IRAN, THE UNITED STATES, AND THE STRAIT OF HORMUZ: CAN INTERNATIONAL LAW PREVENT CATASTROPHE?

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The rules governing resort to force form a central element within international law. . .[1]

There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.[2]

ABSTRACT

We commence with a detailed background and recent history of the Strait of Hormuz and their use. There are at least three elements to consider respecting a strait: the geographic, the functional, and the legal. We highlight the economic value of the goods that transit the Strait annually and review the number of ships that traverse the region and their corresponding nationalities. After we set the stage, we then discuss recent attacks and impoundment of freight ships as well as the response by the attacked. We review the

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1. MALCOLM N. SHAW, INTERNATIONAL LAW 851 (Cambridge Univ. Press 8th ed. 2017).

2. Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Iran-U.S., art. I, Aug. 15, 1955, T.I.A.S. 3853 [hereinafter Treaty of Amity with Iran]. On Oct. 3, 2018, U.S. Secretary of State Mike Pompeo announced the United States was exiting from the treaty. *See* Adam Shaw, *Pompeo Pulls Out of Treaty with Iran, in Response to UN Court Ruling,* FOX NEWS (Oct. 3, 2018), https://www.foxnews.com/politics/pompeo-pulls-out-of-treaty-with-iran-in-response-to-un-court-ruling [https://perma.cc/L5EG-GLRR]. The ostensible reason for this was the International Court of Justice (ICJ) had, earlier in the day, opposed U.S. sanctions against Iran, citing breached obligations in this treaty. *Id.* Under the treaty, either party can withdraw upon one year's notice. Treaty of Amity with Iran, *supra*, at art. XXIII. That would mean that as of October 2019, the United States would no longer be a party.

International Law of the Sea, international straits, and the rights of coastal states over territorial waters. Are the United States and Iran bound by customary international law? If so, are they violating it? Does Iran have a basis to impede vessels from other countries from shipping safely through said waters? What type of force is legally permitted to be used and can the attacked exert self-defense to justify their use of force to the U.N. Security Council?

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I. INTRODUCTION

Around 90 percent of the world's trade is carried by sea; consequently, little wonder that there is so much interest in freedom of navigation.[3] The Strait of Hormuz, connecting the Persian Gulf and the Gulf of Oman, is the only sea passage from the Persian Gulf to the open ocean, and according to the U.S. Energy Information Administration, it "is the world's most

3. Martin Wählisch, *The Iran-U.S. Dispute, the Strait of Hormuz, and International Law*, 37 YALE J. INT'L L. ONLINE 22, 23 (2012).

important oil transit chokepoint."[4] Indeed, nearly 21 million barrels of oil flowed through that strait each day in 2018, or approximately 21 percent of global liquid petroleum consumption.[5] This is an important waterway.

In this Article, we start from the proposition that the sea, that is, the oceans of the world, are to be used for peaceful purposes.[6] And the law requires that all disputes respecting use of the sea are to be settled peacefully,[7] and without resorting to force.[8]

Since the Iranian Revolution of 1979, there has been considerable controversy and sometimes violence respecting the use of the Strait of Hormuz, especially conflict between Iran and the United States.[9] Whether or not we wish to assign potential responsibility for unlawful actions or predict what may happen in the future, we must explore the matter from both a legal and a political perspective, since ultimately politics are likely to have greater influence than law in decision making on all sides. The purpose of this Article is to explore the legal perspective. What we will see is that the state of Iran has engaged in and continues to engage in a variety of actions that are unmistakable violations of a variety of tenets of clear-cut rules of international law.[10]

Things are changing a bit in the region apparently as a result of the transition in the United States from the Trump Administration to that of the Biden Administration. Threats had been made by the Iranian regime against U.S. troops in the region and against President Donald Trump himself;[11] and

4. *The Strait of Hormuz is the World's Most Important Oil Transit Chokepoint*, U.S. ENERGY INFO. ADMIN. (June 20, 2019), https://www.eia.gov/todayinenergy/detail.php?id=39932 [https://perma.cc/BLC4-XJFL] [hereinafter EIA II].

5. *Id.*

6. United Nations Convention on the Law of the Sea, arts. 5, 88, 141, 143, 147, 155, 240, ¶ 2, 242, 246, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. UNCLOS is also known as the Law of the Sea Convention (LOSC).

