit passage regime in article 37 of UNCLOS was a confirmation of navigation in international straits, the right of access to the high seas and freedom of navigation.

In the light of this, it is crucial to recognise which regime Iran currently applies. When signing UNCLOS, Iran declared the following:

> "it is … the understanding of the Islamic Republic of Iran that, first, notwithstanding the intended character of the Convention as one of general application and of law - making nature, certain of its provisions are merely the product of *quid pro quo* and do not necessarily purport to codify the existing customs or established usage regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties that only states parties to the United Nations Convention on the Law of the Sea shall be entitled to benefit from the contractual rights created therein. Those considerations pertain specifically but not exclusively to the following: the right of transit passage through straits used for international navigation - part III, section 2, article 38."[113]

The declaration means that it would apply the transit passage regime only to states parties to UNCLOS. To other states, such as the U.S., it intended to apply the provisions of the 1958 Geneva Convention (innocent passage versus transit passage rights).[114] However, considering the geographical constraints of the Strait of Hormuz and frequent clashes between Iran and the U.S. in the area, currently Iran applies a special passage regime covering the Strait of Hormuz in the context of its 1993 Act on 'the Marine Areas of the Islamic Republic of Iran in the Gulf and the Oman Sea'.[115] According to Bagheri, Iran argues that the right of transit passage provided in UNCLOS article 38 covers only commercial shipping.[116] Therefore, and in order

[113] Para. 1 of Iran's Declaration, 10 December 1982. In United Nations. *Multilateral Treaties Deposited with the Secretary General*. New York 1989, 762.
[114] Nilufer Oral, 'Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers | ASIL' </insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage> accessed 23 July 2019.
[115] Bagheri (n 11) 96.
[116] ibid.

to prevent passages for security reasons, Iran implements transit passage for commercial ships and innocent passage for warships passing through the Strait of Hormuz.[117] Thus, Article 8 of the 1993 Act on the Marine Areas of Iran provides "The Government of Iran inspired by its high national interests and to defend its security may suspend the innocent passage in parts of its territorial sea". [118] Hence, Iran argues that the Strait's position in its territorial waters means that the national security of Iran as the coastal state must be considered a priority.[119] In effect, Iran has frequently declared it would at most only recognize innocent passage through its 12 NM territorial sea.[120] In practice, passage through the territorial sea of warships, submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or noxious substances harmful to the environment is subject to "prior notification" being given to Iran.[121]

Iranian Municipal Law on the Territorial Waters

The "Act on the Marine Areas of the Islamic Republic of Iran in the Gulf and the Oman Sea of 2 May 1993" in Iranian domestic law determined the legal regime over Iran's territorial waters.[122] Article 1 of the Act states that one of Iran's most significant maritime claims is that "Iran's sovereignty extends beyond its land territory, internal waters and Persian Gulf islands, the Strait of Hormuz and the Oman Sea over a strip of sea adjacent to the coastline, described as its territorial sea. This sovereignty includes the air space above the territorial sea as well as its bed and subsoil".[123] Thus, Iran asserts its clear claim that the Strait of Hormuz is inside its territorial sea and believes it has the authority to enforce its control over the Strait.[124] However,

[117] Martin Ira Glassner, 'Iran, Saudi Arabia, and the Law of the Sea; Political Interaction and Legal Development in the Persian Gulf. By Charles G. MacDonald. (Westport, Conn.: Greenwood Press, 1980. Pp. Xv + 226. $28.50.)' (1981) 75 American Political Science Review 1110, 70.
[118] 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea 1993', art 8.
[119] Bagheri (n 11) 96.
[120] Amin (n 22) 398.
[121] 1993 Act (n 119) art 9.
[122] ibid.
[123] ibid.
[124] Bagheri (n 11) 88.

a comparative UNCLOS account on the extent of the coastal State's authority over its territorial waters is a point of contention.[125]

The legally acceptable width of a coastal state's territorial waters and the associated navigational regimes governing them are determined by UNCLOS.[126] For this reason, the Convention's rules on the subject of international navigation through international straits overlapped by territorial waters such as the Strait of Hormuz are binding. In this connection, since neither Iran nor the U.S. as the main user state of the strait has ratified the Convention, its rules relating to the applicable passage regime in the Strait of Hormuz are controversial.[127] Iran argues "UNCLOS was negotiated as a 'package deal' under which we agreed to exchange a liberal freedom of navigation regime, including transit passage and archipelagic sea-lane passage for maritime powers in return for preferential access and sharing of seabed resources beyond national jurisdiction".[128] According to Iran, the right of a coastal state to adopt laws and regulations safeguarding its security interests should include a requirement for prior authorization of warships.[129]

According to article 2 of the 1993 Act, "The width of Iranian territorial waters is 12 NM from the sea-board. A nautical mile equals to 1852 meters. The islands belonging to Iran, whether situated within or outside its territorial sea, have, in accordance with this Act, their own territorial sea".[130] The regime of passage applying to this region is innocent passage, as stated

[125] ibid.
[126] ibid.
[127] ibid.
[128] United Nations, *Law of the Sea Bulletins*, 1996, No 31, 37.
[129] See Islamic Republic of Iran, "Interpretative Declaration on the Subject of Straits" (10 December 1982), 2, in United Nations Division for Ocean Affairs and the Law of the Sea, Declarations and Statements <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Iran Upon signature>. Regardless, the UNCLOS does not require prior notice or authorization before a ship may proceed in innocent passage. Nevertheless, some coastal States have imposed such requirements on warships. Over 25 nations purport to require prior permission, 13 insist on prior notification, and 5 place impermissible special restrictions on nuclear-powered warships. See John Astley III and Michael N. Schmitt "The Law of the Sea and Naval Operations" (1997) 42 AF L Rev 119. 132.
[130] 1993 Act (n 119) art 2.

by article 5 of the Act.[131] Hence the passage of foreign vessels, except as provided in article 9, is subject to the principle of innocent passage only so long as this is not prejudicial to the good order, peace and security of Iran.[132] Passage, except in cases of force majeure, shall be continuous and expeditious. In other words, the harmless passage of foreign vessels through Iran's territorial waters, so long as it does not disturb the discipline, tranquillity and security of the country, is ruled by the terms of innocent passage.[133]

Article 6 of the 1993 Act specifies the passage of foreign vessels, in the case of undertaking any of the following actions, is not considered harmless and is then subject to the terms of criminal and civil regulations:

> a. Any threat or use of force against the sovereignty, territorial integrity or political independence of the Islamic Republic of Iran, or in any other manner in violation of the principles of international law;
>
> b. Any exercise or practice with weapons of any kind;
>
> c. Any act aimed at collecting information prejudicial to national security, defence or economic interests of the Islamic Republic of Iran;
>
> d. Any act of propaganda aimed at affecting the national security, defence or economic interests of the Islamic Republic of Iran;
>
> e. The launching, landing or transferring on board of any aircraft or helicopter, or any military devices or personnel to other vessel or to the coast;
>
> f. The loading or unloading of any commodity, currency or person contrary to the laws and regulations of the Islamic Republic of Iran;
>
> g. Any act of pollution of the marine environment contrary to the rules and regulations of the Islamic Republic of Iran;
>
> h. Any kind of operations on fishing and exploitation of marine resources.

[131] ibid art 5
[132] ibid art 9.
[133] Bagheri (n 11) 89.

i. The carrying out of any scientific research and cartographic and seismic surveys or sampling activities;

j. Interfering with any systems of communication or any other facilities or installations of the Islamic Republic of Iran;

k. Any other activity not having a direct bearing on passage.[134]

Article 9 of the 1993 Act stipulates "Passage of warships, submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances harmful to the environment, through the territorial sea is subject to the prior authorization of the relevant authorities of the Islamic Republic of Iran. Submarines are required to navigate on the surface and to show their flag".[135] So the Article implies the existence of such vessels in the region could threaten Iran's national security in its capacity of coastal state on any occasion. Thus, Iran, motivated by its national interests governing defence of its security, is likely to suspend innocent passage in its territorial sea.[136]

To expand on the points raised above, the passage of warships through the territorial waters of the states was one of the most debated issues at negotiations leading to ratification of UNCLOS.[137] Here, however, the related provision in Article 9 of the 1993 Act on the passage of warships is divergent from UNCLOS.[138] In fact with respect to foreign nuclear-powered ships and those carrying nuclear or other inherently dangerous or noxious substances, Article 23 of UNCLOS states these ships "... shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements"[139] - which is similar to provisions of

[134] 1993 Act (n 119) art 6.
[135] ibid art 9.
[136] Bagheri (n 11) 90.
[137] ibid.
[138] ibid.
[139] UNCLOS (n 103) art 23.

the International Convention for the Safety of Life at Sea (SOLAS).[140] Article 22 of UNCLOS states "tankers, nuclear-powered ships and those carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea-lanes".[141] In this connection, some maintain the first sentence of article 9 of the 1993 Act contradicts UNCLOS.[142] The innocent passage of foreign vessels through the territorial waters of a coastal state does not require prior authorization for warships under the Convention.[143] Nevertheless, the second part of article 9 of the Act is equivalent in meaning to article 20 of UNCLOS, namely that submarines are required to navigate on the surface and to show their flag.[144] It should be noted that navigation on the surface is not subject to a grant of permission from the coastal state under the Convention. Correspondingly, this section of article 9 is also different from stipulations in the Convention.[145] However, it is important to note that in the 1993 Act, in order to protect the country's interests and the ability to undertake harmless passages, Iran draws up specific regulations on a unilateral basis.[146] In a similar way, in order to defend its security, and referring to the natural interests of the country, Iran might suspend the passage and presence of all foreign vessels in various parts of its territorial waters.[147]

Contrary to the list of activities in Article 19 of UNCLOS Article 6 of the 1993 Iranian Act contains a number of variations that render passage not innocent, several of which are not generally accepted, which can be evaluated as follows: 1. Whilst Article 19(2)(c) of UNCLOS states that "any act aimed at collecting information to the prejudice of the defence or security of the coastal state", Article 6(C) of the 1993 Iranian Act employs the expression "national

[140] International Convention for the Safety of Life at Sea (SOLAS) U.N.T.S. 18961 (opened for signature 1 November 1974, entered into force 25 May 1980).
[141] UNCLOS (n 103) art 22(2).
[142] Bagheri (n 11) 90.
[143] ibid.
[144] UNCLOS (n 103) art 20.
[145] Bagheri (n 11) 91.
[146] ibid.
[147] ibid.

security" and adds "economic interests". Nevertheless, these additions do not seem to contravene the provision of Article 19(2)(c).[148] 2. Whilst Article 19(2)(d) of UNCLOS states that "any act of propaganda aimed at affecting the defence or security of the coastal state", Article 6(D) of the Act similarly uses the term "national security" and adds "economic interests". In the same way these additions do not seem to contravene the provision of Article 19(2)(d).[149] 3. Article 19(2)(e) of UNCLOS states "the launching, landing or taking on board of any aircraft", and Article 19(2)(f) proscribes similar acts in relation to "any military device". Article 6(E) of the Act adds the transfer of "personnel" to other vessels or the coast, an act not mentioned in Articles 19(2)(e) and (f) of UNCLOS, although they are arguably consistent with the "catch-all" provision contained in Article 19(2)(l).[150] 4. Article 19(2)(g) of UNCLOS refers to "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". Against this, Article 6(F) of the Act does not mention the restricting words "customs, fiscal, immigration or sanitary" and, therefore, implies the loading or unloading of commodities, etc., is contrary to Iranian laws, thus rendering passage not innocent.[151] 5. Whilst Article 19(2)(h) of UNCLOS only defines "wilful and serious pollution" as non-innocent actions, subparagraph g) of the Iranian Act is more inclusive, outlawing "any act of pollution of the marine environment ..." In Article 6(H) of the Act, the inclusion of exploitation of marine resources alongside fishing (Article 19(2)(i) of UNCLOS) is not open to question, since such acts have no immediate bearing on passage and obviously come under the coastal state's sovereignty.[152] 6.

[148] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, 'Iran's Maritime Claims' (Office of Ocean Affairs Bureau of Oceans and International Environmental and Scientific Affairs 1994) <https://www.state.gov/wp-content/uploads/2020/01/LIS-114.pdf> accessed 23 June 2021. 12.
[149] ibid. 13.
[150] ibid.
[151] ibid.
[152] ibid.

Subparagraph i) of the Act limits "research and survey activities" (Article 19(2)(j) of UNCLOS) to cartographic and seismic surveys and sampling activities.[153]

Article 7 of the 1993 Iranian Act states that "The Government of the Islamic Republic of Iran shall adopt such other regulations as are necessary for the protection of its national interests and the proper conduct of innocent passage".[154] Article 21 of UNCLOS enables the coastal state to enact laws and regulations in conformity with the provisions of UNCLOS and other rules of international law relating to innocent passage.[155] However, Article 7 of the Act appears to be overly generous in its framing. The language "necessary for the protection of its national interests and the proper conduct of innocent passage" does not take account of the caveats of Articles 21(2) and 24 of UNCLOS proscribing application of such legislation to design, construction, manning or equipment of foreign ships, only allowing this, if they make provision for generally accepted international rules and standards.[156] In addition, UNCLOS does not allow requirements to be imposed with the practical effect of either denying or circumscribing the right of innocent passage or discriminating in any way against ships carrying cargoes to, from or on behalf of any state.[157]

Article 8 the 1993 Iranian Act reads "The Government of the Islamic Republic of Iran inspired by its high national interests and to defend its security may suspend the innocent passage in parts of its territorial sea".[158] Article 8 is not generally accepted, due to the fact that it lacks mention of the two limitations on the right of a coastal state to suspend innocent passage.[159] Firstly, any such suspension has be only temporary in nature; and, secondly, Iran should publish details of the suspension such as time and place.[160] The preferred course of action for Iran

[153] ibid.
[154] 1993 Act (n 119) art 7.
[155] UNCLOS (n 103) art 21.
[156] Bureau of Oceans (n 148) 13.
[157] ibid.
[158] 1993 Act (n 119) art 8.
[159] Bureau of Oceans (n 148) 15.
[160] ibid.

would simply have been to adopt the extremely comprehensive language of Article 25(3) of UNCLOS.[161]

Iranian Practice of the Regime of Transit Passage in the Strait of Hormuz

Although a right of transit passage was provided for in article 38(1) of UNCLOS specifically for 'all ships and aircraft' which should not be impeded, Iran acts according to the regulations of its own 1993 Act, which guarantees innocent passage in Iranian territorial waters, especially in the Strait of Hormuz.[162] Nevertheless, when it comes to warships, under that 1993 Act Iran imposes a regime of innocent passage through its territorial waters only with prior authorization from, or notification to Iran as the coastal State concerned.[163] However in the opinion of the ICJ it is generally recognized and in line with international custom that in times of peace states have a right to send warships through straits used for international navigation between two parts of the high seas without previous authorization from a coastal state, provided the passage is innocent.[164] Nevertheless, there is no right of this sort in times of peace for a coastal state to prohibit passage through straits used for international navigation.[165]

UNCLOS has been understood to embody certain key principles of international law as practiced by states, but there are several principles that are derived directly from customary international law.[166] In addition, under customary law there exist certain principles that representing evidence of state practice independent of it. Before 1982 the principal body of law governing maritime environments was the Geneva Conventions, and particularly the 1958

[161] UNCLOS (n 103) art 25(3).
[162] Essentially, some States including France, Federal Republic of Germany, Italy, Australia, Norway, Spain and United Kingdom have opposed the "prior authorization" during foreign vessels passing through their territorial waters. In practice, some other States including Oman, China, Poland, Yemen, the Philippines, Pakistan, Iran, Albania and Algeria have adopted regulations on the "prior authorization" for the warships while passing through their territorial waters. See Kari Hakapää and Erik Jaap Molenaar, 'Innocent Passage—Past and Present' (1999) 23 Marine Policy 131, 138.
[163] Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 74.
[164] Corfu Channel Case, 'Judgment of 9 April 1949' (1949) 35 ICJ Reports 28.
[165] ibid.
[166] Bashir Ali Abbas, *Assessing the 'Law of the Sea': A Case for the US' Right of Passage in the Strait of Hormuz* (Institute of Peace and Conflict Studies) 3.

Convention on the Territorial Sea and Contiguous Zone.[167] This suggests that irrespective of UNCLOS ratification nowadays states are expected to follow provisions of the Law of the Sea, such as the right of non-suspendable innocent passage. This is based on the 1958 Convention on the Territorial Sea or as a provision of customary international law.[168]

Iran resorts to the 12-nautical-mile-limit set under international law for the extension of a state's territorial waters.[169] Oman, the other state whose territorial waters border the Strait of Hormuz, is a party to the UNCLOS, and therefore there exists no question with regard to the applicability of UNCLOS provisions in Omani territorial waters.[170] Iran extended its territorial waters to 12 NM, but in the wake of its non-ratification of the 1982 Convention, it does not recognise this. Therefore, as a result the principles of international law applying in Iranian territorial waters are in line with customary international law and the 1958 Geneva Convention.[171] However given its signatory status, Iran is expected to follow the UNCLOS in principle.[172]

In 1984, Iran implemented a *de facto* exclusion zone in the Gulf, which restricted navigation. Their naval forces started to intercept, inspect, and ultimately detain or redirect ships from other countries that were passing through the Strait of Hormuz.[173] She deployed mines around the Gulf region. In response to the threat of Iran and to protect Kuwaiti tankers, the United States took action to safeguard them by reflagging. The primary purpose of this unconventional flag change was to ensure the protection and preservation of freedom of navigation in the Gulf region.[174] Former United States Secretary of State Shultz stated, "Iran continues publicly and

[167] ibid.
[168] ibid.
[169] ibid.
[170] ibid.
[171] ibid.
[172] ibid.
[173] Jose Antonio De Yturriaga, *Straits Used for International Navigation: A Spanish Perspective*, vol 17 (Martinus Nijhoff Publishers 1991) 320.
[174] ibid.

privately to threaten shipping in the Gulf; it is the basic Iranian threat to the free flow of oil and to the principle of freedom of navigation which is unacceptable".[175]

In response, the United States dispatched warships to the Gulf with the emphasis on minesweepers, as did the United Kingdom, the USSR, France, the Netherlands and Belgium.[176] In defiance of this impressive show of force in the Gulf and Strait of Hormuz Iran insisted on intercepting, searching and detaining vessels of non-belligerent states.[177] However, none of the maritime powers contested this conduct, which not only contradicted the norms of the transit passage regime, but also went against the requirements of the innocent passage regime that Iran had actually agreed to.[178]

In 1987 Iran raised with the United States violations of Iranian territorial waters by American vessels in the strait.[179] It pointed to the contractual character of the right of transit passage set out in UNCLOS.[180] As mentioned above, Article 9 of Iran's Act requires prior authorization for passage through the Iranian territorial sea by foreign warships, submarines, nuclear-powered ships and vessels, or any other floating objects or vessels carrying nuclear or noxious substances harmful to the environment.[181] In May 1993 in reply to an American note protesting against its 1993 Act Iran again emphasized that not all UNCLOS provisions represent customary international law.[182] In its note No 64/1206 of May 1995 in response to a similar protest from the European Union against its Act, Iran reaffirmed the position it declared upon

[175] Harold Lee Wise, *Inside the Danger Zone* (Naval Institute Press 2013) 44.
[176] Yturriaga (n 173) 321.
[177] ibid.
[178] ibid.
[179] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, 'Iran's Maritime Claims' (Office of Ocean Affairs Bureau of Oceans and International Environmental and Scientific Affairs 1994), 67. <https://www.state.gov/wp-content/uploads/2020/01/LIS-114.pdf> accessed 23 June 2021.
[180] ibid.
[181] 1993 Act (n 119) art 9.
[182] United Nations, *Law of the Sea Bulletins*, 1994, No 26, 35.

signing the UNCLOS. So, it should be noted that Iran has not recognized Part III of UNCLOS as general international law.[183]

Omani Practice of the Regime of Transit Passage in the Strait of Hormuz

In the case of Oman its Royal Decree of 1981 concerning the Territorial Sea reads as follows:

> "The Sultanate of Oman exercises full sovereignty over the territorial sea of the Sultanate and over the airspace, and the sea-bed and the subsoil beneath the territorial sea of the Sultanate, in harmony with the principle of innocent passage of ships and planes of other States through international straits…"[184]

When Oman signed UNCLOS in 1983, it made the following declaration:

> "It is the understanding of the government of the Sultanate of Oman that the application of the provisions of articles 19,25,34,38 and 45 of the Convention does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interests of peace and security".[185]

Caminos states that while this declaration does not directly oppose the requirements of the Convention, "it reserves the possibility that Oman might attempt to restrict passage in the Strait of Hormuz if, in its own judgment, it becomes necessary to do so in the future".[186] However, Yturriaga does not share Caminos's concern. In his opinion Oman's declaration reaffirms the fundamental premise that the coastal state has full control and authority over its territorial sea. This principle is universally accepted and not subject to any doubt or dispute according to the Convention.[187]

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[183] United Nations, *Law of the Sea Bulletins*, 1996, No 31, 37.
[184] Art.1 of the Royal Decree concerning the Territorial Sea, Continental Shelf and Exclusive Economic Zone, 10 February 1981. 33.
[185] Oman's Declaration, 10 December 1982. In United Nations. *Multilateral Treaties Deposited with the Secretary General*. New York 1989, 763-764.
[186] Hugo Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea* (Martinus Nijhoff 1987) 226.
[187] De Yturriaga (n 155) 321.