7. *Id.* at arts. 279–81.

8. *Id.* at art. 19, ¶ 2(a), art. 39, ¶ 1(b), art. 301. *See* also U.N. Charter arts. 1 & 2.

9. *See* Suyin Haynes, *The Strait of Hormuz Is at the Center of Iran Tensions Again. Here's How the Narrow Waterway Gained Wide Importance*, TIME (July 23, 2019, 1:36 PM), https://time.com/5632388/strait-of-hormuz-iran-tanker [https://perma.cc/AF3N-4WMJ].

10. *See infra* Part IV.C.

11. Michael Callahan & Nicole Gaouette, *Washington Orders US Aircraft Carrier to Remain in Middle East Amid Iranian Threats*, CNN, https://www.cnn.com/2021/01/03/politics/us-iran-aircraft-carrier-intl-hnk/index.html, [https://perma.cc/J36L-6XLE] (Jan. 3, 2021, 11:15 PM).

to monitor the situation, the aircraft carrier USS Nimitz was ordered to stay on station in the region.[12] But then on February 1, 2021, the USS Nimitz was ordered to return home.[13] Iran seems to be acting in a way to get the attention of the new President, Joe Biden. It has seized the cargo ship of a U.S. ally, arrested a U.S. citizen, and threatened to disallow inspectors to examine their nuclear activities as required by the Joint Comprehensive Plan of Action (JCPOA)[14]—which the Trump Administration pulled out of,[15] but which the Biden Administration appears to have the intention to rejoin.[16] However, President Biden places some conditions on the United States rejoining.[17] Iran seems to have its own conditions before its return to full compliance with JCPOA and welcoming back the United States.[18]

The point to be made is that given that both parties seem to have an intention to come together on the matter, albeit with conditions, it seems to

12. Eric Schmitt, *In Reversal, Pentagon Announces Aircraft Carrier Nimitz Will Remain in Middle East,* N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/world/middleeast/trump-iran-carrier-nimitz.html.

13. Eric Schmitt, *U.S. Aircraft Carrier Returning Home After Long Sea Tour Watching Iran,* N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/us/politics/aircraft-carrier-nimitz-iran-biden-persian-gulf.html?searchResultPosition=5.

14. Joint Comprehensive Plan of Action, July 14, 2015, U.S. Dep't of State, https://2009-2017.state.gov/documents/organization/245317.pdf [https://perma.cc/2SL7-PSSV] [hereinafter Iran Nuclear Deal]. This is an agreement on the Iranian nuclear program between Iran, China, France, Russia, United Kingdom, United States, Germany, and the European Union.

15. *Iran Nuclear Deal: Trump Pulls US Out in Break with Europe Allies*, BBC NEWS (May 9, 2018), https://www.bbc.com/news/world-us-canada-44045957 [https://perma.cc/PXB9-LE2N].

16. Steven Erlanger, *Biden Wants to Rejoin Iran Nuclear Deal, but It Won't Be Easy*, N.Y. TIMES, https://www.nytimes.com/2020/11/17/world/middleeast/iran-biden-trump-nuclear-sanctions.html (June 19, 2021); Aamer Madhani, Josh Boak & Chris Megerian, *Biden Says U.S. Will Not 'Wait Forever' for Iran on Nuclear Deal*, PBS (July 14, 2022, 10:43 AM), https://www.pbs.org/newshour/politics/biden-says-u-s-will-not-wait-forever-for-iran-on-nuclear-deal [https://perma.cc/L38Z-LT7Z].

17. *Biden Will Not Lift Sanctions to Get Iran Back to Negotiating Table*, GUARDIAN (Feb. 7, 2021, 12:03 PM), https://www.theguardian.com/us-news/2021/feb/07/biden-iran-sanctions-negotiating-table-nuclear-deal [https://perma.cc/BG47-JGAX].