Article 309 of UNCLOS excludes the possibility of making reservations.[188] In addition, Article 310 of UNCLOS allows any state to make declarations or statements upon signature, ratification or accession to the Convention provided these "do not purport to exclude or modify the legal effect of the provisions of the Convention in their application to that state".[189] Upon ratification of UNCLOS in 1989 Oman made declarations highlighting no distinction between passage through international straits or the territorial sea outside such straits. It only acknowledged, subject to prior permission, the right of innocent passage of warships, nuclear-powered ships and those carrying nuclear or other noxious substances, and submarines. It would appear that Oman is not prepared to accept the right of transit passage as a principle of international law.[190]

Iranian and Omani transit passage compared

When it signed the Convention, Iran filed the declaration above mentioned setting out its position on the nature of the UNCLOS provisions. It underlined the 'package deal' character of a number of the provisions, undoubtedly as a result of a delicate outworking of concessions between developing and developed countries seeking recognition of maximum freedom of navigation. This explains, according to this declaration, the impossibility of automatically considering these rules (with specific reference to the rules on transit passage and EEZ) in terms of their correspondence to customary law, and thus they are also applicable to non-contracting States of UNCLOS, in accordance with Article 34 of the Vienna Convention on the Law of Treaties 1969.[191]

[188] UNCLOS (n 103) art 309.
[189] ibid art 310.
[190] Bing Bing Jia, *The Regime of Straits in International Law* (Oxford University Press 1998) 185.
[191] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Even after the extension of its territorial waters to 12 NM, Iran therefore insists on application of the regime of innocent passage in the Strait of Hormuz, as opposed to transit passage, with the insistence on requiring warships to obtain prior authorisation for passage.[192] This implies only partial acceptance of the Law of the Sea provisions, since the extension of the territorial sea to twelve miles has become adopted in customary law (and in UNCLOS) particularly in the light of the 'package deal' rejected by Iran, namely as a consequence of acceptance of this measure by the Maritime Powers, who subjected themselves to it in exchange for guarantees and concessions such as, for example, passage in transit.[193] Plausibly dismissing the 'package deal' would result in the feasibility of reinstating full freedom of navigation over and above three miles in interactions between countries that had not ratified UNCLOS.[194] In fact, it has been suggested that extension of the territorial sea to 12 NM is an integral part of recognition of the right of passage in transit through straits, thus automatically prescribing acceptance.[195] Cataldi is only partially in agreement with this position, since in his opinion, in line with general international law, the regime to be considered lies between the extreme position and the Iranian claims.[196]

Oman, upon signing and ratifying the Convention, stated that the provisions of UNCLOS regarding innocent and transit passage do not prohibit a coastal state from implementing measures to safeguard its peace and security. This includes the requirement for warships to obtain prior permission when crossing its territorial sea, including the waters of the Strait of Hormuz.[197] Oman's legislation, as stated in the 1981 Royal Decree, did not acknowledge the right of passage in transit for ships or aircraft. This legislation was not modified after the

[192] James Kraska, 'Legal Vortex in the Strait of Hormuz' (2013) 54 Va. J. Int'l L. 323.
[193] ibid.
[194] ibid.
[195] ibid.
[196] Giuseppe Cataldi, 'The Strait of Hormuz' (*QIL QDI*, 31 December 2020) <http://www.qil-qdi.org/the-strait-of-hormuz/> accessed 5 July 2021.
[197] *Ocean Policy News*, Special Report: the Preparatory Commission, September 1989, 3.

ratification of UNCLOS. In fact, the declaration made during the ratification process explicitly stated that warships would require prior permission.[198] It is noteworthy that unlike Iran, Oman ratified UNCLOS. This arguably makes Oman's position even weaker than Iran.[199] On the face of it, this may mean that Oman is merely reiterating its previous position, which involves treating its part of the Strait of Hormuz as a territorial sea under a regime of innocent passage. On the other hand, a requirement for prior authorization is often difficult to enforce, not least because this requirement has never been widely recognized.[200] Given the foregoing and presuming that transit passage has been included in the body of international law, as Mahmoudi points out, Oman's position is difficult to justify in law.[201]

By recognising the application of innocent passage to the Strait of Hormuz while yet requiring prior permission Oman's declaration arguably violates the provisions of UNCLOS Articles 309 and 310. This is because it has in effect excluded the right of transit passage from UNCLOS, and this is obviously against the provisions of Articles 309 and 310.[202] Iran's position is normal. It is thus attempting to circumscribe the advantage of this right merely to states willing to shoulder the obligations stemming from related concepts in UNCLOS. Iran's declaration upon UNCLOS signature confirms this.[203]

Currently Iran requires "warships, submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances harmful to the environment [to obtain] prior authorization".[204] When it comes to the export of oil from the Middle East, this is not as problematic as it may at first sight appear to be. This is because

[198] Cataldi (n 196) 14.
[199] Erik Franckx and Ahmad Razavi, 'The Strait of Hormuz', *The Proceedings of The Symposium On The Straits Used For International Navigation* (Citeseer 2002) 61.
[200] Said Mahmoudi, 'Passage of Warships through the Strait of Hormuz' (1991) 15 Marine Policy 338, 346.
[201] ibid.
[202] UNCLOS (n 103) arts 309 and 310.
[203] Mahmoudi (n 200) 346.
[204] 1993 Act (n 119) art 9.

oil can perhaps be considered a dangerous substance under the provisions of Iranian law.[205] Indeed, it should be noted, for example, that attention is not paid to any safety measures taken to prevent an oil spill, since reference is only made to the substance itself.[206] However, it should be remembered that the sea lane located in Iran's territorial waters, i.e. in the northern half of the Strait of Hormuz, is meant for traffic towards the Gulf, while ships exiting are to take the southern sea lane through Omani waters.[207]

Nonetheless, a few states require foreign warships to receive prior authorization, before entering their territorial sea, but most oppose this.[208] Therefore the requirement for prior authorization imposed by the Iranian authorities, in other words not mere notification of the authorities prior to entering Iran's territorial sea, is arguably incompatible with the right to innocent passage through international straits as defined by both UNCLOS and customary international law.[209] It should be realised there is no rule under customary international law enabling coastal states to insist on prior authorization, so this cannot be claimed by states that are persistent objectors.[210] In particular the United States have pioneered the position that prior consent of a coastal state for transit passage is not mandatory.[211] Indeed, transit passage through the territorial sea located in a strait should at all events be more flexible than innocent passage through the territorial sea. It follows that if a requirement for prior authorisation of passage of foreign warships has no basis in customary law governing the territorial sea in general, there is even less basis for this in customary law, as it pertains to the passage through straits that happen to overlap a state's territorial sea.[212] By demanding prior permission, Iran seems to be trying

[205] Salinaitė Birutė M. and Kirchner Stefan, 'The Iranian Threat to Close the Strait of Hormuz: A Violation of International Law' (2013) 20 Jurisprudencija 549, 556.
[206] ibid.
[207] ibid.
[208] Churchill and Lowe (n 164) 89.
[209] Birutė M. and Stefan (n 205) 557.
[210] Churchill and Lowe (n 164) 90.
[211] David Anderson, *Modern Law of the Sea: Selected Essays* (Brill 2007) 9.
[212] Birutė M. and Stefan (n 205) 557.

to turn international law on its head, in the process breaching existing law.[213] It is true that Iran harbours a fear of foreign military activities close to its coastline, nevertheless the above-mentioned breach of the law of the sea is not necessary from a national security perspective, because UNCLOS includes clear rules designed to protect the interests any coastal state expected to allow transit passage.[214]

Therefore, although there were some differences (for instance Iran complained at Oman's establishment of straight lines in its territorial sea), the attitude of the two coastal states towards the regime of passage that applies to the Strait of Hormuz is essentially identical with reference to the main aspects.[215] In their opinion extension of the territorial sea to 12 NM has not changed the status of the Strait, which is still, in their view, subject to the right of innocent passage and the need for prior permission for the transit of military vessels.[216]

It is an important question whether domestic legislation adopted, and the declarations deposited at international level correspond to actual practice, namely their degree of effective application. This is definitely crucial, in order to identify the prescriptions of customary law in that area.[217] Although the practice under consideration applies mainly to peacetime, it should be remembered that UNCLOS does not apply in times of war. So, for instance during the Iran-Iraq war the Strait of Hormuz was part of a larger war zone, and ships in transit, including merchant ships, were open to attack by both sides which is unlawful, as civilian objects are protected under the law of armed conflict.[218] Significant for our purposes is the fact that at the beginning of the war Iran closed its coasts but left the Strait of Hormuz open to transit throughout.[219] Several conditions were imposed, such as navigation to be carried out only

[213] ibid.
[214] ibid.
[215] Cataldi (n 196) 14.
[216] ibid.
[217] ibid.
[218] ibid.
[219] ibid 15.

during the day, compulsory pilotage and 48 hours' advance notice for the transit of oil tankers. As the war worsened, detentions and inspections were performed based on suspected transportation of weapons to the enemy.[220]

The legal status of the Strait remains uncertain, and this is compounded by any disagreement between the coastal states and the rest of the Gulf States, and indeed any other maritime states.[221] State practice surrounding the Strait has promoted unhindered transit passage through acquiescence, hence UNCLOS did not disturb this balance but merely codified existing practices.[222] This rule runs contrary to claims by the coastal states, hence lacks the required *opinio juris* necessary to make it a rule embodied in customary international law.[223] Thus these short-sighted approaches of the coastal states, which amply demonstrated in local legislation and in their reservations concerning certain parts of UNCLOS, only exacerbate the uncertainty bedevilling the legal status of the Strait of Hormuz.[224]

6. Conclusion

Over time, the Strait of Hormuz has been of critical importance in terms of geostrategic, communication, and economic relevance. As a result, the Strait's passage regime has become increasingly important. The right of transit passage through straits used for international navigation is a notable deviation from the unrestricted sovereign rights of a coastal state over its territorial sea. Furthermore, it contradicts the prevailing direction of events at the Law of the Sea Conference. The main focus of the Law of the Sea Conference was on establishing regulations for coastal states' extended claims, including the 12 NM territorial sea, exclusive

[220] ibid.
[221] ibid.
[222] ibid.
[223] ibid.
[224] ibid.

economic zones, continental shelf and archipelagic waters. However, the right of transit passage was an exception, as it was claimed by the flag states. Undoubtedly all the delegates negotiated these rights as a whole 'package deal'. Moreover, their inclusion in UNCLOS is contingent upon maintenance of the intricate equilibrium of rights and obligations negotiated during the conference. Nevertheless, the equilibrium between the expanded territorial sea and entitlement to transit passage was included into the overall framework of rights and obligations. The need for this equilibrium arises from the inherent connection between different aspects of UNCLOS, whereby the expansion of one element implies the restriction of another. The conference negotiations show that most of the concerned parties saw a connection between an extended territorial sea and transit passage.[225]

Due to the enactment of laws by over one hundred states, including maritime powers and strait states extending their territorial sea to 12 NM, the entitlement to a 12 NM territorial sea can be considered as an established practise among states. In light of this context the current inquiry centres around whether the presence of the aforementioned link or established state practise has altered the nature of transit passage to become customary international law. However, while it may be considered customary international law, it is not necessarily obvious in this situation that all states bordering the strait can be subjected to transit passage. The situation is different between large straits with high seas routes and smaller straits with sea lanes overlapping territorial seas. In the large straits with high seas routes a littoral state possesses a legal entitlement over a formerly unrestricted area. In this scenario the flag state is deemed the losing party. For smaller straits where sea routes cross over territorial seas, as the Strait of Hormuz, the customary rights of the coastal state are overridden by transit passage. In this scenario the strait state is the party that has lost.

[225] Said Mahmoudi, 'Customary International Law and Transit Passage' (1989) 20 Ocean Development & International Law 157.

Moving on from the exposition of the divergent legal regimes of transit passage in the Strait of Hormuz, it serves to examine the legal regime in another part of the region with considerable legal, geo-political and economic significance. The Turkish Straits which compromise the Strait of Bosphorus and Strait of Dardanelles which though have a different legal regime, provide an opportunity for learning on how to address the challenges in the Strait of Hormuz especially as the legal regime of the Turkish Straits are of long-standing international legal instruments. It is to this that we now turn in the next chapter.

Chapter 5: Lessons from the Black Sea: Insights from the Legal Regime in the Turkish Straits

1. Introduction

The Strait of Hormuz and the Turkish Straits are crucial points of commercial and military vessels across the world. While entry through each of the straits are important, there is also the worry that a vessel may be disturbed beyond the intended "choke point"[1]. Although the legal regime and the geographical configuration of these Straits are different, they share some characters and disputed issues. Military and commercial vessels rely on entry and exit to these straits and the disruption of these transits could lead to an international crisis. The Turkish Straits (Black Sea Straits) are significant from the standpoint of international navigation, particularly as gateways to access the Black Sea, as well as regarding Turkish, European, and Caucasian geopolitics, strategy, and security. The strategic significance of the Turkish Straits played, and continues to play, a significant role in the security of Turkey as well as that of eastern and western European countries throughout World Wars I and II as well as during the Cold War era.[2] Thus, like the Strait of Hormuz the Turkish Straits are not only in the same region, but both are crucial points for commercial and military vessels with global implications.

In addition to the factors mentioned above, the end of the 20th century saw a considerable increase in the amount of oil and other hazardous cargoes shipped by tanker across the Turkish Straits thanks to development of oil resources in the Caucasus and central Asia.[3] The Turkish Straits were then once again in the limelight, but this time from the perspective of safety and

[1] Choke point term has been defined in Chapter 2.
[2] Yüksel Inan, 'The Turkish Straits and the Legal Regime of Passage', *Navigating Straits: Challenges for International Law*, vol 9 (Brill Nijhoff 2014) 199.
[3] Inan (n 2) 199.

security of international navigation and security of the coastal regions.[4] Given the interest in securing oil supplies for global markets, this latter point is of great concern not only to Turkey but also to the economic interests of the Black Sea coastal states and the rest of the world. The Turkish Straits, which are used for international navigation, have developed into two of the busiest and most important straits for exactly these reasons.[5]

One should not underestimate the region's strategic significance: the entire continent of Europe functions as a hinterland for the commodity flow through the Straits thanks to a network of natural and man-made waterways connecting the Black and Baltic seas on the territory of the former Soviet Union, as well as the opening of the canal connecting to the rivers Main and Danube.[6] The position as the only maritime access to and from the Black Sea markets of Bulgaria, Georgia, Romania, Russia and Ukraine, as well as the Caspian Sea and central Asian markets of Armenia, Azerbaijan, Kazakhstan, Turkmenistan and Uzbekistan, makes the Straits even more significant.[7]

The Turkish Straits are also one of the most challenging and hazardous waterways in the world to navigate because of their sharp turns (twelve in the Strait of Bosporus (Istanbul) and six in the Strait of Dardanelles (Canakkale)), which can reach a staggering 80°, and bottom and surface currents moving at a speed of 4 to 8 nautical miles (NM) per hour, rendering navigation extremely challenging.[8] The Black Sea and the Mediterranean Sea are connected by the Strait of Bosporus, Sea of Marmara, Strait of Dardanelles, and the Aegean Sea, making the Turkish Straits significant not only for international navigation but also for connecting two seas.[9]

[4] ibid.
[5] ibid.
[6] Milen Dyoulgerov, 'Navigating the Bosporus and the Dardanelles: A Test for the International Community' (1999) 14 The International Journal of Marine and Coastal Law 57, 64.
[7] ibid.
[8] Inan (n 2) 200.
[9] ibid.

The Bosporus Strait, also known as the Istanbul Strait, connects the Black Sea to the Sea of Marmara, and the Dardanelles Strait, also known as the Strait of Canakkale, connects the Sea of Marmara to the Aegean Sea. Both can be designated, together, as the Black Sea Straits (the Turkish Straits).[10] The Turkish Straits is the collective name for the Bosporus, Dardanelles and Sea of Marmara. The Straits are around 160 NM in total navigable length. At the entrance the Dardanelles are only 2 NM wide, and the channel narrows to 0.97 NM at various points. The surface current speeds up to more than 8 km/hr at the Strait's narrowest point, where it is squeezed between steep banks, rendering shipping extremely challenging.[11] The Bosporus narrows to a width of 550 metres close to Rumelihisari. The currents, which can move at a speed of 7 to 8 km per hour, pose the biggest threats to navigation.[12] Where surface currents and running circles converge, vessels may encounter challenges. Surface currents diminish and reverse intensity when a strong southerly wind blows; this phenomenon, known locally as 'orkoz' makes navigation hazardous due to its unpredictability.[13] They are extremely deep, with average depth of 55 metres and maximum depth of 91 metres. The Bosporus, which runs from the Sea of Marmara to the Black Sea in a roughly north-easterly direction, is a narrow waterway with sharp twists. Its breadth varies from 750 metres to 2.25 miles (3.6 km) at its southern entrance, making it around 19 miles (31 km) long. The main waterway is between 36 and 124 metres deep. Its treacherous currents, in contrast to the Dardanelles, can make navigation challenging and occasionally hazardous. The Dardanelles are not difficult to navigate, despite the presence of two strong currents - a surface current and a saltier undercurrent running in the opposite direction. Vessels can dodge the currents by staying in

[10] ibid.
[11] ibid.
[12] Nihan Ünlü, *The Legal Regime of the Turkish Straits*, vol 13 (Martinus Nijhoff Publishers 2002) 5–7. Cahit Istikbal, 'Regional Transport Demands and the Safety of Navigation in the Turkish Straits: A Balance at Risk', *Proceeding of the International Symposium on the Problems of Regional Seas* (Turkish Marine Research Foundation, Istanbul, 2001) 78.
[13] ibid.

the middle. To make them easier to navigate at night, a number of lights have been installed. [14] The Turkish Straits are one of the six major oil tanker routes in the world at the present time.[15] They are among the most dangerous of all.[16]

In the year 2000 the Turkish Straits were traversed by between 100 and 150 ships every day, including 10 to 15 oil tankers.[17] After a Traffic Separation Scheme (TTS) for the Straits was implemented, the number of collisions decreased from an original 10 to 30 per year in the 1980s and the early 1990s to about 2 to 4 per year nowadays.[18] The shipment of hydrocarbons from the Caspian Sea will continue to put pressure on these Straits.[19]

The chapter proceeds as follows. The first section traces the history of the legal regime of the Turkish Straits. The discussion here traces the history of the legal regime in the Black Sea Straits from Ottoman Empire when the ancient rule of empire was applied to foreign military and civil vessels passing through the Straits. This regime applied until it was replaced by the Lausanne Peace Treaty of 1923 (the Treaty) after the fall of the Ottoman Empire and its succession by a state; Turkey, with the implications of the latter being a diminished successor entity. The most striking feature of the Treaty, not surprisingly, is the granting of some privileges to the other Black Sea States. In 1936, the Treaty gave way to the Montreux Convention which further extended the privileges and powers of the other Black Sea States. The Montreux Convention is the most important legal instrument governing passage through the Black Sea Straits and is the focus of the next section. The next section examines the Turkish national regulatory framework of the Black Sea Straits. Here, the chapter considers the disputes

[14] Jon M Van Dyke, 'Transit Passage through International Straits', *The Future of Ocean Regime-Building* (Brill Nijhoff 2009) 203.
[15] The six major oil tanker routes are: Strait of Hormuz, Strait of Malacca, Suez Canal, Bab el-Mandeb Strait, Turkish Straits, and Panama Canal.
[16] Debora Schweikart, 'Dire Straits: The International Maritime Organization In The Bosporus And Dardanelles' (1996) 5 U. Miami YB Int'l L. 29, 33.
[17] Ünlü (n 12) 58.
[18] ibid 60.
[19] Mesut Hakki Casin, 'The Security and The Legal Aspects of Turkish Straits', *the Proceedings of the Symposium on the Straits used for International Navigation* (2002) 86.

arising from the application of that framework and the position of the parties involved including the International Maritime Organization (IMO). The discussion then moves to recent developments of interest regarding the legal regime of passage through the Black Sea Straits with resonance for other international straits including the Strait of Hormuz. The chapter concludes that there are valuable lessons to be learned from the legal regulations of the Black Sea Straits. Key lessons include the importance of balancing maritime security and navigation rights, establishing clear rules for passage, and involving relevant states in decision-making processes to ensure stability and cooperation in the region. Additionally, mechanisms for dispute resolution and international cooperation can help manage tensions and promote peaceful transit through critical waterways like the Strait of Hormuz.

2. The Regime of the Turkish Straits through history

2.1. The Regime of Passage during the Ottoman Empire Period

The regime currently prevailing in the Turkish Straits is the result of historical developments. The Ottoman Empire was the sole government in charge of deciding the Straits' transit rules for nearly 400 years from 1453 until 1809. In both peacetime and times of war the Straits were blocked to all foreign military and civil vessels under an erstwhile rule known as the (Ancient Rule of the Empire).[20] The Ottoman Empire acknowledged concessions to some governments by means of a system of capitulations, which were issued unilaterally by the Ottoman Sultans, allowing commerce vessels of these powers to navigate through the Straits during peacetime.[21]

[20] İnan Yüksel, 'The Current Regime of The Turkish Straits' (2001) 6 PERCEPTIONS: Journal of International Affairs 103.
[21] ibid.

However, by 1809 transit through the Straits had expanded into a global concern and was now covered by international treaties.[22]

Russian commercial ships had unrestricted access to the Black Sea and the straits under the Kutchuk-Kainardji Treaty, which was signed in 1774 between Russia and the Ottoman Empire. As part of fulfilling its commitment under the treaty to support Russia in disputes with third parties, the Ottoman government agreed to restrict the straits to warships of other states as part of the Unkiar-Skelssi Treaty of 1833, which was negotiated by Russia.[23]

With the conclusion of the London Treaty in 1841 between Great Britain, France, Austria, Prussia, Turkey and Russia, passage in the straits soon became an international issue.[24] Article 1 of the Treaty declared the firm resolve of the Sultan to maintain for the future 'the principle firmly established as the Empire's ancient rule, in virtue of which entry into the Straits of Dardanelles and Bosphorus has always been denied to the warships of foreign Powers; and that, as long as the Porte is in peace, His Majesty will not admit any foreign warships into the said Straits'.[25] The ancient rule of the empire did not affect commercial or light warships passage serving for foreign legations.[26] It was reaffirmed in Article I of the Straits Convention of 1856 which was signed together with the Treaty of Paris that made peace between the Anglo-French Alliance and Russia by ending the Crimean War, and in Article 2 of the London Treaty of 1871.[27] The latter, however, left open the possibility that, in order to guarantee execution of the 1856 peace treaty, warships from states favourable to the Ottoman Empire might be allowed to navigate through the straits. By stating in the Lausanne Convention of 1923 in Article 1 the

[22] ibid.
[23] Bing Bing Jia, *The Regime of Straits in International Law* (Oxford University Press 1998) 110.
[24] London Treaty signed on 13 March 1871 the objective of the treaty was to bring an end to the Franco-Prussian War, a conflict that commenced in 1870 between France and Prussia. An essential concern during the war was the control over the straits of the Bosporus and Dardanelles, which served as a link between the Black Sea and the Mediterranean. For more information See Zeynep Yücel, *The Turkish Straits Treaties and Conventions* (IJOPEC Publication 2023). 33.
[25] The London Treaty 1871 art 1.
[26] Erik Brüel, *International Straits: A Treatise on International Law* (Sweet & Maxwell 1947) 282–283.
[27] Signed at Paris on 30 March 1856.

idea of perpetual freedom of transit and navigation by sea and by air through the Straits, the Convention went much further than the earlier agreements.[28] This freedom applied to both commercial and military ships and aircraft. However, given the shifting political landscape in Europe, Turkey had started to really tackle the demilitarisation stipulations in that agreement as of the late 1920s.[29]

Under the 1809 Canakkale (Kale-i Sultaniye) Convention, 1829 Edirne Convention, 1833 Hunkar skelesi Convention, 1841 London Convention, 1856 Paris Straits Convention, 1871 London Agreement and 1878 Berlin Agreement, the Ottoman Empire pledged to keep the Straits open for commercial vessels of all states during peacetime and in theory to close them to the warships of all others, when there is conflict, the Ottoman Empire reserving the right to decide on the passage rule.[30] All of these documents refer to the Turkish Straits as the Black Sea (Bahr-i Siyah) Strait, the Canakkale (Kale-i Sultaniye) Strait, the Mediterranean (Bahr-i Sefid), depending on the means of entry from the Mediterranean or Black Sea.[31]

The nineteenth-century agreements established the Turkish Straits regime, which persisted until the start of the First World War.[32] The legal framework for the Turkish Straits that emerged after the nineteenth-century agreements was significantly influenced by President Wilson's principles related to the Dardanelles.[33]

[28] Lausanne Peace Treaty II. Convention Relating to the Regime of the Straits, Signed at Lausanne on July 24, 1923. art 1.
[29] Brüel (n 26) 383.
[30] Yüksel (n 20) 103.
[31] ibid.
[32] ibid.
[33] The Wilson's Principle XII is as follows: ". . . and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees." For more information See, President Wilson's Fourteen Points - World War I Document Archive (byu.edu).

2.2. The 20th Century

The fundamental guidelines for the Straits regime were outlined in the Lausanne Peace Treaty of 1923 (the Treaty).[34] The term (Straits) as used in Article 23 of this treaty refers to the Bosphorus, the Sea of Marmara and the Strait of the Dardanelles.[35] The Parties to this Agreement in the same article "... agreed to recognise and declare the principle of freedom of transit and navigation, by sea and by air, in time of peace and in time of war ..." within said area. The term "freedom of transit" is not used in the actual English form of this agreement; instead, it is translated as "la liberte de passage et de navigation" in the original French text, which simply means "freedom of passage and navigation".[36] In general, this principle was eventually enshrined in article 33 of Vienna Convention on the Law of Treaties.[37]

The Lausanne Convention Relating to the Regime of the Straits, which is an essential component of the Lausanne Peace Treaty, guarantees freedom of transit and navigation between the Mediterranean Sea and the Black Sea in accordance with the guiding principles of the Treaty. The Montreux Convention Original French text, like the Treaty, uses the phrase "liberte de passage" (freedom of passage) and defines the Straits in a manner consistent with that of the Treaty.[38]

The freedom of passage for both commercial ships and warships, which was influenced by above mentioned Wilson's Principles[39], served as the cornerstone of the Lausanne Treaty Straits regime.[40] The Lausanne regime considered a number of potential scenarios, including

[34] Lausanne Peace Treaty II (n 28).
[35] ibid art 23.
[36] Inan (n 2) 203.
[37] United Nations, 'Vienna Convention on the Law of Treaties' (1969) 1155 Treaty Series 331. art 33. This article concerns the "Interpretation of treaties authenticated in two or more languages".
[38] Convention regarding the Regime of the Straits, signed at Montreux on 20 July 1936, entered into force 9 November 1936, 173 L.N.T.S. 213. art 1. See also Inan (n 2) 203.
[39] For more information See (n 33).
[40] Inan (n 2) 203.

whether Turkey was a belligerent or neutral state, as well as whether this was a time of peace or conflict.[41] An International Straits Commission was also created by the Treaty to monitor how closely the Convention's rules were followed as ships transited through the Straits. According to article 12 of the Convention "The Commission shall be composed of a representative of Turkey, who shall be President, and representatives of France, Great Britain, Italy, Japan, Bulgaria, Greece, Romania, Russia, and the Serb-Croat-Slovene State, in so far as these Powers are signatories of the present Convention, each of these Powers being entitled to representation as from its ratification of the said Convention. The United States of America, in the event of their acceding to the present Convention, will also be entitled to have one representative on the Commission. Under the same conditions any independent littoral States of the Black Sea which are not mentioned in the first paragraph of the present Article will possess the same right."[42] Turkey's authority over the territory was delineated by the international nature of the Commission and the demilitarised zones in the region.[43]

2.3. The 1936 Montreux Convention

The main reasons why the 1923 Lausanne Straits Convention was unsatisfactory for Turkey were creation of the Straits Commission[44] and demilitarisation of both Straits sides as well as all islands in the Sea of Marmara with the exception of the island of İmrali.[45] The collective guarantee system, which had been accepted for the demilitarised zones' security as well as the security of Turkey in this area, was weak and revealed its shortcomings in the 1930s.[46] Turkey

[41] Lausanne Peace Treaty II (n 28) art 1.
[42] Montreux Convention (n 38) art 12.
[43] Inan (n 2) 204.
[44] A commission known as "The Straits Commission" was established in accordance with Article 10 of the Convention, and it was charged with regulating the passage of warships and military aircraft in accordance with the Convention's provisions. The Annex to Article 2's, paragraphs 2, 3, and 4 specify these provisions. Its members were from many countries; Turkey served as its president, and there were also members from Britain, France, Italy, Greece, Japan, Bulgaria, Romania, Russia, and the Serb-Croat-Slovenian state (Article 12).
[45] Inan (n 2) 204.
[46] ibid.

invoked the *rebus sic stantibus*[47] principle and requested adoption of a new convention to protect its security as a result of political and military events during those years, including the revisionist policies of some states, Italy's militarization of specific areas in the southern Aegean close to Turkish shores, and the failure of international demilitarisation efforts. With the exception of Italy, all of the contracting states responded positively to the Turkish *verbal note* sent to them on April 11, 1936.[48]

On June 22, 1936, a conference to discuss replacing the Lausanne Straits Convention was convened in Montreux. On July 20, 1936, the parties signed this new Convention. The Convention came into force on November 9, 1936 and was designed to regulate navigation and passage of commercial and military ships through the Straits in both peace and war times, and if Turkey perceives an impending threat of war.[49] In order to protect itself, Turkey was given permission by the Protocol annexed to the Convention to remilitarize the islands in the Sea of Marmara and the Straits without delay.[50]

The principle of freedom of transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus was mentioned in the Montreux Convention regarding the Regime of the Straits.[51] According to the Convention, those geographic locations fall under the general term of 'Straits'. "La passage et la navigation" are the terms used in the Convention to describe the freedom of passage and navigation, however His Britannic Majesty's Foreign Office's translation again uses the terms "transit and navigation."[52] The Preamble to the Convention indicates it seeks to protect the security of Turkey and the states bordering the Black Sea. Therefore, since this is one of the fundamental, obvious objectives of the

[47] An international treaty may be terminated due to a fundamental change in circumstances under the *rebus sic stantibus* principle of international law. See VCLT (n 37) art 62.
[48] Inan (n 2) 204.
[49] Montreux Convention (n 38).
[50] Inan (n 2) 204.
[51] Article 23 of the Lausanne Peace Treaty; the original text uses the term "principe de la liberté de passage et de navigation".
[52] Inan (n 2) 205.

Convention, security criteria must be taken into consideration in interpretation and application of Convention provisions (including, in particular, the principle of freedom of passage and navigation).[53]

The Montreux Convention brought relief for Turkey. The powers in attendance at the meeting did not object when Turkey said during the discussions that the Convention would even cover non-signatories.[54] The Convention applies to transit through the Turkish Straits, which are currently under Turkey's sovereign jurisdiction and where Turkey exerts its sovereign authority. In Article 1 of this Convention, freedom of transit and navigation by sea through the Straits was acknowledged and affirmed as an international legal principle.[55] The Convention's provisions set major restrictions on free transit in spite of this pledge and a clause stating that it "shall ... continue without limit of time" is contained in Article 28.[56] The Convention established distinct regulations for commercial and military ships. Additionally, it controlled passage based on whether this happened at a time of war or peace. The distinction between "time of war" and Turkey's status as a belligerent or non-belligerent state was made last.[57]

The Turkish Straits' legal regime, which is recognised by UNCLOS as a special regime under Articles 35(c) and 311 of that convention, is still governed by the 1936 Montreux Convention at the present time and only has nine parties.[58] Gibraltar, Danish, and Magellan Straits' established international legal regimes are also acknowledged by Article 35(c) of UNCLOS, without addressing them by name. Legally speaking, this means the requirements of Part III (Articles 34-45) of UNCLOS which regulates Straits used for international navigation do not

[53] ibid.
[54] Brüel (n 19) 404.
[55] Montreux Convention (n 38) art 1.
[56] ibid art 28.
[57] Jon M Van Dyke, 'An Analysis of the Aegean Disputes under International Law' (2005) 36 Ocean Development & International Law 63, 79–83.
[58] United Nations, 'United Nation Convention on the Law of the Sea' (1982) 1833 U.N.T.S. Treaty Series 397, arta 35(c) and 311.

in general apply to such straits.[59] The Preamble of Montreux Convention declares it aims to protect Turkey's security and the security of the countries bordering the Black Sea. The security measures must therefore be taken into consideration in interpretation and application of Convention provisions (including, in particular, the concept of freedom of passage and navigation), as this is one of the fundamental and clear objectives of the Convention.[60] With the passage of Law No. 476 on Territorial Waters on May 15, 1964, Turkey established a system of straight baselines "on indented coasts or in areas with islands lying close to the shore" (Article 4), the Straits area is bounded by straight baselines becoming an internal sea.[61] However Montreux Convention, which sets out the nature of those rights of passage, does not take the condition of the rivers into consideration.[62]

2.4. An overview of the Montreux Convention's passage regime

As previously stated, the Convention governs the passage of commercial and war vessels in peacetime and wartime and in the event of an impending threat of war, also taking into account whether Turkey is a neutral or belligerent state. Before providing insight into the rules governing the passage of commercial ships during times of peace, a brief explanation of the regime is relevant.

2.4.1. Peace Time

According to the Convention, all commercial ships are entitled to freedom of passage and navigation, day or night, without restrictions based on their flag or kind of cargo. Other than those specified in the Convention, the Turkish government is not to impose any additional taxes or fees on these vessels while they are transiting through the Straits without calling at a port.

[59] Yüksel (n 20) 102.
[60] Inan (n 2) 205.
[61] 'Law No. 476 on Territorial Waters, 1964. | UNEP Law and Environment Assistance Platform' <https://leap.unep.org/en/countries/tr/national-legislation/law-no-476-territorial-waters-1964> accessed 26 February 2024.
[62] U.S. Department of State, 'Limits in the Sea, No. 32, Straight Baselines: Turkey' (1971) 4.

Towage and pilotage are still optional.[63] In principle Turkey has no right to inspect a ship's cargo. The security of the Black Sea countries is prioritised, and naval vessels are categorised as belonging to Black Sea or non-Black Sea Powers. For this reason, transit of certain types of vessels from non-Black Sea Powers into the Black Sea is prohibited, along with tonnage and time restrictions for their presence in the Black Sea.[64] Additionally, all states must notify Turkey by diplomatic channels in advance of the passage of warships.[65] Turkey has continuously implemented a 15-day prior notice policy.[66]

2.4.2. War Time

All commercial ships are subject to the rules in place during peacetime, if Turkey is neutral.[67] Warships of combatant powers are generally not allowed to transit through the Straits, but neutral state warships are permitted to do so in accordance with peacetime standards.[68] If Turkey is belligerent, commercial ships of states not at war with Turkey enjoy the right of transit through the Straits on condition they do not aid the enemy state.[69] However, Turkey retains complete authority to allow or deny requests for the passage of warships.[70] As will be discussed later in this chapter, recently, in February 2022, during the ongoing war between Russia and Ukraine, Turkey decided to prohibit the passage of Russian warships in the Black Sea with the exemption of naval vessels returning to their home ports. Turkey claimed it was exercising its right under Article 19 of the 1936 Montreux Convention.[71]

[63] Montreux Convention (n 38) art 2.
[64] Inan (n 2) 205.
[65] Montreux Convention (n 38) arts 8-18.
[66] Inan (n 2) 205.
[67] Montreux Convention (n 38) art 4.
[68] ibid art 19.
[69] ibid art 5.
[70] ibid art 20
[71] Nilufer Oral, 'To Close or Not to Close the Turkish Straits under Article 19 of the 1936 Montreux Convention Regarding the Regime of the Straits' (*Centre for International Law*, 28 February 2022) <https://cil.nus.edu.sg/to-close-or-not-to-close-the-turkish-straits-under-article-19-of-the-1936-montreux-convention-regarding-the-regime-of-the-straits/> accessed 10 December 2023.

2.4.3. Imminent Danger of War

In the event Turkey believes it is in imminent danger of war, the Convention contains a clause giving it entire discretion over whether to allow warships to pass. Any statement by Turkey claiming imminent danger situation requires consent of other countries.[72] This special situation is not recognised by any other international convention relating to strait transit. Because of the extraordinary circumstances prevailing, when the Montreux Convention was negotiated, this clause was probably accepted.[73]

Subject to certain restrictions, commercial ships are permitted passage under the peacetime regime in cases where Turkey has declared itself to be in imminent danger of war. For example, entry to the Straits is only permitted during daylight hours, and vessels must follow a specific route specified by Turkey. Additionally free pilotage can be made mandatory.[74]

2.4.4. Special Regulations Regarding Warships Freedom of Passage

(a) *Naval Ships*

According to Annex II of the Convention, capital ships are surface warships that weigh more than 10,000 tonnes, have guns with a calibre greater than eight inches (203 mm), or are less than 8,000 tonnes but have guns with a calibre greater than eight inches.[75] In accordance with Article 14, the total tonnage of foreign warships sailing through the straits at any one time - no more than nine of them - shall not be more than 15,000.[76] However, under the provisions of Article 11, capital warships of a Black Sea state with a displacement above 15,000 tonnes may travel through the straits one at a time, each accompanied by a maximum of two destroyers.[77]

[72] Montreux Convention (n 38) art 21(4).
[73] Inan (n 2) 206.
[74] Montreux Convention (n 38) art 6.
[75] Montreux Convention (n 38) Annex II.
[76] ibid art 14.
[77] ibid art 11.

For fleets from non-Black Sea nations that are present in the sea, Article 18 sets a maximum displacement of 45,000 tonnes.[78] Thus, the Montreux Convention grants Black Sea States special privileges not granted to others, and it is exceptional in that it grants Turkey the primary responsibility for upholding the Treaty.[79] Turkey is tasked by Article 18 with keeping track of the total number of warships in the Black Sea and determining whether the Sea is "full," in addition to overseeing the movement of warships through the Straits.[80]

(b) Carriers of Aircraft

Nevertheless, Annex II does not consider vessels with a landing deck that are "not intended or adapted primarily for the purpose of carrying and operating aircraft at sea" as aircraft carriers. Article 15 prevents warships in transit from flying their aircraft.[81] But, under Article 14, aircraft may enter the straits for repair, and under Article 17, which permits courtesy visits to a port in the straits, aircraft carriers may travel through the straits.[82] However, it has been claimed that the Montreux Convention practically prohibits aircraft carriers from passing through the Straits.[83]

Concerns regarding violations of the Convention by Turkey and the former Soviet Union have been raised since the 1960s, since when Soviet aircraft have been flying over Turkey. Only the British government, though, expressed concern about the passage; no complaint was made.[84] Even from Black Sea states, it has been claimed, Article 10 prohibits the passage of this class of ship; nevertheless, the Soviet Union got around the issue by classifying the ships as capital ships or anti-submarine cruisers.[85]

[78] ibid art 18.
[79] Van Dyke (n 14) 205.
[80] ibid.
[81] Montreux Convention (n 38) art 15.
[82] ibid art 17.
[83] F David Froman, 'Kiev and the Montreux Convention: The Aircraft Carrier That Became a Cruiser to Squeeze through the Turkish Straits' (1976) 14 San Diego L. Rev. 681.
[84] Jia (n 23) 113.
[85] ibid.

(c) *Warships In War Time*

Warships that are neutral during a conflict and Turkey is not a combatant are granted "une complète liberté de passage et de navigation" under Article 19.[86] The passage of warships of combatant nations is prohibited, unless they are doing so in order to fulfil duties under the now-defunct League of Nations Covenant or treaties reached with Turkey in accordance with the Covenant's framework. When Turkey is a belligerent, it has total discretion under Article 20.[87]

2.4.5. Other Vessels

(a) Permission of Civil Aviation

Civil aircraft must have permission to overfly Turkey-designated air routes, according to Article 23.[88] There are no regulations in the Convention covering the passage of military aircraft.[89] The states preferred not to regulate their passage in the Convention, despite the issue being discussed at the Conference. Therefore, general international law alone may fill the gap.[90] Since Turkey is not a party of UNCLOS, Part III of UNCLOS would only apply to the passage of military aircraft if it is considered customary international law.[91] The jurisdiction of the coastal state in relation to environmental protection and navigational safety is not covered by the Montreux Convention.[92]

(b) Commercial Vessels

All commercial ships are allowed to navigate freely. However, they are required to pay for services and lighthouse upkeep under Article 2 and Annex I.[93] The Convention's right of

[86] Montreux Convention (n 38) art 19.
[87] ibid art 20.
[88] ibid art 23.
[89] Ünlü (n 12) 50.
[90] ibid.
[91] ibid.
[92] ibid.
[93] Montreux Convention (n 38) art 2 and Annex I.

passage for commercial ships can be distinguished from innocent transit by the imposition of minimal fees. Turkey has passed new regulations in response to the need of limiting the growing threat posed by the passage of tankers and accidents.[94] These rules include, among others the need for advance notification or permission for the passage of vessels of 500 gross registered tonnes and more, whether or not they are carrying dangerous goods, nuclear-powered vessels (Articles 7-9, 29-30), large vessels, which are defined as 150 metres or longer (Articles 2, 29-30), the prohibition of simultaneous passage through the Bosporus or the Dardanelles by multiple large vessels carrying hazardous cargo (Articles 42 and 52), temporary suspension of passage due to "compulsory circumstances" in the straits, such as drilling, scientific and athletic pursuits, the prevention and eradication of marine pollution, the pursuit of criminals (Article 24), and the requirement to use the designated sea lanes in the straits (Article 25).[95]

Due to the negative impact that the unilateral rules would have on the rights of navigation provided by the Montreux Convention, the draft rules were opposed by Russia, Greece, Cyprus, Romania, Ukraine, and Bulgaria.[96] Turkey, relying on its sovereign powers over the waters, stressed that the rules were regulatory rather than restrictive in nature.[97] While Turkey only partially implemented the Maritime Traffic Regulations on July 1, 1994, the International Maritime Organisation (IMO) Assembly eventually adopted Resolution A.827 (19) in 1995 approving the regulations as they were, recognising that the regulations were not intended to prejudice "the rights of any ship using the Straits under international law," including UNCLOS

[94] Jia (n 23) 113.
[95] 'Maritime Traffic Regulations for the Turkish Straits and the Marmara Region, Entered into Force on 1 July 1994' (1994 regulations) <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1994_Regulations.pdf> accessed 9 November 2022.

[96] Glen Plant, 'Navigation Regime in the Turkish Straits for Merchant Ships in Peacetime: Safety, Environmental Protection and High Politics' (1996) 20 Marine Policy 15, 19–20.
[97] ibid.

and the Montreux Convention, and calling for compliance with the rules by subsequent national regulations.[98] As a result, the Montreux Convention regime has evolved with regard to specific regulations regarding the passage of commercial ships.[99] Generally Speaking, Russia criticised these regulations for being against "universally recognised provisions of the Law of the Sea" that state that "no regulations issued by a coastal state may deny, hamper, or impair the rights of freedom of passage through international straits" or violate "the terms of the Montreux Convention, 1936."[100] The IMO's Legal Committee noted that "a significant number of states regarded the Turkish restrictions as inconsistent with the Montreux Convention and the IMO rules and regulations" and determined that the IMO should further investigate the issue.[101] Turkey held off on enforcing parts of the regulations during this period of review, but they were republished in 1998 with the majority of the requirements still in place.[102]

2.4.6. Steps Taken to Enhance Passage and Navigation Security

The period since the 1930s has seen a significant shift in the concept of security. Consequently, coastal states need to consider not only the security of the freedom of passage and navigation but also the security of the lives and property of the locals and the environment, including the marine environment, while attempting to manage these rights.[103] As passage and navigation are governed by legal rules, it is important properly to monitor all developments in the law of the sea pertaining to the safety of navigation and environmental protection. Turkey was granted legal authority not only by the security principle stated in the preamble to the Convention but

[98] International Maritime Organization, *Resolutions and Other Decisions (Resolutions 780-838): Assembly, Nineteeth Session, 12-23 Novenber 1995*, vol 19 (IMO Publishing 1996).
[99] Tullio Scovazzi, 'Management Regimes and Responsibility for International Straits: With Special Reference to the Mediterranean Straits' (1995) 19 Marine Policy 137, 347.
[100] ibid.
[101] Ünlü (n 12) 65.
[102] ibid 65–66.
[103] Inan (n 2) 213.

also by other international agreements like the Safety of Life at Sea Convention (SOLAS), MARPOL, etc., as well as by the general principles of the law of the sea, including UNCLOS.[104] In fact, Turkey took those factors into consideration in 1994 and 1998, when establishing and updating the national rules, which have an impact internationally.[105]

Measures taken to ensure the safety of navigation and passage are traffic separation schemes (TSSs), temporary suspension of the TSSs or sections thereof, and advice to a vessel in the area to comply with Rule 10 and in special cases Rule 9 of COLREG (1972),[106] should it be difficult to follow the TSSs for technological or geographical reasons. These may be due to environmental factors like fog or strong surface currents up to 7-8 knots and cross-currents at the bends temporarily suspending one- or two-way traffic, in order to maintain a safe distance between vessels participating in the Turkish Straits reporting system (TUBRAP).[107] They also include providing advance notice for the purpose of effective and expeditious traffic management as well as for safety of navigation and the environment, offering pilotage or towing services for safer navigation, and requesting that ships over 200 metres in length and vessels with a maximum draught of 15 meters should navigate the Straits during daylight hours.[108] Turkey has also built Vessel Traffic Services (VTS) along the Turkish Straits and established a Vessel Traffic Management Information System (VTMIS) in addition to

[104] ibid.
[105] IMO Res. A/827 and IMO Doc. MSC 71, C 82/3/Add.1 are the results of Turkey's efforts and the implications of its laws. These documents also gave their approval to Turkey's measures, such as the TSS in the Straits. See ibid.
[106] International Regulations for Preventing Collision at Sea 1972, as amended (COLREG), 20 Oct. 1972, 1050 U.N.T.S. 17 (1972). Rule 10 The coastal state is given the authority to create Traffic Separation Schemes (TSSs) and require vessels to operate within these designated lanes. However, according to rule 9, the captain of the vessel has the freedom to decide the specific path of navigation. The Russian Federation and Bulgaria supported rule 9 and strongly advocated for its implementation throughout the passage across the Straits. Observe the perspectives of those states, IMO, MSC 64/22/A.I, Statement by the Delegation of the Russian Federation, Annex 25, December 1994; IMO, MSC 64/22/A.I, Statement by the Delegation of Bulgaria, Annex 26, December 1994.
[107] Inan (n 2) 213.
[108] In addition to approving Turkey's actions, IMO Resolution A/857, which went into force on November 24, 1994, made recommendations for ships' masters to engage pilot services to ensure safe navigation across the Straits of Istanbul, the Strait of Çanakkale, and the Marmara Sea. Additionally, it was recommended that vessels with a maximum draught of 15 metres or more and those longer than 200 metres overall navigate the Straits during the daylight hours.

the above-mentioned measures.[109] The VTS, which have been in place since December 30, 2003, ensure improved traffic control. The inherent challenges and dangers of navigation in the Turkish Straits have not been eliminated as a result of these efforts, but they have significantly improved the safety of transit and navigation. Users of the Straits must enhance the quality of vessels and mechanical dependability in addition to implementing these administrative and technical measures for safety of passage and navigation and for environmental protection.[110]

Since 1994 the number of casualties in the Turkish Straits has dramatically decreased, particularly in the Strait of Bosphorus, when Turkey's regulatory measures came into force. Before these laws were introduced, between 1 May 1982 and 1 July 1994 (the date the 1994 Regulation entered into force) 269 vessels were involved in 208 accidents in the Strait of Bosporus alone.[111] Only 15% of the vessels involved in all these accidents - which included collisions, shore-collisions, groundings, and fire - had a pilot on board; the other 85% were pilotless.[112] Additionally the numbers highlight the significance of IMO Resolution A/857, which urges ships to take a pilot for safe transit and navigation across the Turkish Straits.[113] Between 1990 and 1994 there were between 25 and 43 collisions in the Strait of Istanbul each year. The number of collisions had significantly fallen to just 2-4 per year by the time the 1994 Turkish domestic regulatory legislative measures and the aforementioned IMO Resolution came into force. Without a doubt the VTS system made a significant contribution to the reduction in regional casualty rates and safety of navigation.[114] However, despite the IMO's urgent advice the number of pilots engaged by ships travelling through the Turkish Straits has

[109] Nilüfer Oral and Bayram Öztürk, *The Turkish Straits: Maritime Safety, Legal and Environmental Aspects*, vol 25 (Türk Deniz Araştırmaları Vakfı 2006) 58–65.
[110] Inan (n 2) 214.
[111] ibid.
[112] ibid 215.
[113] ibid.
[114] ibid.

still not reached an appropriate level. This is despite taking into account all local and international regulatory measures.[115]

In 2000, about 27% (11,130) of ships going through the Strait of Dardanelles and 40% (19,209) of ships passing through the Strait of Bosporus invested in a pilot. Due to the increased and intense traffic increasing numbers of ships are engaging pilots to navigate through the Straits.[116] For example, in 2009, 24,977 out of 51,422 ships did this, to navigate through the Strait of Istanbul, while in 2010, 26,035 out of 50,871 ships did. Analysis of the numbers reveals a correlation between the increasing tonnage and length of vessels and the mounting demand for pilots. Taking a pilot on board increases the security and safety of the trip.[117]

Istanbul itself is also impacted by the increase in shipping through the Straits. The city is very significant with its 13.5 million residents and historical significance; UNESCO designated it a "World Heritage City" in view of its 3000 years of history and for hosting several cultures. Environmentalists became interested in the city and its surroundings because of these characteristics.[118] Ship breakdowns, groundings, oil tanker and LPG tanker explosions and other hazards pose a threat to the important historical structures lining the city's coastline. This irrefutable fact emphasises the value of the Turkish government's environmental protection policies and the need for third parties to respect them. It also renders them more important.[119]

The Greek Cypriot Ships M/T Nassia and M/V Shipbroker collided in the Bosporus in March 1994, causing 20,000 tonnes of crude oil to burn for five days and shutting down traffic for a week. Twenty-nine crew members died because of this collision. This inspired the Turkish government to unilaterally enact its 1994 Maritime Traffic Regulations (the Turkish

[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid.
[119] ibid 216.