18. Amir Vahdat, *Iran: US Must Lift Sanctions Before It Lives Up to Nuke Deal*, ABC NEWS (Feb. 7, 2021, 11:48 AM), https://abcnews.go.com/International/wireStory/irans-leader-us-lift-sanctions-return-deal-75737566 [https://perma.cc/9KBT-TM7D].

open the door for negotiations.[19] In fact, an understanding on a revised nuclear deal seems closer than ever at the moment.[20]

Despite that, the entire range of unlawful activities of Iran in the Strait of Hormuz and their implications have not been fully described, despite the gallons of ink that have been consumed in articles about it. These articles concentrate on the violations of the law of the sea and speak of the rights-of-passage regime, but they do not speak of the other accumulated offenses committed by Iran.[21] Much of the conflict stems from the polar opposite ways in which the two sides see their obligations and rights under international law, which is not to say that either side's positions on the matter are entirely correct ones.

This Article will examine: (1) the climate in the region—as it relates to U.S.-Iranian relations—and the potential for a change for the better, (2) the violations of international law are bellicose and dangerous and can ignite a blazing war if miscalculations occur, and (3) the need to fully examine the international legal violations of Iran in the Strait of Hormuz, lest they be forgotten and swept under the rug.[22]

Much has been written about the behavior of Iran in the waters of the Persian Gulf, and particularly about the narrow band of water connecting the Gulf to the Sea of Oman and the open ocean, namely the Strait of Hormuz, or what international law calls a strait used for international navigation.[23]

19. Mohammad Javad Zarif, *Iran Wants the Nuclear Deal It Made: Don't Ask Tehran to Meet New Demands*, FOREIGN AFFS. (Jan. 22, 2021), https://www.foreignaffairs.com/articles/iran/2021-01-22/iran-wants-nuclear-deal-it-made [https://perma.cc/947H-YB8T].

20. Colm Quinn*, Will the Iran Deal Be Revived?*, FOREIGN POL'Y (Aug. 23, 2022, 6:31 AM), https://foreignpolicy.com/2022/08/23/iran-deal-nuclear-biden-decision/.

21. *See, e.g.*, Nilufer Oral, *Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers*, AM. SOC'Y INT'L L.: INSIGHTS (MAY 3, 2012), https://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage [https://perma.cc/ZL4Q-ND9W]; Jennifer El-Fakir, Note, *Retaliatory or Lawful?: How Iran's Seizure of the* Stena Impero *in the Strait of Hormuz Violated International Law*, 59 COLUM. J. TRANSNAT'L L. 425 (2021); James Kraska, *Legal Vortex in the Strait of Hormuz*, 54 VA. J. INT'L L. 323 (2014).

22. *See infra* Part IV.C.

23. Guiseppe Cataldi, *The Strait of Hormuz*, QUESTIONS INT'L L. (Dec. 31, 2020, 4:12 PM), http://www.qil-qdi.org/wp-content/uploads/2020/12/02_Asian-Straits_CATALDI_FIN.pdf [https://perma.cc/CU3Q-U5V6].

The bulk of articles written have given short shrift to the myriad of legal transgressions that Iran has engaged in.[24] It seems apropos to outline those, since there are so many, especially in light of what the current state of affairs is: the Biden Administration appearing intent on getting back into the Iran Nuclear Deal.[25]

II. BACKGROUND FOR THE ISSUES

Iran's location on the Persian Gulf makes it a strategically significant state.[26] As has been seen, innocent passage is allowed in territorial waters, and transit passage is allowed through international straits under the United Nations Convention on the Law of the Sea (UNCLOS).[27] Iran's security interests seem to be the primary reason that Iran is not a party to the UNCLOS.[28] Thus, Iran applies the regime of innocent passage, claiming the Strait of Hormuz as its territorial waters.[29] Iran says that the movement of warships through the Strait of Hormuz, especially U.S. warships, is a threat to its national security.[30] Of course, however, much transit passage—or indeed any manner of passage—of shipping, of whatever nature, through the Strait of Hormuz may be a matter of Iranian security, but such passage is of equal importance to global peace and security.[31]

Since the United States is also not a party to the UNCLOS, Iran maintains that it cannot claim the right of transit passage in the strait since the regime of transit passage was only created by the UNCLOS and was not a matter of law, customary or otherwise.[32] The parties agreed during the negotiations of the UNCLOS that it was a complete package, to be taken as a whole, and the parties must accept all or none of it, with no permission to

24. *See* Haynes, *supra* note 9.