Regulations) for the Turkish Straits and the Marmara Region.[120] This provoked a flurry of criticism and at times vituperative complaints from some members of the international nautical community, especially from Black Sea riparian states.[121]

The MSC approved the proposal for adoption on condition that a broad set of guidelines for navigating the Straits also be developed; the proposal needed to be approved by the MSC at its next session, in order to be forwarded to the IMO Assembly for final adoption. On January 11, 1994, Turkey implemented the Regulations unilaterally.[122] The IMO received a set of Draft Rules for Ships Navigating in the Straits of Istanbul and Canakkale in the same month.[123] Although there are significant differences, it appears that the Draft Rules were meant to be in accordance with the Regulations.[124]

The MSC gathered in May 1994 to discuss the Turkish proposal and the Regulations. All the countries bordering the Black Sea, Greece and Cyprus accused Turkey of violating the Montreux Convention.[125] The arguments were legal, political and technical. It was said that Turkey opted for a unilateral strategy over a multilateral one. Additionally, it was claimed that the Turkish Draft Rules and Regulations violated the Montreux Convention, particularly the towage requirement, and denied, impeded, or impaired the rights of navigation through the Straits, envisaged the suspension of those rights for reasons other than force majeure, imposed authorization requirements and procedures on certain categories of vessel and contradicted the Montreux Convention.[126]

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[120] Jeanene M Mitchell and Christopher C Joyner, 'Regulating Navigation through the Turkish Straits: A Challenge for Modern International Environmental Law' (2002) 17 The International Journal of Marine and Coastal Law 521, 530.
[121] Gündüz Aybay and ORAL Nilüfer, 'Turkey's Authority to Regulate Passage of Vessels through the Turkish Straits' (2002) 3 Perceptions: Journal of International Affairs 84–108.
[122] Dyoulgerov (n 6) 79–80.
[123] IMO Doc. MSC 63/7/2.
[124] Plant (n 96) 18.
[125] S Andrew Scharfenberg, 'Regulating Traffic Flow in the Turkish Straits: A Test for Modern International Law' (1996) 10 Emory Int'l L. Rev. 333, 361.
[126] Inan (n 2) 212.

Other arguments raised against the plan included that it was unreasonable to demand ships longer than 200 metres only pass during the day and with the tug escorts the Turkish Administration unilaterally specified, that it was incompatible with the idea of traffic separation and that it was unsuitable considering the IMO ships' routeing safety criteria.[127]

Due to resistance raised by some members, in June 1994, the MSC approved less restrictive guidelines. It disregarded all the provisions that would have given Turkey the power to deny passage or block the Straits at its discretion and replaced mandatory provisions with recommendations.[128] The Assembly approved the International Maritime Organization (IMO) Rules and Recommendations on Navigating through the Straits of Istanbul, the Strait of Canakkale and the Sea of Marmara in December 1995.[129]

3. The Maritime Traffic Regulation for the Turkish Straits and Marmara Region

Turkey proposed fifty-nine modifications to the Montreux convention rules of passage in its 1994 Regulations in addition to the rules of passage for the Turkish Straits. Turkey argued these changes were essential to preserve the Straits' orderly marine trade and lower the risk of future incidents.[130] They said all ships passing through the Turkish Straits should comply with the Turkish Regulations.[131] The captains of all merchant vessels are required to guarantee their vessels meet the standards set out in Article 6(B)(a)-(m) of the Turkish Regulations.[132] The name, flag, tonnage, ports of destination and departure and any ship deficiencies that might

[127] Plant (n 96) 19–20.
[128] Dyoulgerov (n 6) 80.
[129] IMO Resolution A.827(19) 1995.
[130] 'Note on the Turkish Straits / Republic of Türkiye Ministry of Foreign Affairs' <https://www.mfa.gov.tr/the-turkish-straits.en.mfa> accessed 1 April 2024.
[131] ibid.
[132] 1994 regulations (n 95) art 6.

jeopardise navigational safety must therefore be reported to the Turkish authorities by ship captains.[133]

The process for transit through the Straits is outlined in Part III of the Turkish Regulations.[134] Navigation of vessels through the Straits must be within defined traffic lanes,[135] the use of automatic pilot is prohibited,[136] about there is a mandated, specified speed.[137] Foreign vessels are simply advised to engage a pilot for safety of navigation[138], but Turkish vessels over 150 metres in length are obliged to use a pilot, in order to travel through the Straits safely.[139] Furthermore Part III grants the Undersecretariat for Maritime Affairs of Turkey[140] (the Undersecretariat) the authority to temporarily outlaw all maritime traffic in the Turkish Straits for the duration of construction projects, including underwater work, drilling, fire extinguishing, scientific and sports activities, salvage and rescue operations, pollution prevention, the pursuit of criminals and similar objectives.[141]

The Turkish Regulations prohibit discharge of any pollutants into the Sea of Marmara or the Turkish Straits, including refuse, bilge water and oil.[142] According to Article 42 large vessels carrying hazardous cargo are not allowed to enter the Straits, if another such vessel is already on the way through.[143] By requiring the owner or manager of a large vessel to provide details about the vessel to the Undersecretariat at the planning stage of the passage, Article 29 limits the right of certain types of vessels to enter the Straits. The Undersecretariat is also required to advise the owner or manager of a large vessel of the outcome of its review.[144] A similar

[133] ibid arts 7-8.
[134] ibid arts 15-28.
[135] ibid art 25.
[136] ibid art 15.
[137] ibid art 17.
[138] ibid art 31.
[139] ibid.
[140] ibid art 2(a).
[141] ibid art 24.
[142] ibid art 33.
[143] ibid art 42.
[144] ibid art 29.

approach is outlined in Article 30 of these regulations for ships with nuclear-powered engines and for ships transporting nuclear, hazardous, or noxious cargo or waste seeking permission to pass through the Straits.[145] According to Scharfenberg, Articles 29 and 30 imply that Turkey has the discretion to prevent such vessels from navigating the Straits.[146]

4. Disputes on the Turkish Regulations

Greece, Russia, and a number of other states depending on the Turkish Straits for transportation to and from Black Sea ports, objected when Turkey passed the Turkish Regulations. These states asserted that the free commercial vessel transit rights granted by the Montreux Convention were violated by the Turkish Regulations.[147] They maintained that Turkey had passed the Turkish Regulations, in order to prevent an increase in oil tanker traffic and to lobby for construction of an oil pipeline that would replace tankers and transport oil from the Caspian oil shelf through Turkey to lucrative Western markets.[148] Turkey responded to these claims by asserting the Turkish Regulations were introduced specifically to aid environmental protection and navigational safety. Turkey insisted it had no intention of violating or impairing the rights granted by the Montreux Convention to ships using the Turkish Straits.[149] The Turkish Regulation has been the subject of international dispute between Turkey and Russia concerning its legitimacy. When it comes to maritime shipping through the Straits, all the neighbouring states are dependent on Turkey, despite Turkey's claims that it is interested in environmental protection and safety of navigation.[150]

[145] ibid art 30.
[146] Scharfenberg (n 125) 355–356.
[147] ibid 360.
[148] ibid.
[149] ibid.
[150] Serge V Pavlyuk, 'Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region' (1998) 22 Fordham Int'l LJ 961, 984.

4.1. Position of Turkey as to the appropriateness of its Regulations

The Turkish Ministry of Foreign Affairs believes that the risk of accidents is increased by the size and volume of ships passing through the Straits.[151] Turkey highlights the International Maritime Organization's (IMO) warning in 1994 about an increased risk of significant maritime traffic in the Turkish Straits as evidence in support of its argument.[152] The Turkish Ministry of Foreign Affairs also emphasises how heavily congested the Straits are with traffic.[153] The Straits are used by 45,000 large vessels annually,145 and an additional 1,000 local vessels pass near every day. Any disaster in the Straits involving fire, explosion or toxic material emission might put the health and lives of twelve million Istanbul citizens in danger. Turkey also highlights the threat increased maritime traffic poses to the ecosystem of the Black Sea as justification for the Turkish Regulations.[154]

Scharfenberg reviewed Turkey's justification for its unilateral action designed to enforce the Turkish Regulations,[155] contending they are legal and should not be interpreted as impeding navigation in violation of the Montreux Convention, because the significant increase in maritime traffic has heightened the risk of collisions and pollution.[156] He comes to logical conclusion that the Turkish Regulations, which are basically in accordance with the terms of the Montreux Convention, are an effort to prevent collisions and guarantee orderly navigation in the Turkish Straits.[157] He also examined alternate courses of action Turkey might pursue, if it stands by the Turkish Regulations and stops attempting to operate within the confines of the

[151] 'Note on the Turkish Straits / Republic of Türkiye Ministry of Foreign Affairs' (n 130).
[152] ibid.
[153] ibid.
[154] ibid.
[155] Scharfenberg (n 125) 333.
[156] ibid 395.
[157] ibid.

Montreux Convention.[158] Turkey might persuade marine insurance providers to require the services of a pilot, so as to ensure cover when transiting the Straits.[159] Turkey could also encourage its maritime companies to minimise pollution and overcrowding by establishing bilateral agreements.[160] Scharfenberg also argue that renegotiating the Montreux Convention at a meeting called by the signatory parties to the Treaty and all third parties with an interest in the Turkish Straits would be a better option for Turkey. He acknowledges Turkey might not want to do this, however, in order to maintain control over navigation through the Turkish Straits.[161]

4.2. Position of the Parties Challenging the Turkish Regulations

The Turkish Regulations challenged by Russia, Greece, Bulgaria and other countries that rely on Black Sea shipping, because they act against their interests.[162] Russia argues that Turkey unfairly prolongs the wait times for hundreds of Russian ships at the entry to the Straits, causing the shipowners significant economic losses.[163] For instance, Novorossiysk Shipping Co. alleged that in the second half of 1995, while its vessels waited for permission from the Turkish authorities to enter the Straits, it lost more than US$1 million. Since adoption of the Turkish Regulations Russia has argued they do not comply with the Montreux Convention or the International Maritime Organization's (IMO) Rules and Recommendations on Navigation Through the Straits of Istanbul, Canakkale, and Marmara (IMO Rules and Recommendations).[164]

[158] ibid 388–394.
[159] ibid 395.
[160] ibid 394.
[161] ibid.
[162] ibid.
[163] Pavlyuk (n 150) 988–989.
[164] ibid.

As a matter of illustration, Russia continues to maintain Turkish Regulations' Articles 40, 41, 50, and 51, which restrict maritime traffic during periods of low visibility and unsatisfactory currents,[165] are in violation of both the Montreux Convention and UNCLOS, since UNCLOS Article 44 prevents suspension of transit passage, and Article 42(2) prevents costal states from enforcing their laws and regulations in a way that restricts transit passage.[166] Additionally Russia contends that IMO Rules 1.2 and 1.3 which address situations in which a vessel is unable to comply with traffic separation schemes and authorise temporary suspension of traffic separation schemes and two-way traffic violate Article 25 of the Turkish Regulations, which imposes penalties on vessels that cross designated traffic lanes.[167]

4.3. Position of the IMO Regarding the Suitability of the Turkish Regulations

The task of drafting maritime rules for shipping in the Turkish Straits that would satisfy the modified circumstances was awarded to the IMO. The IMO's Maritime Safety Committee convened in May 1994 to talk about the Turkish Regulations.[168] At this summit all the IMO Black Sea member states together with Greece and Cyprus charged Turkey with breaking the Montreux Convention.[169] The Maritime Safety Committee suggested less stringent guidelines for transit through the Turkish Straits after discussing proposed revisions to the Turkish Regulations. Turkey was asked by the Maritime Safety Committee to abide by these recommendations.[170] The IMO issued the IMO Rules and Recommendations based on recommendations by the Maritime Safety Committee. The IMO Rules and Recommendations are different from the 1994 Turkish Regulations in that participation in the reporting system

[165] 1994 Regulations (n 95) arts 40, 41, 50, 51.
[166] UNCLOS (n 58) arts 44 and 42(2).
[167] 1994 Regulations (n 95) art 25. See also Pavlyuk (n 147) 990, [IMO Rules and Recommendations] Rules 1.2 and 1.3.
[168] Pavlyuk (n 147) 990.
[169] Scharfenberg (n 125) 361.
[170] ibid.

established by Turkey is merely strongly encouraged rather than explicitly required. Also, the IMO Rules and Recommendations strongly advise positioning a Turkish pilot on board Turkish flag vessels to aid in navigation through the Straits, although they do not mandate it. The IMO Rules and Recommendations also urge daylight navigation for ships longer than 200 metres with a draught of over 15 metres.[171]

Contrary to the Turkish Regulations, which give Turkey the right to prevent a vessel from passing through the Straits, if it does not adhere to the traffic separation scheme,[172] Rule 1.2 of the IMO Rules and Recommendations suggests the non-compliant vessel should notify the Turkish authorities of this in advance, enabling Turkey to accommodate it, by temporarily suspending that specific aspect of the traffic separation scheme.[173] Essentially the IMO Rules and Recommendations make an effort to resolve Turkey's safety concerns about navigating the Straits, while remaining compliant with the Montreux Convention.[174] A Working Group of the IMO Maritime Safety Committee released a 1997 report that examined the Turkish Regulations, suggested potential amendments and revised recommendations addressed to the Government of Turkey, after in 1994 recommending some significant changes to the 1994 Turkish Regulations, in order to make them acceptable to the international community.[175] But Turkey insisted on its right to control the Turkish Straits on its own, rejecting both the 1994 IMO recommendations and the 1997 Working Group report.[176]

Schweikart argued the IMO prevented use of force in the dispute, because it presented governments, corporations and environmental groups a platform for global discussion of the Turkish Straits issue.[177] She suggests the IMO Marine Safety Committee draw up temporary

[171] Pavlyuk (n 150) 992.
[172] 1994 Regulations (n 95) art 29.
[173] [IMO Rules and Recommendations] Rules 1.2 and 1.3
[174] Scharfenberg (n 80) 364.
[175] ibid.
[176] Pavlyuk (n 150) 993.
[177] Debora Schweikart, 'Dire Straits: The International Maritime Organization in The Bosporus and Dardanelles' (1996) 5 U. Miami YB Int'l L. 29, 20.

procedures to deal with urgent maritime issues, in order to keep the current controversy under control. Such procedures would guarantee Turkey's concerns would be taken into account as soon as possible and allow the IMO some time to further assess the situation and choose the most effective course of action.[178] She draws the conclusion that additional efforts to increase efficiency of IMO processes would aid in devising a solution to the problem of regulation in the Turkish Straits based on merit rather than on oil interests.[179]

4.4. Turkey's Insistence on the Legitimacy of the Turkish Regulations

Implementation of a suitable solution to the Turkish Straits issue is unlikely to be furthered by either the assertion that the Turkish Regulations are valid and in accordance with the Montreux Convention or reliance on IMO processes.[180] The IMO provided Russia and Turkey a forum for amicable discussion of the Turkish Straits dispute. The major tool for resolving the Turkish Straits crisis has been this dialogue. But the conflict is still going on, and it could now become more dangerous. The IMO only backed a compromise proposal and rejected Turkey's stance.[181] Turkey and Russia are not, however, bound by the IMO Rules and Recommendations. As a result, the lack of compulsion renders IMO mechanisms ineffectual for settling the Turkish Straits conflict.[182] However, given their unilateral nature and detrimental impact on the shipping industry of the Black Sea republics, Turkey's insistence on legitimacy of the Turkish Regulations is unreasonable. The likelihood tension in the Turkish Straits may be exacerbated, as more large ships, primarily tankers, travel through the Straits, cannot be ignored by Turkey.

[178] ibid.
[179] ibid.
[180] Pavlyuk (n 150) 997.
[181] ibid.
[182] ibid 996.

In all likelihood the Baku-Ceyhan pipeline across Turkey will not be constructed in the near future; instead, tankers will be used to deliver Caspian oil through the Turkish Straits.[183]

Thus, despite Turkish objections a fleet of oil tankers carrying thousands of tonnes of crude will shortly arrive at the northern Bosporus entry and ask for permission to enter. Turkey is adamantly committed to blocking oil tankers from transporting their cargo through the Turkish Straits. This viewpoint is shared by influential environmental organisations and the Turkish industrial lobby.[184] However, it is extremely unlikely Russia would accept the legitimacy of the Turkish Regulations restricting tanker passage through the Straits and thereby forfeit billions of dollars in export revenues from oil, given the recent economic crisis in Russia and the neighbouring nations. There have been no successful attempts to date to compromise the views of the two nations.[185]

4.5. 1998 update to the Turkish Regulations

Turkey enacted an updated set of regulations on November 8th, 1998. Most articles have had their phrasing clarified, and others have had their substance updated, when there is disagreement over the subject.[186] "Deep draught vessel" and "large vessel" are defined more broadly in the revised regulations. The phrase "vessel in transit" was no longer defined as "vessel exercising innocent passage". In Article 17 provisions relating to mandatory towing are modified.[187]

According to Article 20, transportation may be stopped due to force majeure, crashes, other issues involving public safety, navigational risks or surface- or undersea building projects for

[183] ibid.
[184] ibid.
[185] ibid 997–998.
[186] Ünlü (n 12) 66.
[187] 'Maritime Traffic Regulations for The Turkish Straits and the Marmara Region, 1998' (1998 Regulations). art 17.

the benefit of the general public.[188] The Administration must now be notified of the type of cargo at least 72 hours before passage, and vessels carrying nuclear or dangerous goods or waste must possess relevant certificates, according to Article 26.[189] However, "all steps advised by the Administration" must be taken by nuclear-powered vessels. Warships, which are exempt from numerous other regulations, are not affected by this.[190] The statement that a violation of the Regulations is a crime has been removed. Still, debate was not ended by this.[191]

Turkey asserts that it has effectively implemented the TSS, and associated Rules and Recommendations adopted by the IMO in the Turkish Straits since 1994. However, Russia has brought to the attention of the MSC (Maritime Safety Committee) the fact that Turkish data indicates that over a period of more than four and a half years, it is evident that a considerable number of ships, due to their dimensions, were unable to remain within the designated lane of the TSS in the narrow and winding parts.[192]

The MSC acknowledged Turkey's expressed desire to become a member of the International Convention on Civil Liability for Oil Pollution Damage (CLC) and Fund Conventions, as amended by the 1992 Protocols. However, several delegations, including those from Cyprus, Greece, Norway, the Russian Federation, and the United States, raised concerns regarding Turkey's stance on enforcing the CLC Convention in the Straits. These delegations pointed out that the Convention stipulates (Article VII, paragraph 11) that contracting Parties must ensure that ships entering or leaving their ports, as well as ships entering or leaving an offshore terminal in their territorial sea, have appropriate insurance or alternative forms of security in place.[193]

[188] ibid art 20.
[189] ibid art 26.
[190] ibid art 49.
[191] Pavlyuk (n 150) 998.
[192] ibid.
[193] IMO Doc. MSC 70/23 (1998), paras. 11.12–11.17.

The MSC noted that a preliminary draft of a new report covering all facets of safety and environmental protection had been prepared, including a review of the IMO Rules and Recommendations on Navigation through the Straits of Istanbul, Strait of Canakkale and Marmara Sea, as well as preliminary draughts for the sections on Vessel Traffic Service (VTS) and pilotage.[194] The outdated TUBRAP SRS, which was little used, would be replaced by the proposed VTS, which is to be created in compliance with resolution A.857(20).[195]

The Greek delegation felt the Working Group's recommendation to request the Turkish government to submit to the Organization a proposal for an obligatory ship reporting system was incompatible with resolution A.827 (19) by virtue of the mandatory reporting system's very nature.[196] But since the SOLAS amendment of 1996 mandatory Ship Reporting System (SRS) has been permitted. Although the IMO had deliberated on revising the 1994 Rules and Recommendations, the negotiations were unsuccessful. The discussions were marked by significant disagreements between Russia and Turkey, particularly regarding certain technical aspects of the Turkish Regulations. These disagreements centred around Turkey's power to temporarily halt two-way traffic and suspend the transit of vessels longer than 150 metres.[197]

In June 1999 the MSC resolved the current IMO-adopted routeing system was effective. Turkey was not considering changing it or the related Rules and Recommendations.[198] Additionally, the working group had not come to a firm decision that any change would make a clear and definitive contribution to the safety of navigation in the Straits. As the Coastal State does not currently see any need for any amendments, there is little chance of an agreement being reached on changes in the near future to the current routeing system adopted by the

[194] ibid para. 11.20.
[195] IMO Doc. MSC 70/23 Add.2 (1998), Annex 12.
[196] ibid.
[197] Glen Plant, 'The Turkish Straits and Tanker Traffic: An Update' (2000) 24 Marine Policy 193–214.
[198] ibid.

IMO.[199] Furthermore, according to the General Provisions on Ships' Routeing, the Coastal State's consent is required, before any routeing system can be adopted or modified by the IMO.[200]

As a result, the MSC concluded the discussion on the topic and stated interested parties should focus their efforts on encouraging full and efficient use of the reporting system and pilotage services and the deployment of a new VTS in the Straits as soon as feasible.[201] Russia's, Cyprus' and Greece's delegates opposed the topic's conclusion. The United States delegation, which was supported by a number of others, noted that the discussions during this session had, in its opinion, been constructive and positive and had centred on safety. The revised VTS came into force on December 30, 2003.[202]

Despite assertions that the Montreux Convention regime of passage established an innocent passage in the Turkish Straits, the Convention does not include an innocence requirement, and the 1994 Regulations highlight the discrepancy between the Convention and the innocent passage regulation. By the regime of innocent passage, whether customary or conventional, conditions such as prior authorization for the passage of specific commerce ships go beyond the powers of the coastal state.[203]

It has been proposed that Article 24 of the Montreux Convention, which states that "the functions of the International Commission established under the [1923 Lausanne Convention] are hereby transferred to the Turkish Government," could be used to justify Turkey's unilateral action.[204] As a result, Turkey is believed to have the authority to regulate maritime traffic

[199] ibid.
[200] ibid.
[201] IMO Doc. MSC 71/23 (1999), para. 22.31.
[202] See <http://www.turkishstraits.com/upload/docs/ug_en.pdf> for more details about the VTS.
[203] Jia (n 23) 114–115.
[204] Montreux Convention (n 38) art 24.

without restriction.[205] But it was Turkey that opposed the Allied Powers' plan in 1923 to give the Commission more authority over passage.[206] There is no indication that the parties at Montreux in 1936 intended to rely on Turkey's application of customary international law in resolving passage disputes not expressly covered by the Convention.[207]

According to Plant, in a number of official sources Turkey argued that it is reasonable to impose restrictions on the movement of large tankers, because doing otherwise might restrict non-tankers' rights to pass. Turkey claimed these restrictions are not designed to outlaw passage but rather to regulate it, and that the principle of safe navigation must be taken into account along with the principle of free navigation.[208] Although these arguments have some validity, it is Turkey's overall unilateral action that is being questioned. It is challenging to defend the idea that unregulated topics are left to Turkey's unilateral decision because of the lengthy history of passage through the Straits under varied degrees of Ottoman control.[209] He concludes that, it is unfortunate the MSC disregarded the IMO Council 1995 decision that the matter of conformity of the 1994 Regulations with the IMO Rules and Recommendations should be addressed by the IMO. It is particularly unfortunate Turkish public statements that navigation interests must be subjected to national security and environmental protection objectives have not been corrected. One may add the decision to end the discussions has raised a few other problems, the answers to which seem provided by the IMO.[210]

As a result of the end of the Cold War Turkey's strategic importance on NATO's southern flank decreased. This change also resulted in a fall in Turkey's favoured standing among Western nations and the substantial support it was receiving. At the same time new

[205] Matteo Fornari, 'Conflicting Interests in the Turkish Straits: Is the Free Passage of Merchant Vessels Still Applicable?' (2005) 20 The International Journal of Marine and Coastal Law 225, 239.
[206] Plant (n 197) 196.
[207] ibid.
[208] Plant (n 96) 22–23.
[209] ibid.
[210] Plant (n 197) 208.

opportunities for Turkey to assert itself as a regional player and economic power were presented by the post-Cold War economic and political developments in Eastern Europe and central Asia, particularly the emergence of several independent states that were oil-rich and had a majority Muslim population.[211] Since the 1990s the Black Sea and Caspian Sea region, in particular, has grown in significance as a major energy transport route for the world's oil and gas supply. The main export route is through pipeline to Black Sea ports, where it is loaded on tankers and transported across the Black Sea and through the Turkish Straits. From there most of the Russian oil is shipped to markets in Europe and Asia.[212] The number of tankers passing through the Straits climbed from 4,500 in 1996 to 10,023 in 2005.[213] Moreover, the number of tankers exceeded 40,000 passed through the Straits in 2019.[214]

Modern pipeline construction projects reduce environmental concerns in the Straits. Of these the Black Sea and the Straits are entirely circumvented by the Baku-Tbilisi-Ceyhan pipeline, which began operating in June 2006.[215] In recent decades the Straits have seen a significant increase in overall maritime activity. A daily average of 200 ships and vessels were navigating the Bosporus in 1938. In 2002 150 commercial ships and over 2,000 local craft made daily trips across the Bosporus. The likelihood increases that the pollution from tanker crashes or explosions might endanger the Bosporus ecology, endanger Istanbul's citizens' health and safety, and affect the preservation of the region's historic landmarks.[216]

As Turkey is not a Party to UNCLOS, unregulated problems under the Montreux Convention are dealt with in accordance with customary law or by agreement with other States. If Turkey

[211] Dyoulgerov (n 6) 65.
[212] Nilufer Oral, 'Oil Transportation Security in the Black Sea and the Turkish Straits' (2007) 5 Journal of International Logistics and Trade 27–28.
[213] ibid 29.
[214] 'Let Me Get This Strait: The Turkish Straits Question Revisited | Center for International Maritime Security' (1 June 2020) <https://cimsec.org/let-me-get-this-strait-the-turkish-straits-question-revisited/> accessed 7 March 2024.
[215] Oral (n 199) 31.
[216] Mitchell and Joyner (n 120) 532.

became a Party to UNCLOS, unregulated matters under the Montreux Convention would be governed by Part III of UNCLOS. Although it is true that "it is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies"[217], it is best to determine whether Part III reflects customary law, and what customary law actually says on the subject within an international forum like the IMO, which has the authority to recommend and, in some cases, to make routeing and other measures mandatory.[218]

5. The Black Sea Straits: Some Recent Developments and Challenges

An estimated 3 million barrels a day of crude oil and 20 million tons per year of petroleum products transit through the Turkish straits. This represents around 3 percent of the annual global oil trade.[219] The Montreux Convention has effectively governed the passage regulations in the Straits for more than eighty years, and even non-party governments to the Convention have adhered to its rules since 1936. To clarify, the Convention grants the right of passage to ships from both contracting parties and all nations, without any kind of discrimination. Despite being signed by only nine states, the Convention has been acknowledged as establishing rights and responsibilities that have been universally accepted.[220] The Montreux Convention specifies rules for warship transit through the Black Sea Straits of the Bosporus and Dardanelles. Like the case with the Strait of Hormuz, disputes regarding the Turkish Straits, however, have strategic implications beyond regional security and could affect global peace and security as

[217] *Lake Lanoux (Spain v France) (Arbitral Award)*, 24 ILR (1957), 132.
[218] Hugo Caminos and Vincent P Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge University Press 2014).
[219] Oil and gas transit boom endangers Turkish Straits | Daily Sabah Available at <https://www.dailysabah.com/energy/2018/04/10/oil-and-gas-transit-boom-endangers-turkish-straits> accessed 5 December 2023.
[220] Caminos and Cogliati-Bantz (n 218) 77.

the recent discussions over the passage of ships in relation to the Russia-Ukraine war demonstrate.[221]

The situation regarding the Russian warships passage in the Straits is controversial. In the ongoing conflict between Russia and Ukraine, the straits have emerged as a crucial element of strategic importance. In February 2022, Turkey closed the Turkish Straits to Russian warships, exercising their right under Article 19 of the 1936 Montreux Convention.[222] Ukrainian President Zelensky formally asked the Turkish Government on 24 February 2022 to prohibit Russian armed ships from passing through the Turkish Straits, in accordance with Article 19 of the 1936 Montreux Convention Regarding the Regime of the Straits. In response, the Turkish Government stated that it is unable to prohibit the return of Russian military vessels to their bases, citing the same Article of the Convention. Confusion arose when President Zelensky expressed his gratitude to President Recep Erdogan and the Turkish people on Twitter for the decision to close the Straits under article 19(2). However, Turkey later disputed that this was the case.[223] On February 27th 2022, the Turkish Foreign Minister declared that Turkey would prohibit Russian vessels from passing through the Straits.[224] Following that, there was uncertainty regarding Turkey's legal jurisdiction to block the straits according to international law (or its inclination to do so).[225] Ankara responded by stating that it is unable to prevent the passage of Russian warships.[226] Subsequently, Turkish authorities provided clarification that

[221] Dita Liliansa, 'Threats to Commercial Shipping during International Armed Conflicts: Lessons for Southeast Asia from the Russia-Ukraine Conflict' (2023) 8 Asia-Pacific Journal of Ocean Law and Policy 287.
[222] Tayfun Ozberk, 'Turkey Closes the Dardanelles and Bosphorus to Warships' (*Naval News*, 28 February 2022) <https://www.navalnews.com/naval-news/2022/02/turkey-closes-the-dardanelles-and-bosphorus-to-warships/> accessed 4 December 2023.
[223] Oral (n 71).
[224] ibid.
[225] 'Zelensky Says Erdogan Agreed to Close Strait despite Turkish Officials' Denials' (*Washington Examiner*, 26 February 2022) <https://www.washingtonexaminer.com/policy/defense-national-security/zelensky-says-erdogan-agreed-to-close-strait-despite-turkish-officials-denials> accessed 5 December 2023.
[226] Isil Sariyuce and Celine Alkhaldi, 'Turkey Says It Cannot Stop the Passage of Warships through Its Straits Following Request from Ukraine' (*CNN*) <https://www.cnn.com/europe/live-news/ukraine-russia-news-02-25-22/index.html> accessed 10 December 2023.

just Russian naval vessels that are heading back to their own port will be excluded from the closing of the straits.[227]

The extent to which Turkey exceed its legal authority in closing the straits remains uncertain. Turkey has the authority to prohibit the passage of warships from any state involved in a conflict across the straits.[228] It may also do so if it is in anticipation of a "imminent danger of war." However, the act of prohibiting neutral warships, which are not involved in the Russia-Ukraine conflict and do not pose any threat to Turkey, from passing through the straits in a manner that would put Turkey at "imminent danger" seems to go beyond its jurisdiction.[229]

Naval vessels are required to inform Turkey through diplomatic channels about their planned passage, allowing a period of eight days for Black Sea States and fifteen days for non-Black Sea States.[230] Consequently, due to these regulations, Russia, as a state located on the Black Sea, possesses the exclusive entitlement to navigate through the Turkish Straits in order to bring its military vessels back to their home ports.[231] According to the treaty, warships of belligerent parties are prohibited from transiting through the straits during armed conflict, unless the ships are owned by a country that shares a border with the Black Sea and are heading back to their own ports. Upon recognising Russia's state of "war" Turkey was compelled by the treaty to prevent Russian warships from passing through the straits. There is just one situation in which Russian warships are allowed to pass, and that is when they are going back to their bases in the Black Sea.[232]

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[227] Firat Kozok, 'War in Ukraine: Turkey to Restrict Transit of Russian Warships to Black Sea - Bloomberg' <https://www.bloomberg.com/news/articles/2022-02-28/turkey-to-restrict-transit-of-russian-warships-through-straits?leadSource=uverify%20wall> accessed 7 December 2023.
[228] James Kraska, 'Can Turkey Legally Close Its Straits to Russian Warships? It's Complicated' (2022) 99 International Law Studies 23, 545.
[229] ibid.
[230] Montreux Convention (n 38) art 13.
[231] ibid art 19.
[232] ibid.

Turkey has the authority to restrict the straits to warships from any country if it is involved in a conflict, as stated in Article 20 of the Montreux Convention.[233] If such a situation arises, Turkey has the authority to prevent warships from any country from passing through the straits. Additionally, according to Article 21, Turkey has the authority to block the straits if it perceives an immediate threat of war, even if Turkey is not already engaged in a conflict.[234] Turkey utilised this power on February 28th, 2022 and declared the closure of the straits to warships from all countries.[235] Turkey may plausibly argue that it is closing the straits to warships from all countries due to the possibility that neutral states might assist one of the warring parties, such as NATO warships secretly providing intelligence to Ukrainian forces, which could increase the likelihood of a conflict near Turkey's borders and indirectly pose a threat of imminent war to Turkey.[236] However, this reasoning is very speculative since neutral warships typically do not present any danger to Turkey and hence cannot be disregarded. Article 20 guarantees the right of neutral warships to pass the straits.[237]

Turkey's decision to prohibit the passage of warships from any country through the straits establishes a worrisome standard for neutral nations not involved in the Ukraine crisis.[238] Despite their non-involvement in the conflict, Turkey's move may violate their navigational rights, as outlined in Article 20, as it does not seem to be specifically designed to reduce the intensity of the current conflict.[239] As an illustration, the U.S. Sixth Fleet and other NATO nations deploy naval vessels in the Black Sea, although the United States maintains a neutral stance in the fight. These activities are crucial for the alliance's presence and security, as well

[233] ibid art 20.
[234] ibid art 21.
[235] Kraska (n 228) 547.
[236] ibid.
[237] ibid.
[238] ibid.
[239] ibid.

as to provide reassurance to Bulgaria and Romania, both of whom are coastal states located on the Black Sea.[240]

The issue is whether the Turkish government should consider Russia as a belligerent country under the Convention and restrict Russian military vessels from accessing the Straits, considering the Russian invasion of Ukraine.[241] Furthermore, it is worth considering whether the potential resumption of Russian vessels to their bases in Crimea would effectively nullify any tangible impact on Article 19. Russia's involvement in an armed military assault on Ukraine's territorial integrity and sovereignty establishes its status as a belligerent under the Montreux Convention. The Convention does not offer a specific understanding of the term "belligerent" and does not mandate any initial "declaration of war" or other formal action.[242] According to the Hague Convention of 1907, the term "belligerents" encompasses a wide range of entities, extending beyond armies to encompass militias and voluntary organisations.[243] Article 2 of the four 1949 Geneva Conventions is universally applicable in instances of officially declared war or any other kind of armed conflict that may occur between two or more of the High Contracting Parties, irrespective of whether one of them acknowledges the state of war.[244] Although the 1936 Montreux Convention was negotiated prior to the establishment of the UN Charter and the evolution of contemporary international humanitarian law, it pertains to the League of Nations.[245] Although the Convention could be revised every 5 years after 20

[240] ibid.
[241] Oral (n 71).
[242] ibid.
[243] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
[244] I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949. II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949. III. Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949. IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.
[245] Oral (n 71).

years of being in effect, it has remained in effect without any modifications for the past 86 years.[246] This has been achieved through subsequent practice and interpretation.[247]

In sum, the Montreux Convention establishes a distinction between states operating in the Black Sea and those operating outside of it, acknowledging specific benefits associated with the former. The regime of passage for vessels of war is contingent upon the temporal context, specifically whether it pertains to periods of peace or times of war, as well as Turkey's classification as either non-belligerent or belligerent, or its perception of threatened with imminent war. Throughout the course of several decades, Turkey has been compelled to undertake a meticulous and strategic execution of the 1936 Montreux Convention amidst a context characterised by volatile political dynamics.[248] The Montreux Convention holds significant strategic importance for Turkey, extending beyond its role as a convention governing the transit of ships through the straits.[249] Eventually, Western powers would also recognise the usefulness of the Convention in managing Russian aspirations. Following the conclusion of World War II, Stalin reversed the previously held stance of the USSR, advocating for limited access for warships.[250] He requested a modification to the Montreux Convention, always granting Soviet warships unrestricted transit. The USSR sought to maintain unrestricted access to the straits exclusively for Black Sea states' warships, while denying passage to non-Black Sea warships. Additionally, it aimed to establish joint control with Turkey over the Straits and create bases.[251] On April 5, 1946, the United States, having previously expressed support for the revision of the Convention, acted by dispatching the battleship USS Missouri

[246] ibid.
[247] ibid.
[248] ibid.
[249] ibid.
[250] ibid.
[251] ibid.

to Istanbul. This event signified the inaugural instance of a United States warship being stationed in the Istanbul Strait. The Cold War commenced at this point.[252]

The 1936 Montreux Convention is the primary governing treaty for the Turkish Straits, with the most comprehensive and specific regulations among all longstanding agreements. The Convention grants unrestricted passage rights to merchant vessels from all nations through the Turkish Straits. However, it imposes certain limitations on warships, prohibiting the transit of aircraft carriers by any nation.[253]

6. Conclusion

The Turkish Straits have been the subject of political, military, and economic conflicts throughout history. The Ottoman State established the Straits' legal system as the sole sovereign power over the Straits from the 15th century, when it controlled the Straits, to the start of the 19th century. In accordance with the Ottoman State's decline in power beginning in the first quarter of the 19th century, the legal system of the straits was established by several international treaties, and the great governments of the era attempted to use the straits for their own interests.[254]

The Montreux Convention, which entered into force on November 9, 1936, and is still in effect today, governs the Black Sea Straits between the Turkish Republic and the rest of the world, balancing the needs of international marine trade with the advantages of guaranteeing sovereignty. A new transitional regime was established in the Straits with the Montreux Convention. Turkey was given responsibility for implementation and control of the new

[252] ibid.
[253] 'Implementation of the Montreux Convention / Republic of Türkiye Ministry of Foreign Affairs' <https://www.mfa.gov.tr/implementation-of-the-montreux-convention.en.mfa> accessed 8 December 2023.
[254] Oktay Çetin, 'The Montreux Convention and Effects At Turkish Straits' [2018] Oil Spill along the Turkish Straits 33, 40.

regime. This agreement highlights the advantages of bordering the Black Sea, while taking Turkey's security interests into consideration. Similar rights helped Turkey develop its security. Without the Montreux Convention Turkey would not have the power to prohibit warships from passing through the Straits in the case of a danger of war, making it difficult for Turkey to maintain its own security. Turkey would not be able to play a neutral role in any battle in the region, because powerful states would be allowed to send large warships to the Black Sea. This would have a detrimental impact on coastal states and put Turkey under pressure. The Montreux Convention is a crucial agreement that ensures the balance between peace and security in the region as a result.[255]

The passage regime through these straits is based on free and unimpeded navigation, as established by Art. 1 of the Montreux Convention, and was negotiated by States mainly aiming to keep the Straits open to warships. However, the Montreux Convention regime appears to contradict the regime outlined in the Turkish Regulations (and the IMO Rules), because the Regulations impose several restrictions that go beyond the free passage regime.[256]

The Turkish Straits had previously had the Ottoman Empire as the unilateral controlling power over the straits from the 15th century until the 19th century. With the fall of the Ottoman Empire, the Turkish Straits became subject of conflict among competing powers and the detailed Montreux Convention was developed to ensure continuous peaceful use of the straits. The approach of the competing and interested parties to resolving the tensions that arose in the Turkish Straits provides a useful reference for how to resolve competing claims, tensions and conflict regarding the use of the Strait of Hormuz among the coastal states and the international community to ensure peaceful passage in this strategic strait.

[255] ibid.
[256] Fornari (n 205).

Virtually all the straits used for international navigation that are choke points generate conflict at some point or the other. Thus, the importance of a sustainable, peaceful legal regime of passage through them is heightened. Exploring the nature and operation of the legal regime of another international strait that is a choke point might be useful in navigating conflicts and developing solutions to them. The Black Sea Straits do have their own share of conflicts and challenges. Nonetheless, the legal regime of the Straits, particularly the Montreux Convention, provides valuable lessons for the regulations of the Strait of Hormuz. Key lessons include the importance of balancing maritime security and navigation rights, establishing clear rules for passage, and involving relevant states in decision-making processes to ensure stability and cooperation in the region. Additionally, mechanisms for dispute resolution and international cooperation can help manage tensions and promote peaceful transit through critical waterways like the Strait of Hormuz to which we now return in the next chapter.

Chapter 6: Legal Challenges Concerning Passage through the Strait of Hormuz

1. Introduction

As has been demonstrated in the examination of the legal regime of the Black Sea Straits, the potential to generate tensions and legal challenges is a common feature of choke points. For some years now, tensions have been rising again in the Strait of Hormuz.[1] Iran, in response to further economic sanctions against it, because of its nuclear programme, is constantly threatening to block the Strait of Hormuz.[2] This chapter examines the Iranian threats to block the Strait of Hormuz and the legality of blocking the Strait under international law. A central issue is whether Iran is allowed to block the Strait, or even threaten to do so. Iran's approach to the legal regime governing the Strait of Hormuz is significant because of the geographical location of the Strait. This is because it constitutes the only possible route for 12,000 ships every year, most of which transport 150,000 tons of global oil trade.[3]

The ongoing disputes between the United States as the major user State of the Strait, and Iran as a coastal state of the Strait is of particular interest. The most pressing dispute between the United States and Iran centres on the rights of foreign warships, submarines and military

[1] 'Iran Threatens to Block Strait of Hormuz Oil Route' *BBC News* (28 December 2011) <https://www.bbc.com/news/world-middle-east-16344102> accessed 10 March 2024. 'Iran Threatens to Close Strait of Hormuz over EU Oil Sanctions' (*The Telegraph*, 23 January 2012) <https://www.telegraph.co.uk/news/worldnews/middleeast/iran/9032948/Iran-threatens-to-close-Strait-of-Hormuz-over-EU-oil-sanctions.html> accessed 10 March 2024. Saeed Kamali Dehghan and Saeed Kamali Dehghan Iran correspondent, 'Iran Threatens to Block Strait of Hormuz over US Oil Sanctions' *The Guardian* (5 July 2018) <https://www.theguardian.com/world/2018/jul/05/iran-retaliate-us-oil-threats-eu-visit-hassan-rouhani-trump> accessed 27 February 2024. 'Iran Raises Stakes in U.S. Showdown With Threat to Close Hormuz' *Bloomberg.com* (22 April 2019) <https://www.bloomberg.com/news/articles/2019-04-22/iran-will-close-strait-of-hormuz-if-it-can-t-use-it-fars> accessed 10 March 2024. 'Strait of Hormuz: Why Does Iran Threaten to Close It?' (*euronews*, 28 June 2019) <https://www.euronews.com/2019/06/28/strait-of-hormuz-why-does-iran-threaten-to-close-it> accessed 10 March 2024.

[2] Dehghan and correspondent (n 1).

[3] James Kraska, 'Legal Vortex in the Strait of Hormuz' (2013) 54 Va. J. Int'l L. 323, 324.

aircraft passing through the Strait. The passage of United States (U.S.) warships through the Strait has brought to the fore the contentious nature of Iran's approach, as demonstrated by its arresting American sailors in 2016.[4] While there are other users of the Strait and there are instances of disputes between them and Iran, the most significant and longstanding disputes on the use of the Strait is between Iran and the United States. We need to keep in mind in this regard that Iran is a signatory to UNCLOS, and as mentioned earlier it has generally been disposed to granting transit passage to only State Parties to UNCLOS.[5] The United States is not a State Party to UNCLOS.[6]

Additionally, Iran's nuclear program has given rise to further tension between them in recent years. Accordingly in times of crisis Iran has intensified its control over the Strait, of course evoking objections from the U.S. Nevertheless, although Iranian actions referring to nuclear non-proliferation have inspired widespread comment, virtually no modern analysis has been conducted into the far-reaching disputes between Iran and the U.S. because of the legal regime applied to the Strait of Hormuz.[7] However, this is a serious oversight, because adherence by the two sides to international law principles is the most pressing problem for discussion. As mentioned earlier in Chapter 4, the legal regime governing Iran's territorial waters was regulated by the 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea dated 2 May 1993'.[8] Under the terms of article 1 of the Act one of Iran's most significant maritime claims is that "[t]he sovereignty of Iran extends, beyond its land territory, internal waters and its islands in the Gulf, the Strait of Hormuz and the Oman Sea, to a belt of sea, adjacent to the coastline, described as the territorial sea. This sovereignty extends

[4] Sarah N Lynch, 'U.S. Sailors Captured by Iran Were Held at Gunpoint - U.S. Military' *Reuters* (18 January 2016) <https://www.reuters.com/article/idUSKCN0UW1TC/> accessed 27 February 2024.
[5] See Chapter 4.
[6] ibid.
[7] Kraska (n 3) 323.
[8] 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea' 1993. (1993 Act).

to the air space over the territorial sea as well as to its bed and subsoil".[9] On this understanding Iran explicitly designates the Strait of Hormuz as an integral part of its territorial waters. Thus, it presumes it can enforce rules asserting its sovereign rights over the Strait. However, it should be noted that UNCLOS provisions covering the extent of coastal state jurisdiction over its territorial waters are divergent in this respect.[10]

The United Arab Emirates possesses the second most extensive shoreline in the Gulf, surpassed only by Iran, which exercises authority over the entire eastern coast of the Gulf and the Gulf of Oman.[11] The Strait of Hormuz provides access to the maritime territories of Saudi Arabia, Iraq, Kuwait, Qatar and Bahrain.[12] The depth of the Strait of Hormuz exceeds 100 metres in the sections traversed by the primary maritime routes.[13] The strait is deeper at the eastern and central regions, particularly on the side of the Arabian Peninsula, allowing even the largest crude oil tankers in the world to navigate it.[14] In contrast, the Iranian side of the Strait of Hormuz is characterised by greater depth. Some islands are situated inside the region designated for international shipping in the middle and western sections of the Strait of Hormuz. These islands include Great Quoin, Little Quoin, Abu Musa, Bani Forur, Sirri, and Greater and Lesser Tunb.[15]

This chapter proceeds as follows. It examines the implication of Iranian actions on the passage regime. This will include the disputed views regarding passage through the Strait. Then it considers the threat to impede passage in the Strait. The chapter further traces the territorial disputes around the Strait. Then it discusses the Sea Lines and Traffic Separation Scheme (TSS)

[9] ibid art 1.
[10] Saeed Bagheri, 'Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective' (2015) 13 New Zealand Yearbook of International Law 83, 88.
[11] Alexander Lott, *Hybrid Threats and the Law of the Sea: Use of Force and Discriminatory Navigational Restrictions in Straits* (Brill | Nijhoff 2022) 158.
[12] ibid.
[13] ibid.
[14] 'Hormuz and Malacca Remain Top Oil Chokepoints' (*The Maritime Executive*) <https://maritime-executive.com/article/hormuz-and-malacca-remain-top-oil-chokepoints> accessed 4 December 2023.
[15] Lott (n 11) 158.

in the Strait including the legal issues regarding the implementation of it. After that the chapter investigates some recent navigational violations in the Strait and its legal implications before highlighting possible solutions and applicable principles. It concludes that closing or even threatening to close the Strait is a violation of International Law.