25. Erlanger, *supra* note 16. The 2015 nuclear deal is also known as the Joint Comprehensive Plan of Action (JCPOA). Kali Robinson, *What Is the Iran Nuclear Deal?*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/what-iran-nuclear-deal [https://perma.cc/TYD6-NT9T] (July 20, 2022, 3:43 PM).

26. Saeed Bagheri, *Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective,* 13 N.Z. Y.B. INT'L L. 83, 83 (2015).

27. *Id.*; UNCLOS, *supra* note 6.

28. Bagheri, *supra* note 26.

29. *Id.*

30. *Id.*

31. Kraska, *supra* note 21, at 325.

32. *Id.* at 327–28.

states taking exceptions to one matter or another.[33] Perhaps because neither the United States nor Iran are parties to the UNCLOS, there is continuous disagreement on how or which international law applies to the Strait of Hormuz.[34]

III. HISTORY

Long before the UNCLOS, commentators on international law argued that straits, being a necessary highway for commercial transportation between areas of the high seas, must always permit the passage of foreign shipping.[35] This included the notion that even though certain straits could be within the claimed territorial waters of a coastal state, that state should not and could not stop navigation or passage through such straits.[36] The question of whether international law allowed, without the coastal states' permission, warships or others to transit international straits that may be within the territorial waters of a state was answered by the International Court of Justice (ICJ).[37] In the 1946 *Corfu Channel* case, the court established that customary international law provides that "the right of innocent passage cannot be prohibited by a coastal [s]tate in times of peace."[38] This was before the advent of the principle of transit passage.[39]

By the time of the UNCLOS negotiations in Caracas, the three nautical mile limit to the territorial sea was still the accepted international norm.[40] The application of that limit to the territorial sea would create high seas corridors in more than 100 straits around the world.[41] Through those corridors, ships and aircraft of any state would have complete freedom of passage, and this would apply to the Strait of Hormuz.[42] Adopting a standard

33. Third United Nations Conference on the Law of the Sea, 1973–1982, 62d conf., 189th plen. mtg. ¶¶ 211, 253, U.N. Doc. A/CONF.62/SR.189 (Dec. 8, 1982); Third United Nations Conference on the Law of the Sea 1973–1982, 62d conf., 191st plen. mtg. ¶ 169, U.N. Doc. A/CONF.62/SR.191 (Dec. 9, 1982).

34. Kraska, *supra* note 21, at 325.

35. Mohd Hazmi bin Mohd Rusli, *A Historical Overview on the Legal Status of Straits Used for International Navigation Under International Law*, 1 AALCO J. INT'L L. 103, 111–12 (2012).

36. *Id.* at 112.

37. *Id.* at 114–16.

38. *Id.* at 116. *See* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, at 28–29 (Apr. 9).

39. Mohd Rusli, *supra* note 35, at 116.

40. *Id.* at 122.

41. *Id.* at 122–23.

42. *Id.* at 123.

12-mile limit would mean that most international straits would not have a high seas corridor, thereby hampering transit by maritime states.[43] At the time of the Caracas negotiations, a 12-mile limit had become widely popular, and there was a push to have it recognized in the new convention.[44] In the give and take of negotiations, the 12-mile limit was accepted largely in return for the scheme of transit passage through all international straits,[45] since maritime states like the United States, the Soviet Union, and others insisted on such freedom because:

> The 'territorialisation' of international straits would compromise the freedom of overflight of (military) aircraft and navigation of foreign warships, including submerged submarines. Thus maritime [s]tates urged the introduction of a new regime relating to the right of 'transit passage', which was finally embodied in Part III of the [UNCLOS]. It is important to note that the agreement on the 12-mile territorial sea was closely linked to ensuring the freedom of navigation and overflight through international straits.[46]

The UNCLOS is widely considered to be a codification of customary international law,[47] and as such is binding on all states, even those not parties to the UNCLOS.[48] Most maritime states, including the United Kingdom, the United States, and others, considered that the international strait transit passage regime to not be new,[49] but rather a codification of customary international law.[50] Further, in 1992, then U.N. Secretary General Boutros Boutros-Ghali stated: "The regime of transit passage has been widely accepted in general terms by the international community and has become

43. *Id.* at 123–24.