2. Implications of Iranian Actions on the Passage Regime

As discussed earlier in Chapter 4 when signing UNCLOS, Iran declared it would apply the transit passage regime only to states ratifying it. Regarding other countries such as the United States, it said it would apply the provisions of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 (1958 Geneva Convention).[16] Significantly, notwithstanding the variations between these two passages rules, both instruments outlaw blocking of passage to all vessels claimed to be unjustified.[17]

By its declaration Iran is obliged to respect the transit passage rights of all vessels flying a flag of a state party to UNCLOS whether commercial or military. On the other hand, these ships and foreign-flagged military vessels engaged in transit passage through the Strait of Hormuz should actually comply with the applicable provisions of UNCLOS, the United Nations Charter, and customary international law.[18]

It is important to assess possible implications of Iranian actions as a result of differences between UNCLOS transit passage and non-suspendable innocent passage. Both regimes require that passage be "continuous and expeditious." UNCLOS Article 19, which is equal to Article 14(4) of the 1958 Geneva Convention, defines "innocent passage" as passage that is

[16] United Nations, 'Convention on the Territorial Sea and the Contiguous Zone' (1958) 516 U.N.T.S. Treaty Series 205.
[17] Nilufer Oral, 'Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers' (American Society of International Law 2012).
[18] ibid.

not prejudicial to the peace, good order, or security of the coastal state.[19] The 1958 Geneva Convention provides that a coastal state should not suspend innocent passage rights in straits.[20] Moreover, UNCLOS provides examples of non-innocent passage not covered by the 1958 Geneva Convention. These include, *inter alia*: the threat or actual use of force against the sovereignty, territorial integrity or political independence of the coastal state, or acting in any other manner in violation of the United Nations Charter; the use of or even practice with weapons; intelligence gathering; acts of propaganda; or indeed launching, landing, or taking on board any aircraft or military device.[21] In such cases of non-innocent activities a coastal state is entitled to prevent passage.[22]

3. Disputed views of passage through the Strait of Hormuz

While the Strait of Hormuz is located within Iran's territorial seas, its secondary role as an international shipping route requires further examination. In particular there needs to be examination of the dispute over the Strait. A legal dispute exists between Iran and the United States mainly over the scope of international navigation rights, which is an issue that was at the centre of the debate during the drafting of UNCLOS.[23] Iran is showing particular sensitivity concerning threats to its sovereignty and territorial integrity, seeing it was partitioned and occupied by Britain and Russia in the course of the Second World War.[24]

[19] 1958 Geneva Convention (n 16) art 14(4).
[20] ibid art 16(4).
[21] United Nations, 'United Nation Convention on the Law of the Sea' (1982) 1833 U.N.T.S. Treaty Series 397. art 19.
[22] Oral (n 17).
[23] SH Amin, 'The Regime of International Straits: Legal Implications for the Strait of Hormoz' (1980) 12 Journal of Maritime Law and Commerce 387.
[24] Charles G MacDonald, 'Iran's Strategic Interests and the Law of the Sea' (1980) 34 Middle East Journal 302.

As known, the United States as a major user state of the Strait opposes all restrictions to international navigation rights.[25] As Reisman made clear in 1980, in the opinion of the United States maritime straits are international waterways that should not be impeded or suspended.[26] In previous diplomatic notes the United States objected to Iran's marine legislation regulating transit passage rights.[27] Indeed, according to Schachte and Bernhardt the United States argued that no coastal state should impose a requirement for prior permission for foreign vessels to exercise the right of innocent passage,[28] and in fact the International Court of Justice (ICJ) had declared in the *Corfu Channel Case* in 1949 that no authorization is needed.[29] Contrary to this authorization was incorporated in UNCLOS covering research and survey activities carried out during transit passage a provision of this nature was not included to cover ships engaged in innocent passage through the territorial sea of another state.[30] According to U.S. argumentation the right of transit passage should be unrestricted, in order to prevent conflict. Coastal states might otherwise become political "bouncers".[31]

3.1. United States Freedom of Navigation program (FON)

The United States was concerned about the possibility of restrictions on navigational rights beyond 3 NM, so in 1979 they generated the Freedom of Navigation (FON) Program.[32] As

[25] United States Department of State, 'Limits in the Sea, No. 112, United States Responses to Excessive National Maritime Climes'.; Kim Young Koo, 'Transit Passage Regime Controversy Revisited: An Appraisal and Analysis on the Legal Ambiguities and Recent Trends' (1992) 37 KOREAN J. INT'L L. 79; Kraska (n 3) 326; Farzin Nadimi 'Clarifying Freedom of Navigation in the Gulf | The Washington Institute' <https://www.washingtoninstitute.org/policy-analysis/clarifying-freedom-navigation-gulf> accessed 10 April 2024.
[26] W Michael Reisman, 'The Regime of Straits and National Security: An Appraisal of International Lawmaking' (1980) 74 American Journal of International Law 48.
[27] United States Note to the United Nations, Jan. 11, 1994 (USUN 3509/437), *in* LIMITS IN THE SEAS: IRAN'S MARITIME CLAIMS,37.
[28] William L Schachte Jr and J Peter A Bernhardt, 'International Straits and Navigational Freedoms' (1992) 33 Va. J. Int'l L. 527.
[29] Corfu Channel Case, 'Judgment of 9 April 1949' (1949) 35 ICJ Reports.
[30] UNCLOS (n 21) art. 40.
[31] Schachte Jr and Bernhardt (n 28) 7.
[32] 'Under Secretary of Defense for Policy > OUSDP Offices > FON' <https://policy.defense.gov/OUSDP-Offices/FON/> accessed 28 February 2024.

stated in the U.S. Oceans Policy (1983), the United States "will exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner that is consistent with the balance of interest" reflected in the Law of the Sea Convention. Some coastal states in the world have asserted maritime claims that the United States considers to be excessive – that is, such claims are inconsistent with the international law of the sea and impinge upon the rights, freedoms, and uses of the sea and airspace guaranteed to all states under that body of international law.[33] The United States, however, "will not […] acquiesce in unilateral acts of other states designed to restrict the rights and freedom of the international community". Since 1979, U.S. Presidents have directed the U.S. Government to carry out a Freedom of Navigation (FON) Program to preserve this national interest and demonstrate a non-acquiescence to excessive maritime claims asserted by coastal states.[34] The U.S. FON Program includes: (1) consultations and representations by U.S. diplomats (U.S. Department of State), and (2) operational activities by U.S. military forces (U.S. Department of Defense (DoD) FON Program).[35] As a result of this the United States has been actively defending its navigational rights in zones where it considers maritime claims to be excessive, as well as in critical international straits like the Straits of Hormuz, Malacca, and Gibraltar. Since 1983 the U.S. Navy conducted universal naval operations under the umbrella of the FON Program to assert the U.S. understanding of its maritime rights. Affirming the right of free passage, U.S. Naval forces engage in FON exercises with special focus on areas of disputed maritime claims, in order not to set a precedent suggesting that the international community might have accepted the status quo.[36] U.S. vessels regularly transit the Strait of Hormuz under maritime and air

[33] ibid.
[34] ibid.
[35] ibid.
[36] Martin Wählisch, 'The Iran-United States Dispute, the Strait of Hormuz, and International Law' (2012) 37 Yale Journal of International Law 22, 27.

surveillance by Iran.[37] Indeed, on February 14, 2012 the USS Abraham Lincoln passed through the Strait without incident.[38]

The official U.S. Government position, which has long been supported, in particular with reference to the FON program, states that:

> (a) Iran may control the passage through the Strait of Hormuz, but may not close or block it, and, as a signatory of UNCLOS, may not act contrary to the purposes and object of that Convention in light of the rules of treaty law codified by the 1969 Vienna Convention on the law of treaties.
>
> (b) the right of transit passage is also provided for by customary law since it reflects an established practice and corresponds to the *opinio juris* of the majority of states. The possible closure of the Strait, the prohibition of overflight and the obligation for submarines to transit in emergence would therefore always be unjustified and illegitimate, since it is contrary to the right of transit passage as provided by customary law as codified by UNCLOS. The right of the coastal State to prevent transit would remain limited only to the case of ships threatening or using force against the sovereignty, political independence, territorial integrity of coastal States, or otherwise in violation of the principles of international law incorporated in the UN Charter. Furthermore, according to the U.S.' position no difference should be made between commercial and military vessels, since the behaviour and not the nature of the vessels is decisive.[39]

3.2. Practice of passage through the Strait

Examination of the practice of transit through the Strait of Hormuz in general confirms U.S. observations regarding passage through territorial waters.[40] These show that Iranian regulatory provisions providing for the possibility of closure of the Strait for safety reasons and requiring permission for the transit of military vessels do not enjoy effective and concrete application, unless a situation of latent or declared conflict already exists between a coastal state and the

[37] *Iranian Boats Shadow US Aircraft Carrier in Gulf*, TODAY'S ZAMAN (Feb. 15, 2012), http://www.todayszaman.com/news-271494-iranian-boats-shadow-us-aircraft-carrier-ingulf.html.
[38] *USS Abraham Lincoln in Strait of Hormuz Voyage*, BBC NEWS (Feb. 14, 2012), http://www.bbc.co.uk/news/world-middle-east-17027768.
[39] United States Department of State (n 25), 65–68.
[40] Bagheri (n 10) 91.

flag state of the vessel in question. The above-mentioned provisions serve only as exceptional measures to be activated in case of need.[41] The 1990 Gulf War is enlightening in this respect: warships from the U.S. and other countries involved in the conflict crossed the Strait of Hormuz several times without either coastal state's permission or without causing any specific reaction from them.[42]

Despite recurrent threats[43] the Iranian never actually closed the Strait in reaction to economic sanctions by the international community.[44] Only in a few cases has Iran taken action to prevent navigation in direct response to another specific event. The latter circumstance has however been constantly and explicitly denied, and these actions have been justified with an assertion of violation of internal rules.[45] This demonstrates Iran's awareness that such action could not be an appropriate response.

A long-standing legal conflict on the right of passage, namely for foreign warships, military aircraft, and submarines, has persisted for many years. This disagreement is a significant and unpredictable factor in the overall strategy to prevent Iran's nuclear programme.[46] During periods of conflict, Iran strengthens its regulatory control over the Strait by inspecting foreign vessels and issuing threats to block the passage of warships. This action often triggers a response from the United States.[47] There is need to examine the fundamental disagreement between Iran and the United States on international law of the sea and, in specific, the legal regime appropriate for the Strait of Hormuz. The United States is a major user of the Strait of Hormuz, using it for naval and oil tanker traffic. It strongly supports the use of international

[41] ibid.
[42] ibid.
[43] 'Iran's Deputy Parliament Speaker Threatens to Close Strait of Hormuz' (*Iran International*, 25 November 2023) <https://www.iranintl.com/en/202311252689> accessed 27 February 2024. Also See Dehghan and correspondent (n 1).
[44] Wählisch (n 36) 27.
[45] ibid.
[46] Kraska (n 3) 326.
[47] ibid.

law for resolving disputes and is therefore highly interested in comprehending the legal framework that governs the Strait. Additionally, the United States seeks to ensure a fair and equitable distribution of rights and responsibilities among all parties involved in the Strait.[48] Experience in the *Oil Plaforms Case*[49] indicates that Iran is not afraid to sue the United States at the International Court of Justice. Thus, it is important to evaluate the issue, not least because legal rulings usually have strategic repercussions.[50]

3.2.1 Iran's position

Unlike the rules for navigational transit passage in UNCLOS, the 1958 Geneva Convention grants ships from all nations a relatively limited right of non-suspendable innocent passage in straits that are covered by territorial seas.[51] As discussed in Chapter 4 Iran argues that the right of transit passage through straits used for international navigation is only granted to countries that are parties to UNCLOS. Therefore, non-parties like the United States do not have the right of transit passage. Moreover, the 1958 Geneva Convention entitles states to exercise non-suspendable innocent passage in straits, which excludes submerged submarines and aircraft in flight. Iran has signed but not ratified UNCLOS. Iran also has signed but not ratified the 1958 Geneva Convention. As a non-party to the convention Iran argue that it is not legally bound by its terms unless the provisions reflect customary international law.[52] However, signing a treaty entails some legal consequences. Art 18 (a) of the Vienna Convention on the Law of Treaties (VCLT), provides that a signatory to an international convention is obliged to refrain from acts which defeat the object and purpose of a treaty.[53]

[48] ibid.
[49] *Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6)*.
[50] Kraska (n 3) 326.
[51] 1958 Geneva Convention (n 16) arts 14 and 15.
[52] Kraska (n 3) 327.
[53] United Nations, 'Vienna Convention on the Law of Treaties' (1969) 1155 Treaty Series 331. art 18(a).

3.2.2 United States position

The United States is not party to UNCLOS**;** thus, it does not take advantage of the right of transit passage through straits used for international navigation. This also applies if the coastal state is not a party to the convention.[54] The United States argues that the regime of transit passage through straits used for international navigation, as described in UNCLOS, is based on customary international law rather than being specifically defined by the terms of the convention.[55] The continue to argue that transit passage, as stated under Article 38 of UNCLOS, is a reflection of established state practice and *opinion juris.*[56]

In a supplementary note dated September 23, 1994, the U.S. Secretary of State addressed the President of the Law of the Sea Convention regarding the regime of transit passage "protects long-standing navigation and overflight rights in international straits through the concept of transit passage."[57] It is interesting that, while the 2007 United States Senate Treaty Report on UNCLOS acknowledges that innocent passage is recognised as a right under customary international law, it does not explicitly establish that transit passage holds the same legal status.[58] This oversight implies that the United States considers the customary rights of transit passage to be less strong than those of innocent passage. However, it does not alter the American stance that transit passage is an essential part of custom and state practice.[59]

Thus the U.S. position embodies the conventional approach. In 1992**,** for instance, the Ministry of Foreign Affairs of the Kingdom of Thailand concluded in a statement to the Secretary-

[54] Kraska (n 3) 328.
[55] ibid.
[56] ibid.
[57] *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary,* DISPATCH U.S. DEP'T OF STATE SUPPLEMENT, Feb. 1995,1, 2,13.
[58] Convention On the Law Of The Sea Report, S. Rep. No. 110-9, at 12, 20 (1st Sess. *2007),* Available at <https://www.gc.noaa.gov/documents/UNCLOS-Sen-Exec-Rpt-110-9.pdf>
[59] Kraska (n 3) 328.

General of the United Nations the "regime of transit passage has been widely accepted in general terms by the international community and has become part of the practice of States, both of States bordering straits as well as of shipping States."[60] According to this opinion, even though the United States is not a party to UNCLOS, it nevertheless as a matter of historical practise, enjoys the right of transit passage through international straits.[61] In fact, the U.S. rejects Iran's assertion of extensive security authority over the territorial waters because Article 16(4) of the 1958 Geneva Convention prohibits a coastal state from suspending innocent passage.[62] In spite of these disagreements on transit rights, as Kraska has suggested, it appears that a minimum agreement between the United States and Iran should include a right for the United States to non-suspendable innocent passage of warships in the Strait of Hormuz under Article 16(4) of the 1958 Geneva Convention, as well as a right of submerged navigtion and overflight beyond Iran's 3 NM territorial sea.[63] This view is a reasonable one to take as it basically reflects the position of customary international law on the issue.

4. Implication of territorial sea extension on foreign passage

The issue of the extension of Iran's and Oman's territorial seas is closely linked to the acceptable legal framework for passage through the Strait of Hormuz, whether innocent or transit passage. During the 1958 Convention's negotiations, most countries agreed that coastal states could only claim sovereignty over a 3 NM territorial sea.[64] A major feature of UNCLOS that permanently changed the law of the sea is the extension of the territorial sea from 3 NM in 1958 to 12 NM in the 1970s. Extension of the territorial sea from 3 to 12 NM was the pivotal

[60] Permanent Rep. of Thailand to the U.N., Letter dated Feb. 18, 1993 from the Permanent Rep. of Thailand to the United Nations addressed to the Secretary-General, U.N. Doc. A/48/90 (Feb. 22, 1993).
[61] Kraska (n 3) 328.
[62] ibid.
[63] ibid.
[64] Kraska (n 3) 329.

argumentation of UNCLOS, and it is balanced by substitution of innocent passage with transit passage in straits. Iran is not a party to UNCLOS and, thus, is not entitled to 12 NM territorial sea or other benefits of UNCLOS. Neither does Iran have to accept transit passage by ships, submarines, and aircraft of other states. Therefore, Iran can only maintain the United States entitled only non-suspendable innocent passage through those parts of the Strait of Hormuz overlapped by its 3 NM territorial sea.[65] Extension of the zone to 12 NM is a benefit conferred on states party to UNCLOS as a key part of a 'package deal'. Thus, irrespective of whether the United States is right in saying it is entitled to transit passage as a matter of customary law, this becomes quite irrelevant, since U.S. warships, aircraft, and submarines still enjoy high seas freedoms beyond Iran's 3 NM territorial sea.[66] Due to the fact that the width of the Strait of Hormuz is more than 20 NM, the area over which Iran can exercise sovereignty and require innocent passage is limited.[67] As a result, vessels, aircraft, and submarines from the United States have complete freedom to operate in the high seas beyond Iran's territorial sea, which extends up to 3 NM from its coast. It should be noted that these rights have an even wider scope than does transit passage under UNCLOS.[68] However, Iran's actions suggests that it does not agree with this position.

Iranian officials maintain the passing of foreign warships - especially U.S. ones - through the Strait of Hormuz does not qualify as innocent.[69] According to article 9 of the 1993 Act "Passage of warships, submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances harmful to the environment, through the territorial sea is subject to the prior authorization of the relevant authorities of the Islamic Republic of Iran. Submarines are required to navigate on the surface and to show their

[65] ibid.
[66] ibid.
[67] ibid 330.
[68] ibid.
[69] Bagheri (n 10) 90.

flag".[70] This implies that the existence of these ships in the area threatens Iranian national security as a coastal state. Similarly, Iran, motivated by its overriding national interests, and in defence of its security, might at any time suspend innocent passage in its territorial sea.[71]

In elaboration of the points mentioned above, the passage of warships through territorial waters was one of the most controversial issues at the negotiations leading to adoption of UNCLOS.[72] However, the provision of article 9 of the 1993 Act on the passage of warships is contrary to UNCLOS.[73] In relation to foreign vessels powered by nuclear energy or carrying hazardous or harmful substances, article 23 of UNCLOS states that these ships "... shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements"[74] - such as provisions of the International Convention for the Safety of Life at Sea (SOLAS).[75] Importantly, Iran, the United States as well as the Gulf Coastal States are parties to SOLAS.[76] However, "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 sea-lanes".[77] In this respect it is maintained that the first sentence of article 9 of the 1993 Act contradicts UNCLOS.[78] Implementation of innocent passage for foreign vessels through the territorial sea of a coastal state does not rely on prior authorization for warships under the Convention. However, the second sentence of article 9 of the Act has a similar meaning to article 20 of UNCLOS, namely that submarines are required to navigate on the surface and

[70] 1993 Act (n 8) art 9.
[71] ibid art 8.
[72] United Nations. Office for Ocean Affairs, the Law of the Sea, United Nations. Division for Ocean Affairs, and the Law of the Sea., *The Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol 29 (New York: United Nations 1992).
[73] As this article require prior permission for warships. See 1993 Act (n 8) art 9.
[74] UNCLOS (n 21) art 23.
[75] International Convention for the Safety of Life at Sea (SOLAS) U.N.T.S. 18961 (opened for signature 1 November 1974, entered into force 25 May 1980).
[76] UNTC, 'International Convention for the Safety of Life at Sea' (1974) <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800ec37f> accessed 18 April 2023.
[77] UNCLOS (n 21) art 22(2).
[78] For more discussion on this point see Chapter 4.

show their flag. Despite this under the Convention navigation on the surface has not been subject to permission from the coastal state. Similarly, article 9 of the Act is different from Convention provisions.[79]

On the basis of the framework discussed with respect to the 1993 Act, in order to secure its interests and the principle of permitting harmless passages, Iran tends to draw up specific regulations on a case-by-case basis.[80] Similarly, in order to defend its security, and referring to its overriding interests, Iran has given itself the right to suspend the passage and stay of all foreign vessels in its territorial waters. Given the Iran-US confrontations in the Gulf region and specifically in the Strait of Hormuz following 1979, all seizures by Iran's Revolutionary Guard from the U.S. Navy have been claimed to be in accordance with the 1993 Act.[81]

5. The Potential Threat to Impede Passage in the Strait

The Strait of Hormuz has been jeopardized by marine mines laid within its waters by the Iranian Navy during the Iran-Iraq War, which caused damage to one U.S. warship.[82] In response to these actions by the Iranian Navy, the U.S. predictably undermined Iran's authority in the Gulf by means of "Operation Praying Mantis." which was an attack by U.S. forces within Iranian territorial sea.[83] This was intended in retaliation for the Iranians mining the Gulf during the Iran-Iraq war and indeed consequential harm to an American warship.[84] The operation started on 18 April 1988. U.S. Navy SEALs Marines and Navy SEALs attacked the Iranian Sassan and Sirri oil platforms at the same time.[85] A number of hardened defenders remained on both

[79] Bagheri (n 10) 91.
[80] ibid.
[81] ibid.
[82] 'Oil and Water: The Tanker Wars | History Today' <https://www.historytoday.com/archive/feature/oil-and-water-tanker-wars> accessed 29 February 2024.
[83] 'One Day of War' (*U.S. Naval Institute*, 1 March 2013) <https://www.usni.org/magazines/naval-history-magazine/2013/march/one-day-war> accessed 29 February 2024.
[84] ibid.
[85] ibid.

platforms, firing from the Sirri on U.S. warships with an Iranian 23 mm anti-aircraft weapon. U.S. vessels returned fire, stopping the attack; one U.S. shell struck a compressed gas tank, incinerating the remaining defenders there, but the resulting fire prevented a U.S. SEAL platoon boarding Sirri island.[86] In addition, U.S. Marine Cobra helicopters and naval forces raked Sassan island with gunfire. Marines then roped themselves aboard the burning structure. After making it secure, the Marines withdrew and detonated 1,300 pounds of explosives.[87] As a consequence of this minor clash, Iran decided to terminate the war with Iraq.[88] Ever since Iran has considered the presence of U.S. warships in Iranian territorial sea, even in the Gulf and the Indian Ocean, as posing a threat to its national security.[89]

The international law of the sea guarantees free transit through international straits.[90] According to Bagheri, Iran threatens to block the Strait of Hormuz because it is not party to UNCLOS, such that it does not feel obliged to acknowledge legal rules therein, unless these are recognised as customary international law and therefore binding on all states (and according to Iran they are not).[91] However, Iran is a signatory to UNCLOS which entails some legal consequences. As UNCLOS is an international treaty Article 18 (a) of the 1969 Vienna Convention on the Law of Treaties, provides that a signatory to an international convention is obliged to refrain from acts which defeat the object and purpose of a treaty.[92]

As mentioned earlier in Chapter 4, Iran's delegate at its signature of UNCLOS, stated their understanding that only states party to UNCLOS should be entitled to enjoy the contractual

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[86] ibid.
[87] Michael A Palmer, *Guardians of the Gulf: A History of America's Expanding Role in the Persion Gulf, 1883-1992* (Simon and Schuster 1999) 141.
[88] Bradley Peniston, *No Higher Honor: Saving the USS Samuel Roberts in the Persian Gulf* (Naval Institute Press 2013) 217.
[89] *Interpretative Declaration on the Subject of Straits - Understanding of the Islamic Republic of Iran*, Law of the Sea Bulletin No. 5 (July 1985) 13-15 <www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE5.pdf>.
[90] Frank Nolta, 'Passage through International Straits: Free or Innocent--The Interests at Stake' (1973) 11 San Diego L. Rev. 815. 823.
[91] Bagheri (n 10) 97.
[92] VCLT (n 53) art 18(a).

rights created thereby. According to them the regime of transit passage through straits used for international navigation is only a feature of UNCLOS, and thus the privilege of transit passage is not available to non-parties, namely in this case the U.S. He specifically stated that this applied to the right of transit passage through international straits.[93] On the other hand the U.S. disputed this interpretation, claiming that the transit passage regime in Part III, Section 2, and article 38 of UNCLOS reflected customary international law.[94] This specifies that ships and aircraft of all countries enjoy the right of transit passage through international straits.[95] With regard to warships the U.S. claims that their mere exercise of transit passage poses no threat to the sovereignty of any coastal state and that this regime of transit passage also applies to approaches to international straits.[96]

Irrespective of Iran's claims current practice dictates that transit passage through the Strait of Hormuz does not threaten Iranian security as a coastal state. This reflects the duties of ships and aircraft during transit passage outlined in article 39 of UNCLOS.[97] Under international law of the sea the scope of freedom of navigation in the straits depends on the situation of the waters establishing them. Accordingly, if the width of the strait is double that of the territorial waters, the coastal state should not prevent the passage of the foreign ships through the strait, due to the fact that such straits constitute part of international waters. Thus, straits with such dimensions are freely open to all ships. Therefore, this implies that the transit passage through territorial sea located within an international strait such as the Strait of Hormuz should not be blocked on the grounds that it favours the navigating state despite the geographical location.[98]

[93] United Nations Convention on the Law of the Sea "Declarations and Reservations – Islamic Republic of Iran" in *Multilateral Treaties Deposited with the Secretary-General XXI. 6,* U.N. Doc ST/LEG/SER. E13 (Dec 31, 1984) at 234 <https://treaties.un.org/doc/source/publications/MTDSG/2001-vol.2-english.pdf>.
[94] Kraska (n 3) 328; Wählisch (n 27) 24.
[95] Joshua Owens, 'The Legal Status of the Bering Strait' [2011] China Oceans L. Rev. 85, 102–103.
[96] United States Department of State (n 25).
[97] UNCLOS (n 21) art 39.
[98] Salinaitė Birutė M. and Kirchner Stefan, 'The Iranian Threat to Close the Strait of Hormuz: A Violation of International Law' (2013) 20 Jurisprudencija 549, 553.

However, it should be noted that if the sea-lanes in straits used for international navigation are located in territorial sea, freedom of navigation should be applied in the context of the coastal state's regulations. This means that a coastal state is entitled to suspend the passage of foreign ships in some cases, in order to protect its national security. Still this provision does not imply that Iran can block the Strait.[99] Considering the 1993 Act discussed above and UNCLOS, Iran can regulate the passage of foreign ships through the Strait of Hormuz but not prevent it. In other words, even though Iran is not a party to UNCLOS, it cannot act contrary to its aims considering its signatory status as stated earlier.[100] As Guilfoyle argues "Iran could seek to restrictively regulate passage through its territorial sea short of suspending innocent passage - provided that as a matter of custom the Corfu Channel and not the UNCLOS rule applies".[101]

Preventing the passage of foreign vessels amounts to violation of international law.[102] In fact the right of a coastal state to prevent transit or non-suspendable innocent passage is constrained by threatening acts of ships or actual use of force against the sovereignty, political independence or territorial integrity of states bordering the strait, or actions in violation of the principles of international law outlined in the United Nations Charter.[103] Even occasional low-level attacks on the Gulf shipping and facilities could empower Iran to start a war of intimidation in an effort to pressure its neighbours.[104] Reference is made to the rights of transit passage under UNCLOS as well as the rights of non-suspendable innocent passage under the 1958 Geneva Convention.[105] The oil flowing through the Strait of Hormuz accounts for roughly

[99] ibid.
[100] ibid.
[101] Douglas Guilfoyle "Iran and the Strait of Hormuz: Some Initial Thoughts" (2012) EJIL: Talk <www.ejiltalk.org>.
[102] Oral (n 17).
[103] ibid.
[104] Anthony H Cordesman, 'Iran, Oil, and the Strait of Hormuz' (Center for Strategic and International Studies 2007) 2.
[105] ibid.

21% of the world's oil trade; as a consequence providing security in the area is significant.[106] Therefore blocking the Strait would limit supplies to consumers around the world, especially in Western Europe, that obtains in excess of 70% of its oil from the Gulf.[107]

The possibility of states abusing their rights to the disadvantage of other states was recognised by the drafters of UNCLOS, and this led to the clarification of Article 300 which reads "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".[108] Indeed the law of the sea has for centuries been charged with balancing opposing interests,[109] one notable example being the waters near to shore.[110] So far it appears that Iran may require use of sea lanes through its territorial waters, but it does not have the authority to block full access to its territorial sea, let alone the Strait of Hormuz.[111]

6. Territorial Disputes around the Strait of Hormuz

There are longstanding disputes on some areas surrounding the Strait of Hormuz which is at least in part linked to British colonialism in the Gulf region. As stated earlier, Iran claims sovereignty over Abu Musa, Greater Tunb, and Lesser Tunb.[112] As Iran claims sovereignty over those islands, it can also claim jurisdiction over the marine areas around the islands, with potential impact on the legal regime of passage through those areas. However, these islands underlie an ongoing dispute between Iran and the United Arab Emirates (UAE).[113] Abu

[106] 'The Strait of Hormuz Is the World's Most Important Oil Transit Chokepoint - U.S. Energy Information Administration (EIA)' <https://www.eia.gov/todayinenergy/detail.php?id=61002> accessed 27 February 2024.
[107] Rouhollah K Ramazani, *The Persian Gulf and the Strait of Hormuz* (Brill Archive 1979) 13.
[108] UNCLOS (n 21) art 300.
[109] Leslie M MacRae, 'Customary International Law and the United Nations' Law of the Sea Treaty' (1983) 13 Cal. w. Int'l LJ 181.
[110] Malcolm D Evans, 'The Law of the Sea', *International law* (Oxford University Press 2010).
[111] Birutė M. and Stefan (n 98) 556.
[112] See Chapters 1 and 3.
[113] Bagheri (n 10) 103.

Musa,[114] is the most important of these islands and is located within the entrance of the Strait of Hormuz almost equidistant from both coasts. The island is currently administered by Iran as part of its province of Hormozgan, but it is also claimed by the UAE as a territory of the emirate of Sharjah.[115] Iran asserts that these three islands were under Iranian jurisdiction until they were occupied by Great Britain in 1908. Subsequently, the emirate of Sharjah gained control over the three islands during the British takeover of the Gulf region in 1908. But in 1968 Great Britain announced it would withdraw from the Gulf in 1971. On 29 November 1971 Iran and the emirate of Sharjah signed a "Memorandum of Understanding"[116] calling for Sharjah to maintain sovereignty over Abu Musa Island, while Iran should station military forces there. Ten days later, on 30 November, Iran sent its military forces to the Island, but then took control of the two other neighbouring islands, Greater and Lesser Tunbs. Of course, Iran's seizure of these islands caused a major dispute between the two countries.[117] The Memorandum stipulated the island, and its energy resources were to be divided between the two. By agreeing to the

[114] Located 38 miles northwest of Sharjah but south of a notional median line that could be used to divide the Gulf, Abu Musa is approximately three-square miles. Abu Musa is an island in the Persian Gulf that has been claimed by Iran and the UAE Economic Security and environmental reasons have made the Island valuable for these countries. One of the most important significant features of the Abu Musa is that it is potentially full of oil reserves. Therefore, oil is being extracted from a field close to the shores of the Island. The dispute over the Island between Iran and UAE has not been resolved yet. The Seizure of Abu Musa occurred on 30 November 1971 when British forces withdrew from the Gulf region. Immediately following British withdrawal from the region, Iranian marines laid siege to and gained territorial control of the Abu Musa and two other islands located in the Strait of Hormuz for the first time since 1921, when the islands were first captured by Britain from Iran. For more information see Richard A Mobley "The Tunbs and Abu Musa Islands: Britain's Perspective" (2003) 57 Middle East J 627, 628-629.

[115] Fred M Shelley, *Nation Shapes: The Story behind the World's Borders* (ABC-CLIO 2013) 457.

[116] According to the Memorandum: "Neither Iran nor Sharjah will give up its claim to Abu Musa nor recognize the other's claim. Against this background the following arrangements will be made:1) Iranian troops will arrive in Abu Musa. They will occupy areas the extent of which have been agreed on the map attached to this memorandum; 2) (a) Within the agreed areas occupied by Iranian troops, Iran will have full jurisdiction and the Iranian flag will fly; (b) Sharjah will retain full jurisdiction over the remainder of the island. The Sharjah flag will continue to fly over the Sharjah police post on the same basis as the Iranian flag will fly over the Iranian military quarters; 3) Iran and Sharjah recognize the breadth of the island's territorial sea as twelve nautical miles; 4) Exploitation of the petroleum resources of Abu Musa and the sea bed and subsoil beneath its territorial sea will be conducted by Buttes Gas & Oil Company under the existing agreement, which must be acceptable to Iran. Half the governmental oil resources hereafter attributable to the said exploitation shall be paid directly by the Company to Iran and half to Sharjah; 5) The nationals of Iran and Sharjah shall have equal rights to fish in the territorial sea of Abu Musa; and 6) A financial assistance agreement will be signed between Iran and Sharjah". For more details, see R Schofield & P Toye *Documentary Studies in Arabian Geopolitics: Lower Gulf Islands: Abu Musa and the Tunbs Dispute* (Arabian Geopolitics, England, Slough, 1993), 490.

[117] Rongxing Guo, *Territorial Disputes and Resource Management: A Global Handbook* (Nova Publishers 2006) 40.

Memorandum, Sharjah prevented an invasion by Iran. The UAE asserts that the majority of the population residing in Abu Musa has been of Arab descent for several centuries. Accordingly, "Arabs from the eastern Gulf littoral have always controlled the islands and Iran has no claim to either Abu Musa or the Tunbs".[118] In contrast Iran claims the islands had historically been a part of Iran, so Iran will not yield a single inch of its territory.[119] However, in 1980, the UAE presented their claims to the United Nations Security Council. Nevertheless, the Council rejected these claims because Iran had constructed most of the island's infrastructure and the governor of Abu Musa is Iranian.[120]

The disputes remain unresolved despite negotiations between the parties. Although the UAE position is to refer the dispute to the ICJ, if bilateral negotiations fail, Iran has consistently rejected any kind of third-party adjudication, concluding that the only alternative legal approach was direct bilateral negotiations.[121] However, such negotiations have already failed on many occasions. The failure of diplomatic negotiations over the Tunb islands left Iran with no alternative to claim that it had to exercise its sovereign rights over what was Iranian territory.[122] The Iranian Government stated it would not allow the territory of its off-shore islands to be violated, nor would it allow its sovereign rights to be infringed in any way.[123] Former Iranian Foreign Minister Abbas Ali Khalatbari said that in the post-revolutionary age the Islamic Republic of Iran occupied the islands so that another country could not "threaten navigation in the Strait of Hormuz to the detriment of all littoral States".[124] This would mean

[118] Barry Rubin, *Crises in the Contemporary Persian Gulf* (Routledge 2013) 44.
[119] Khalid SZ Nahyan, *The Three Islands: Mapping the UAE-Iran Dispute* (Royal United Services Institute 2013) 100.
[120] Bagheri (n 10) 103.
[121] Al-Mazrouei (n 118) 13.
[122] ibid. 27.
[123] *1610th Meeting – Provisional Agenda for the 1610th Meeting of the Security Council* [1971] U.N. Security Council Records 17, 200-220.
[124] Dr Abbas Khalatbari's interview in *the Financial Times*, London, November 10, 1971. Citied in Sharif M Shuja, 'Islamic Revolution in Iran and its Impact on Iraq' (1980) 19 Islamic Studies 213.

that Iran's sovereignty claims over Abu Musa and the two Tunb islands are based on regional security and stability.[125]

Aware of the strategic position and importance of Abu Musa for regional peace and security, Iran was determined to re-establish its sovereignty over the three islands. In addition, the 1971 Memorandum stated that Sharjah inhabitants were permitted to stay on Abu Musa Island to enjoy a peaceful life alongside Iranian citizens. According to Bagheri, despite respecting some administrative rights vested in the Sharjah government, Iran recognized island security as a natural right. Subsequently Iran's parliament announced that preserving the security of Abu Musa Island was the inescapable responsibility of Iran. Correspondingly security of the Strait of Hormuz is bound to Iran's policy on these three islands. [126] It should be noted that Abu Musa Island gives Iran a base for projecting its power and influence south towards the Gulf Cooperation Council (GCC).[127] Control of Abu Musa also gives extra protection to Bandar Abbas, an Iranian port with significance for its oil industry and military base.[128]

7. Sea Lines and Traffic Separation Scheme (TSS) in the Strait of Hormuz

In order to reach certain Gulf countries, for instance Qatar, from the Indian Ocean, ships are obliged to use sea lanes through the Strait of Hormuz. Sea lanes like this, as the name implies, are designated routes of maritime navigation.[129] In particular they are used in areas with a lot

[125] Noura S Al-Mazrouei, 'Disputed Islands between UAE and Iran: Abu Musa, Greater Tunb, and Lesser Tunb in the Strait of Hormuz' [2015] Gulf Research Centre Cambridge 12–13.
[126] Bagheri (n 10) 104.
[127] Gulf Cooperation Council (GCC) was established in Riyadh, Saudi Arabia, in May 1981. The Council is a political and economic alliance of six Middle Eastern countries – Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, and Oman. The purpose of the Council is to achieve unity among its members based on their common objectives and similar political and cultural identities. Presidency of the council rotates annually. For more information, see Mr David Robinson, Mr Tobias N Rasmussen and Samya Beidas-Strom, 'Gulf Cooperation Council Countries (GCC): Enhancing Economic Outcomes in an Uncertain Global Economy' (International Monetary Fund 2011).
[128] Guo (n 113) 39.
[129] Birutė M. and Stefan (n 98) 555.

of traffic in close geographical proximity such as straits, and they can be imposed in the coastal state's territorial sea[130] on oil tankers in particular.[131] The concept of sea lane passage existed in customary international law prior to adoption of UNCLOS, and therefore it is also binding on the two non-parties Iran and the United States, as outlined in Article 22.[132] Legally-binding TTS have been in use for almost half a century in areas with a large number of ships in a small area of water.[133] The aspects needing to be taken into account by the coastal state when delineating sea lanes through its territorial sea are outlined in Article 22(3), which goes beyond customary law but takes existing customs into account, such as "channels customarily used for international navigation".[134] The considerations included in Article 22(3) hint at a more fundamental rule to the effect that the coastal state may not exercise the right to designate sea lanes for the purpose of blocking innocent passage through its territorial waters. This is not only a rule of customary law, but also a direct consequence of preventing *abus de droit*, which mirrors the concept of good faith, a feature of international treaties for centuries.[135] In addition, it constitutes a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[136]

Historically, predetermined shipping routes originated in 1898 whereby shipping companies for safety reasons operated passenger ships across the North Atlantic.[137] Subsequently, related provisions were incorporated into the original SOLAS Convention.[138] The Inter-Governmental Maritime Consultative Organisation (IMCO), now known as the International Maritime

[130] UNCLOS Article 22.
[131] ibid.
[132] Steven Groves, 'Accession to the UN Convention on the Law of the Sea Is Unnecessary to Secure US Navigational Rights and Freedoms' [2011] Backgrounder 2.
[133] David Anderson, 'The Strait of Dover and the Southern North Sea-Some Recent Legal Developments' (1992) 7 Int'l J. Estuarine & Coastal L. 85.
[134] UNCLOS Article 22 (b).
[135] Michael Byers, 'Abuse of Rights: An Old Principle, a New Age' (2001) 47 McGill LJ 389.
[136] Article 38(1)(c) 'Statute of the Court Of Justice | INTERNATIONAL COURT OF JUSTICE' <https://www.icj-cij.org/statute> accessed 18 April 2023.
[137] International Maritime Organisation, 'Ships' Routeing' <https://www.imo.org/en/OurWork/Safety/Pages/ShipsRouteing.aspx> accessed 29 February 2024.
[138] SOLAS Convention (n 76).

Organisation (IMO) IMO is entrusted with the task of determining the routes of ships, by the SOLAS Convention.[139] By virtue of Chapter V of SOLAS, the IMO has the authority to establish among other things the Traffic Separation Schemes (TTS). This chapter acknowledges the IMO as the sole global entity responsible for developing these systems. Rule 10 of the International Regulations for Preventing Collisions at Sea (COLREG)[140] governs the conduct of ships while navigating through traffic separation systems implemented by IMO.[141] As mentioned earlier in this chapter Iran, Oman and the UAE are all parties to SOLAS Convention. TTS and ship routing systems have been implemented in key congested shipping locations worldwide, resulting in a significant reduction in collisions and groundings. Furthermore, UNCLOS also designates the IMO as '"the competent international organization" in matters of navigational safety, safety of shipping traffic and marine environmental protection.'[142] Effectively, UNCLOS in addition to conferring the powers of TTS on the IMO, also added further responsibilities on the organisation marine environmental protection.

The TSS in the Strait of Hormuz was established in 1973 by a resolution of the IMO. It comprises two designated lanes and a separation zone with a width of one mile.[143] This TSS is considered one of the most ancient worldwide, as it was established in 1973, just one year after COLREG were implemented.[144] Rule 10 of TSS is included in these regulations. The TSS in the Strait of Hormuz underwent modifications in 1979.[145] The current configuration includes a

[139] IMO (n 138).
[140] International Regulations for Preventing Collision at Sea 1972, (COLREG), 20 Oct. 1972, 1050 U.N.T.S. 17 (1972).
[141] ibid.
[142] ibid.
[143] Inter-Governmental Maritime Consultative Organization, Resolution A.284(VIII), "Routeing Systems," adopted on 20 November 1973, 'In the Strait of Hormuz', 41. https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.284(8).pdf accessed 4 November 2023.
[144] Convention on the International Regulations for Preventing Collisions at Sea, adopted 20 October 1972, entered into force 15 July 1977, 1050 UNTS 16.
[145] Inter-Governmental Maritime Consultative Organization, COLREG.2/Circ.11, Amended Traffic Separation Scheme in the Strait of Hormuz, 7 June 1979.
https://www.transportstyrelsen.se/globalassets/global/sjofart/dokument/sjotrafik_dok/imo_colreg.2_cirkular.pdf. accessed 18 November 2023.

designated space for separation and two lanes for traffic moving in opposite directions, one for eastbound traffic and one for westbound traffic. Additionally, there is an inshore traffic zone located between the coast of the Musandam Peninsula and the landward limit of the TSS.[146] Since the TSS falls under the territorial jurisdiction of Iran and Oman, they can control the passage through the Strait of Hormuz.

8. Legal issues regarding the implementation of the TSS

Iran has implemented disputed measures in response to suspected violations of the Traffic Separation Scheme (TSS) in the Strait of Hormuz. In July 2019 the *Stena Impero*, a tanker owned by Sweden and flagged by the United Kingdom, was approached by four Iranian warships and a helicopter.[147] Iranian naval forces then boarded the tanker.[148] The vessel was detained and sent to the Iranian port of Bandar Abbas.[149] Iran asserted that the *Stena Impero* was involved in a collision with an Iranian fishing vessel:

> As a result of that collision, the Iranian vessel suffered serious physical damage and some of the injured crew and fishermen are still in critical condition. Subsequently, the tanker disregarded the warnings by the Iranian coastal authorities, switched off its Automatic Identification System at 2059 local time and, in a dangerous operation, entered the Strait of Hormuz from the exit lane.[150]

[146] Alexander Lott and Shin Kawagishi, 'The Legal Regime of the Strait of Hormuz and Attacks against Oil Tankers: Law of the Sea and Law on the Use of Force Perspectives' (2022) 53 Ocean Development & International Law 123, 127.
[147] Anna Ringstrom, 'Iranian Maritime Official Says UK Tanker Stena Impero to Be Released Soon: Fars News' *Reuters* (23 September 2019) <https://www.reuters.com/article/idUSKBN1W70D9/> accessed 27 February 2024.
[148] Letter dated 20 July 2019 from the Charge d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2019/589 (22 July 2019), 1.
[149] Letter dated 23 July 2019 from the Charge d' affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2019/593 (23 July 2019), 1.
[150] ibid.

This narrative challenge the stance of the United Kingdom, which asserts the tanker was "in full compliance with all navigation and international regulations, with her Automatic Identification System (AIS) switched on and publicly available and verifiable."[151] The United Kingdom further argued that there is no substantiated proof of a reported collision with an Iranian fishing boat. Despite contrary statements by the Iranian Revolutionary Guard Corps, this act was an obvious response to detention of the Iranian tanker '*Grace 1*' (also known as 'Adrian Darya') off Gibraltar on 4 July 2019 due to accusations of violation of sanctions imposed by the European Union on transfer of oil to Syria. '*Grace 1*' was eventually allowed to sail on 19 August.[152] Furthermore, even if such an incident did occur, the fact that the *Stena Impero* was situated within Omani territorial waters would have prohibited Iran from intercepting the ship.[153] The arrest of the *Stena Impero* by Iran was justified in terms of allegations of harm caused to Iranian nationals and a fishing vessel, pollution and damage to the marine environment, as well as claims of reckless navigation by the tanker.[154] Iran conducted a comprehensive examination of the specialised navigation maps.[155] The Stena Impero and its crew were released by Iranian officials in September 2019, two months after the initial arrest.[156] The issue surrounding the legitimacy of the Iranian involvement in relation to *Stena Impero* is a complex matter due to the uncertain nature of the navigation regime in international straits and the special status surrounding the Strait of Hormuz.[157]

[151] Lott and Kawagishi (n 147) 128.
[152] 'Iran: what the law of the sea says about detaining foreign ships in transit', *The Conversation* (Jul, 23, 2019), Iran: what the law of the sea says about detaining foreign ships in transit (theconversation.com)
[153] Lott and Kawagishi (n 147) 128.
[154] ibid.
[155] ibid.
[156] 'Stena Impero: Seized British Tanker Leaves Iran's Waters' *BBC News* (27 September 2019) <https://www.bbc.com/news/world-middle-east-49849718> accessed 4 December 2023.
[157] Ida Caracciolo, 'Enforcing Sanctions on Iran At Sea: Tensions over the Interpretation and Application of the Law of the Sea' [2021] Nuclear Non-Proliferation in International Law-Volume VI: Nuclear Disarmament and Security at Risk–Legal Challenges in a Shifting Nuclear World 479, 494.

Aircraft exercising the right of transit passage are exempt from application of the TSS under articles 39(3) and 41 of UNCLOS.[158] Sovereign immune vessels do not have to adhere to a TSS, while exercising transit passage. However, it is typically advisable for them to do so. In contrast, foreign ships not owned by a state are required to adhere to the TSS during transit passage (as stated in Articles 39(2)(a) and 41(7) of UNCLOS).[159]

However, it remains uncertain whether and to what degree a coastal state has the power to enforce measures against commercial ships passing through a strait, under the principle of transit passage, in reaction to breaches of the TTS.[160] According to Article 233 of UNCLOS, if a privately owned foreign ship violates the laws and regulations mentioned in Article 42(1)(a)-(b) of UNCLOS, and as a result causes or poses a significant threat to the marine environment of a strait, the neighbouring states of that strait have the right to take necessary enforcement action.[161] Article 42 encompasses various aspects, such as breaches of navigation safety and the control of maritime traffic, including TTS, as indicated by its connection to Article 41 of UNCLOS.[162] It is generally acknowledged that these rights are insufficient to detain the ship that has violated the TTS concerned.[163] Referring to the drafting history of Article 42(2) of UNCLOS, Nandan and Anderson contend that allowing the arrest of vessels in a strait would weaken the right of transit passage. Nonetheless they acknowledge the possibility of arresting a vessel in port for actions taken in a strait is a separate issue.[164]

Violation of the TTS and the corresponding mandatory routing measures does not provide the coastal state of a strait the authority to detain the ship. Doing so would impede and interrupt

[158] UNCLOS (n 21) arts 39 and 41.
[159] Lott and Kawagishi (n 147) 128.
[160] ibid.
[161] UNCLOS (n 21) art 233.
[162] According to Article 41 of UNCLOS, 'it is allowed to establish sea lanes and define Traffic Separation Schemes (TSS) in straits when it is deemed necessary to ensure the secure navigation of ships'.
[163] Lott and Kawagishi (n 147) 128.
[164] Satya N Nandan and David H Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982' (1989) 60 British Yearbook of International Law 159, 192.

the right of transit passage, which goes against the provisions of Article 44 of UNCLOS.[165] If a ship violates the applicable TSS, it is entitled to proceed with transit passage. The coastal state adjacent to the strait has the authority to issue a warning to the ship and may pursue other appropriate action, such as imposing a fine or seeking compensation for any resulting harm.[166] While Iran has not ratified UNCLOS, it is relevant to bear in mind that Iran ratified the SOLAS and considering that SOLAS mandated the IMO to approve TTS, Iran is bound by IMO's TTS decisions.

Furthermore, both ships and aircraft possess the legal entitlement to engage in transit passage within the vicinity of the Strait of Hormuz. This marine region is predominantly within the jurisdiction of the states bordering the strait. Although there is a narrow corridor at the eastern end of the Gulf known as the EEZ corridor, which spans a few nautical miles, it is important to note that the straits regime still applies in the maritime area between the Iranian and United Arab Emirates' coast. This area includes the islands of Abu Musa, Bani Forur, Sirri and Greater and Lesser Tunbs, all of which are under Iran's control.[167] The TSS in the Strait of Hormuz also extends to the waters situated among the aforementioned Iranian-controlled islands.[168]

The current system of straight baselines in Iran, which connect islands in the Gulf, does not significantly impact the passage regime in the Strait of Hormuz. Iran seems to believe that a base point situated on disputed land cannot be considered an appropriate point according to Article 7(1) of UNCLOS, when choosing base points for its system of straight baselines. The sovereignty of the islands of Greater and Lesser Tunb and Abu Musa, situated in the eastern part of the Gulf, has been a subject of dispute between Iran and the United Arab Emirates since

[165] UNCLOS (n 21) art 44. Also see Steven B Kempton, 'Transportation and Communications: Ship Routing Measures in International Straits' (2000) 14 Ocean Yearbook Online 232, 241.
[166] Lott and Kawagishi (n 147) 128.
[167] See 'Iran' at Marine Regions.org: https://www.marineregions.org/eezdetails.php?mrgid=8469&zone=eez accessed 17 November 2023.
[168] Lott and Kawagishi (n 147) 129.

1971.[169] Iran has not established a direct connection between Greater and Lesser Tunb and Abu Musa with its mainland shore and adjacent islands using a straight baseline.[170] The islands of Forur, Bani Forur and Sirri are excluded from Iran's system of straight baselines, despite the undisputed sovereignty of Iran over these islands.[171] They cannot be recognised as a fringe of islands located near Iran's coast, according to Article 7(1) of UNCLOS.[172] They are situated in the central eastern region of the Gulf, west of the Tunb and Abu Musa islands, and are far from the mainland shore.[173]

Article 3 of the Iranian 1993 Act states that the waters located on the side of the baseline of the territorial sea that is closer to the land, as well as the seas between islands that are owned by Iran and are within a distance of 24 NM from each other, are considered part of Iran's internal waters.[174] The islands of Tunb, Abu Musa, Forur, Bani Forur and Sirri are all situated within a 24 NM radius of each other.[175] Consequently they create an unbroken expanse of territorial sea that stretches from the Iranian coast far into the Gulf. Iran's territorial sea also extends in close proximity to the United Arab Emirates' coast on the southern side of the Strait of Hormuz, specifically on the Musandam Peninsula.[176]

The TSS passes the Strait of Hormuz within this marine region. Westbound traffic is instructed to navigate through the waters located between the Iranian mainland coast and the islands of Greater and Lesser Tunb and Forur. The three islands mentioned serve as a barrier between eastbound and westbound commerce. In addition, the Bani Forur, Sirri and Abu Musa islands,

[169] UN Doc. S/10409, (3 December 1971), 1: https://undocs.org/S/10409 accessed 23 November 2023. See also UN Doc. S/2017/17, (6 January 2017), 1: https://undocs.org/S/2017/17 accessed 23 November 2023.
[170] United States Department of State, 'Limits in the Sea, No. 114, Iran's Maritime Claims', 1994. 9.
[171] ibid.
[172] UNCLOS (n 21) art 7(1).
[173] Lott and Kawagishi (n 103) 132.
[174] 1993 Act (n 8) art 3.
[175] Abu Musa, the farthest island from the Iranian coast, is situated approximately 24 NM away from its nearest neighbouring island, Sirri. See Lott and Kawagishi (n 103) 132.
[176] ibid.

which are further away, enhance Iran's influence and potential control over international trade in the Strait of Hormuz.[177]

If Iran decides to link these islands to its mainland coast through straight baseline segments, it will establish internal waters covering a significant maritime region in the central part of the eastern Gulf. Under this scenario the boundary of Iranian internal seas would be located at around 40 NM, calculated from the nearest point on its mainland shore. Importantly this situation does not rely on whether Iran implements a theoretical straight baseline system to the disputed Tunb and Abu Musa islands.[178] Iran's sovereignty over Sirri island is undisputed. The distance between Sirri island and the coast of Iran is like the distance between Abu Musa Island and the coast of Iran.[179]

Furthermore, Iran may consider invoking Article 3 of its 1993 Act to enclose the western portion of the TSS in the Strait of Hormuz with straight baseline segments. The question is, would the expanding of its straight baseline be lawful under the international law of the sea? According to the principles of the law of the sea, the creation of internal seas in the central area of the eastern part of the Gulf would not substantially impinge upon global maritime transportation.[180] Articles 8(2) and 35(a) of UNCLOS provides that the rights of innocent passage and transit passage continue to be applicable in internal waters.[181]

Moreover, it is not feasible to establish hypothetical new straight baseline segments (in compliance with Article 7 of UNCLOS), since the Iranian islands of Tunb, Abu Musa, Forur, Bani Forur, and Sirri are not located adjacent to the Iranian coast. It is arguable that as a signatory to UNCLOS, if Iran were to create new straight baseline segments around these

[177] ibid 133.
[178] ibid.
[179] ibid.
[180] ibid.
[181] UNCLOS (n 21) arts 8(2) and 35(a).

islands, it would violate the provisions of Articles 7, 8(2), and 35(a) of UNCLOS.[182] Consequently, such a unilateral action by Iran would not legally affect international shipping in the Strait of Hormuz.[183] In addition, even if Iran were able to assert these waters were traditionally regarded by Iran as territorial waters, it is quite probable that most governments would not acknowledge this claim.

The transit passage regime applies purely to the eastern end of the Gulf, because the narrow EEZ corridor located south of the Iranian-controlled islands does not possess the same navigational and hydrographical characteristics as the rest of the strait, as stated in Article 36 of UNCLOS.[184] Due to the shallower waters near the coastline of the United Arab Emirates, the EEZ corridor is not suitable for the safe passage of Very Large Crude Carriers and Ultra Large Crude Carriers. Smaller ships going to or from the central or western part of the Gulf would experience a considerable increase in both distance and expense if they were to take the longer route using the EEZ corridor.[185] In contrast the main route that passes through the territorial sea between the Iranian-controlled islands of Abu Musa, Bani Forur, Sirri and Greater and Lesser Tunbs is more direct and cost-effective. Moreover, the limited width of the EEZ corridor poses a heightened danger of collision for ships and aircraft passing through, particularly if international vessel and air traffic is diverted to this confined area.[186]

[182] ibid.
[183] Lott and Kawagishi (n 103) 134.
[184] UNCLOS (n 21) art 36.
[185] Lott and Kawagishi (n 103) 129.
[186] ibid.

9. Some Recent Navigational Violations in the Strait of Hormuz and its Legal Implications

In June 2019 two oil tankers collided with mines as they approached the Strait of Hormuz.[187] The U.S. maintained the strikes on the oil tankers were carried out by Iranian forces.[188] Iran shot down a U.S. drone over the Strait of Hormuz a few days later.[189] Iran acknowledged shooting down the drone but denied any responsibility for the oil tanker attack.[190] In January 2021, Iran apprehended a South Korean-flag tanker, prompting South Korea to deploy a destroyer in the Strait of Hormuz area.[191] There is also the incident of the detention of the Stena Impero, a UK-flagged oil tanker for purported violation of routing measures.[192]

As the United Kingdom is party to UNCLOS, it possesses the right of transit passage through the Strait of Hormuz. Iran, being a signatory state of UNCLOS, is obliged to respect the right of transit passage through the Strait of Hormuz, at least in relation to UNCLOS-state parties.[193] There is an obligation on signatory to a treaty to refrain from defeating the object and purpose of the treaty.[194] A major object of the UNCLOS is to ensure that all ships and aircraft in international straits like the Strait of Hormuz 'enjoy the right of transit passage, which shall not be impeded'.[195] Iran has authority to take steps other than arresting a ship, when it violates the routing measures, while exercising its right of transit passage. Such steps could include, for

[187] Edmund Blair, 'Latest on Tanker Attacks South of the Strait of Hormuz' *Reuters* (14 June 2019) <https://www.reuters.com/article/us-mideast-attacks-latest-idUSKCN1TF1FN> accessed 19 October 2023.
[188] 'Strait of Hormuz: US Confirms Drone Shot down by Iran' *BBC News* (20 June 2019) <https://www.bbc.com/news/world-middle-east-48700965> accessed 19 October 2023.
[189] ibid.
[190] ibid.
[191] 'South Korea to Send Delegation after Iran Seizes Tanker' *BBC News* (5 January 2021) <https://www.bbc.com/news/world-asia-55540507> accessed 19 October 2023.
[192] Lott and Kawagishi (n 103) 144.
[193] ibid.
[194] VCLT (n 53) art 18.
[195] UNCLOS (n 21) art 38.

example, sending a warning to the ship violating the routing measures and potentially demanding reimbursement for any damage caused or indeed imposing a fine.[196]

Vessels that fly the flag of a country that is a party to UNCLOS, such as South Korea, enjoy a higher level of legal assurance, when exercising their right to navigate through the Strait of Hormuz, compared to vessels that fly the flag of a country that is not a member of UNCLOS. Iran has not ratified UNCLOS and asserts that the legal regime of innocent passage is applicable in the Strait of Hormuz based on 1958 Geneva Convention and customary international law. Until it is definitively proved that the right of transit passage is a recognised practise in customary international law, vessels flying the flag of a non-party state to UNCLOS, such as the United States, cannot be fully assured that they have the right of transit passage when passing through the Strait of Hormuz.[197] However vessels belonging to non-state parties under UNCLOS can still use their customary right of non-suspendable innocent passage. This right has been explicitly affirmed by the practise of states and by the ICJ in the Corfu Channel judgement. Among other things the legal regime of non-suspendable innocent passage prohibits the suspension of passage due to military exercises in a strait. Unlike the right of transit passage, Article 25(1) of UNCLOS empowers a coastal state to take the measures necessary in its territorial sea to prohibit non-innocent passage.[198]

Legally speaking, the 2019 mine attacks on oil ships in the Strait of Hormuz are fraught with more ambiguity than the Strait's passage arrangements. According to state practice, case law and relevant legal literature, it is unclear under United Nations Charter Article 51 whether an attack on a commercial vessel qualifies as an "armed attack".[199] Although the U.S. maintained

[196] Lott and Kawagishi (n 103) 144.
[197] ibid.
[198] UNCLOS (n 21) art 25(1).
[199] Article 51 of the United Nation Charter, See United Nations, Charter of the United Nations, 1 UNTS XVI, 24 October 1945, https://www.refworld.org/legal/constinstr/un/1945/en/27654 [accessed 18 April 2024]; See also Lott and Kawagishi (n 103) 145.

Iran was behind the 2019 mine attacks on oil tankers in the Strait of Hormuz, other countries have refrained from taking action against Iran.[200] They failed to produce enough information to establish Iran's responsibility for these mine attacks beyond reasonable doubt. It is also plausible to suggest the mine attacks were carried out by a non-state actor.[201]

10. Possible Solutions and Relevant Principles

The strait's transit passage regime is entirely based on treaty law. The creation of a treaty or as customary international law is required to invoke the transit right. Iran's experience with the *Oil Platforms Case* shows that it is not hesitant to sue the U.S. in the ICJ to dispute the legality of U.S. warship operations near its coast.[202] Iran and the U.S. both claim that the law is on their side. Is it adequate to say that transit passage has become customary law as the United States claims? Warship transit through straits is "quite common, generally unnoticed, and usually without attendant controversy," according to centuries of experience with peacetime deployment of warships.[203] States have used narrow corridors on several times, thus the idea of them being closed as a matter of law is novel. Although freedom of navigation was exercised in straits used for international navigation, it was done within the confines of the territorial sea of 3 NM. However, transit passage is both a bigger and lesser right than what maritime powers had in the past. It is a larger right because it bypasses the strait's obstruction of coastal State maritime boundaries. Ships, aircraft, and submarines passing through the strait on transit passage are no longer bound by the requirement to avoid a coastal State's territorial waters and

[200] ibid 145.
[201] ibid.
[202] *Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6)*
[203] William T Burke, 'Who Goes Where, When, and How: International Law of the Sea for Transportation' (1977) 31 International Organization 267.

may navigate on any route from shoreline to shoreline.[204] After examining all of these issues, the following conclusions can be formed about how to resolve the non-member state dispute between Iran and the U.S. To begin with, Iran may insist on having only non-suspendable innocent passage through those parts of the Strait of Hormuz that are overlapped by its 3 NM as a matter of customary international law derived from the *Corfu Channel Case*. In another regard, the United States is fair in that ships, warships, aircraft, and submarines would have high seas freedom beyond Iran's 3 NM territorial sea as a matter of customary law.[205]

Second, because the average width of international straits is about 16 NM, the region beyond the traditional claim of territorial sea is nearly 10 NM, and foreign ships will enjoy traditional freedom of navigation. Because the Strait of Hormuz is only about 20 NM wide, the area over which Iran may exercise sovereignty and allow others to navigate freely is quite limited. The practical result is that U.S. ships and aircraft would exercise high sea freedom beyond three NM of Iran's claim in any manner.[206]

Third, the period of the ICJ's adoption of non-suspendable innocent passage right through straits in 1949 and the Geneva Convention's recognition of this right in 1958 for all ships, whether merchant or warships, should be considered from historical perspectives. At the time, the territorial sea was just 3 NM wide, and aircraft were not commonly utilised in commercial operations. So, it's hardly unexpected that overflight and underwater passage were left out.[207]

Fourth, whether the transit right exists under customary international law is still debatable. It can be lawful for all types of merchant ships, but not for warships, in terms of overflight and

[204] Md Asrafuzzaman Babu, 'Non Accession to UNCLOS and the Doctrine of Innocent Passage or Transit Passage: Challenges and Prospects' (2019) 6 International Journal of Humanities Social Sciences and Education (IJHSSE).
[205] ibid 6.
[206] ibid.
[207] Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 111.

underwater passage. It is most likely accurate in the instance of the Dover Strait and Gibraltar, where all bordering states expressly extended such powers to all countries.[208]

Fifth, if Iran merely claims a 3 NM territorial sea, it appears reasonable to assume that other countries will respect the corresponding regime of innocent passage through the territorial sea. This will be based on the 'cannon-shot rule' and customary international law in operation before the UNCLOS which extended the limit to 12 NM with the requirement that this extension goes with recognition of the right of transit passage. Thus, beyond the 3 NM, Iran should also expect states to exercise the full range of high seas freedoms and other internationally lawful uses of the sea.[209] On the other hand, Iran's existing claim to a 12 NM territorial sea suggests that other states are entitled to freedom of navigation through the strait, either as a transit passage or as the historic precursor to high seas freedoms, which is even more permissive. Instead, Iran has sought to maintain the current 12 NM territorial sea while preserving the navigational regime of innocent passage through the strait. That approach was condemned by the Third United Nations Conference on the Law of the Sea as a risk that distorts the 'package deal' bargain by allowing 'cafeteria-style' selection and rejection of legal provisions, which has no basis in treaty or customary law.[210]

11. Conclusion

Over time, the Strait of Hormuz has been of critical importance to world states in terms of geostrategic, communication, and economic relevance. Therefore, the Strait's passage regime has become increasingly important. Closing the Strait of Hormuz to foreign ships would

[208] Babu (n 205) 6.
[209] ibid.
[210] ibid 7.

amount to a violation of international law. The imposition of economic sanctions bears no direct relationship to the physical act of passage of vessels through the Strait of Hormuz.

If in response to western economic sanctions Iran were to carry out its threat to block the passage of vessels (including notably oil tankers) through the Strait of Hormuz, this action would arguably amount to violation of international law.[211] Considering its obligation as a signatory to UNCLOS as such action will amount to defeating the object and purpose of the treaty. Again, blocking the passage of vessels in peace time constitutes a violation of the right of non-suspendable innocent passage recognised in customary international law and codified in the 1958 Geneva Convention. The legal right of a coastal state to prevent transit and non-suspendable innocent passage of ships is limited to acts taking place while the ship is in engaged in passage through the strait and constituting a threat, or indeed actual use of force against the sovereignty, territorial integrity, or political independence of coastal states, or acting in any other manner in violation of the principles of international law embodied in the United Nations Charter.

Inclusion of the right of transit passage in customary international law is uncertain. If this is not the case, then non-state parties to UNCLOS can exercise the customary rights of non-suspendable innocent passage when passing through the Strait of Hormuz. On the other hand, state-parties to UNCLOS like China, Japan, South Korea, the European Union member states, the United Kingdom, Norway, can exercise the right of transit passage in the Strait of Hormuz. Iran, as a signatory state to UNCLOS has an obligation not to defeat the object and purpose of the treaty.[212] Oman, as a state party to UNCLOS, should adhere to the obligation of granting transit passage rights to other states in the Strait of Hormuz.

[211] Caracciolo (n 158) 480.
[212] VCLT (n 53) art 18.

Chapter 7: Conclusion

The strait of Hormuz is a critical strait for international navigation. The history of the use of the Strait from the ancient times to the contemporary period demonstrates the significance of the Strait as a major point of passage for vessels involved in trade from one end of the world to the other. In the contemporary period, its use as a route by oil and gas vessels has meant the Strait continues to retain its position as a major trade route and, has been the case in history, a potential source of conflict. Thus, research on viable approaches to maintaining peace through international law is important. Not surprisingly, it is prone to generating disputes with resonance for the global economy and global peace. Yet, as demonstrated by this study, the critical issue of the right of passage through the strait, has not been comprehensively researched. This study has investigated different legal issues relating to the coastal states and user states to contribute to setting out a viable approach under international law, and specifically, the Law of the Sea governing the transit passage regime through the Strait.

To facilitate free navigation, it is necessary to strike a balance between controlling and providing unrestricted navigation of straits. Given the national security and economic interests of each state, it is crucial to take this into consideration. Various subjects were examined, such as the implementation of national and (customary or conventional) international law, as well as the constraints on and ease of access in the use of international straits. Access to straits is governed by national and international law, whether under water, on water or in the air and in the case of the Strait of Hormuz, or indeed, any other strait used for international navigation, it is imperative to adhere by the provisions of international law.

The security and safety of ships in the Strait will remain a priority, so long as there is a sustained growth in the demand for Gulf oil and gas. The demand by the Gulf states for products and weaponry from worldwide markets through this strait, which acts as the gateway to the Gulf,

remains constant. Global interest in the region could potentially lead to an escalation in the military and political influence of these significant states. Consequently, the Strait of Hormuz has been turned into a catalyst for animosity and persistent conflict among different countries.

To sustain global peace and stability, it was imperative to establish a transit passage regime for vessels and aircrafts. The transit passage alleviates the political constraints faced by coastal states in their duty as gatekeepers, hence minimising the likelihood of strait states being involved in international conflicts. The rights and duties between the coastal and the user states has been set out in UNCLOS complying with them provides a viable route to security and stability in enhance global trade and economic development.

The overall equilibrium of rights and obligations, created by UNCLOS as a 'package deal' has modified and incorporated the entitlement to transit passage and extended territorial sea. This equilibrium was necessitated by an inherent correlation, wherein the expansion of one element resulted in the restriction of the other, in contrast to the compromises observed on other aspects of UNCLOS. Based on conference negotiations duration, most states concerned acknowledged a correlation between an expanded territorial sea and a transit passage.

Due to the enactment of laws by over one hundred states, including maritime powers and strait states extending their territorial sea to 12 NM, the entitlement to a 12 NM territorial sea can be considered as an established practice among states. Considering this situation, the current inquiry centres around whether the presence of the link or established state practice has altered the nature of transit passage to become customary international law.

Prohibiting foreign vessels from accessing the Strait of Hormuz would constitute a breach of international law. There is no clear correlation between the implementation of economic sanctions and the physical act of vessels passing through the Strait of Hormuz. If Iran were to implement its threat to obstruct the passage of vessels, particularly oil tankers, through the

Strait of Hormuz in response to western economic sanctions, it could be argued that this action would be a violation of international law. This is because Iran is a signatory to UNCLOS, and taking such action would undermine the intended purpose and objectives of the treaty. Once more, the act of impeding the transit of ships during times of peace might be seen as a breach of the entitlement to non-suspendable innocent passage, as acknowledged in customary international law and formally established in the 1958 Geneva Convention. A coastal state has the legal authority to prevent the transit and non-suspendable innocent passage of ships only if the actions occur while the ship is passing through the strait and pose a threat or actual use of force against the sovereignty, territorial integrity, or political independence of coastal states. Furthermore, a coastal state also can prevent the passage if such an act was in violation of the principle of international law embodied in the United Nation Charter.

The Ottoman Empire was the sole authority that ruled the Turkish Straits from the fifteenth century until the nineteenth century. The Montreux Convention was created to guarantee the straits' continued peaceful use when the Ottoman Empire collapsed, and the Turkish Straits became a point of contention between rival nations. In order to ensure peaceful passage in this strategically important strait, the competing and interested parties' approach to resolving the tensions that arose in the Turkish Straits serves as a helpful guide for resolving conflict, tensions, and competing claims regarding the use of the Strait of Hormuz among the coastal states and the international community.

There is uncertainty over the incorporation of the right of transit passage into customary international law. In the event that this condition is not met, non-state parties to the United Nations Convention on the Law of the Sea (UNCLOS) have the ability to use the customary rights of non-suspendable innocent passage while traversing the Strait of Hormuz. In contrast, certain state-parties to UNCLOS, such as China, Japan, South Korea, the member states of the

European Union, the United Kingdom, and Norway, possess the authority to exercise the right of transit passage within the Strait of Hormuz. Iran, being a signatory state to UNCLOS, is obligated to uphold the purpose and objectives of the treaty. As a party to UNCLOS, Oman is obligated to grant transit passage rights to other states in the Strait of Hormuz.

The legal status of the Strait continues to be uncertain, further complicated by potential disagreements between the coastal states and the other Gulf States, as well as any states with maritime interests. The practice of states regarding the passage through the Strait has promoted unimpeded transit passage through tacit acceptance, hence UNCLOS did not disrupt this equilibrium but only formalised pre-existing customs. This practice might contradict the assertions made by the coastal states, so it does not possess the necessary *opinio juris* to be considered a rule established in customary international law. Therefore, the narrow-minded strategies employed by the coastal states, as shown in their local laws and reservations about certain provisions of UNCLOS, simply worsen the existing ambiguity surrounding the legal status of the Strait of Hormuz. The coastal as well as user states, and indeed the global economy, will be best served by certainty, openness, accommodation, and consistency offered by the robust provisions of UNCLOS on the right of transit passage in straits used for international navigation, like the Strait of Hormuz.

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