44. *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, OCEANS & L. SEA: U.N. (2012), https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective [https://perma.cc/96EZ-MQ56].

45. *Id.*

46. YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 117 (Cambridge Univ. Press 3d ed. 2019).

47. *Id.* at 127; *see* Bernard H. Oxman, *Transit of Straits and Archipelagic Waters by Military Aircraft*, 4 SING. J. INT'L & COMPAR. L. 377, 391 (2000).

48. TANAKA, *supra* note 46, at 127; *see* TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 369–70 (Cavendish Publ'n Ltd. 1998).

49. Mohd Rusli, *supra* note 35, at 128.

50. Michael C. Stelakatos-Loverdos, *The Contribution of Channels to the Definition of Straits Used for International Navigation*, 13 INT'L J. MARINE & COASTAL L. 71, 71 (1998); J.B.R.L. Langdon, *The Extent of Transit Passage: Some Practical Anomalies,* 14 MARINE POL'Y 130, 130–31 (1990).

part of the practices of [s]tates, both of [s]tates bordering straits as well as shipping [s]tates."[51] However, there is also a substantial number of those who believe the provisions regarding transit passage through straits of the UNCLOS is a departure from the provisions of customary international law and cannot be relied upon as such.[52] However, in 2008, Ian Brownlie stated that the regime could become confirmed as customary international law, and there is evidence of a trend in this direction.[53] One of the leading experts on the international law of the seas, Yoshifumi Tanaka, agrees.[54] What remains clear, however, is the principle that there shall be no suspension of transit passage through straits used for international navigation by the coastal state for security purposes, or any other reason,[55] derived from the *Corfu Channel* case—which recognized the principle as customary international law and found its way into the 1958 Convention on the Territorial Sea and the Contiguous Zone,[56] and thence to the UNCLOS.

"[T]here is continuous disagreement between Iran and the U.S. on the application of international law in the Strait of Hormuz . . . . The most important dissension between the two [s]tates is on the right of passage of foreign warships, military aircraft, and submarines through the Strait."[57] The problem stems from a variety of causes. Iraq was the aggressor in the Iran-Iraq War of 1980–1988, and Iran mined the Persian Gulf and the Strait, damaging a U.S. warship.[58] The United States retaliated and a series of armed incidents between the United States and Iran ensued.[59] Some say that U.S. intervention caused the Iranians to stop the war.[60]

51. U.N. Secretary-General, *Progress Made in the Implementation of the Comprehensive Legal Regime Embodied in the United Nations Convention on the Law of the Sea,* ¶ 23*,* U.N. Doc. A/47/512 (Nov. 5, 1992).

52. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 271 (Oxford Univ. Press 7th ed. 2008).

53. *Id.*

54. TANAKA, *supra* note 46, at 129.

55. UNCLOS, *supra* note 6, at art. 44.

56. Convention on the Territorial Sea and the Contiguous Zone, art. 16(4), Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639.

57. Bagheri, *supra* note 26, at 87.

58. *Id.* at 92.

59. *Id.*

60. *See id.*

Further, although neither Iran nor the United States have ratified the UNCLOS, Iran did sign it; the United States did not.[61] When it was finalized, it was supposed to be an all or nothing deal,[62] which means no reservations.[63] This meant that a state had to accept and abide by the treaty in its entirety, not pick and choose—as is often the case with treaties—as to which articles would bind their actions. Further, as mentioned above, the UNCLOS increased the territorial size to 12 miles, which put the narrow Strait of Hormuz—and international waterway under the UNCLOS—completely within the territorial waters of Oman and Iran.[64] For the following reasons, Iran considers any shipping within the strait to be a potential threat to its security because it is so close to its shores—especially warships—and particularly those of the United States, with whom it has had unhappy war-like adventures in the past.[65]

The United States has maintained that it considers (parts of) the UNCLOS to be customary international law, but not others.[66] For example, the United States maintains that under customary international law, it has transit passage rights for its warships and military overflight rights through the straits.[67] Moreover, the United States does not recognize any state's right

61. Farzin Nadimi, *Clarifying Freedom of Navigation in the Gulf*, WASH. INST. (July 24, 2019), https://www.washingtoninstitute.org/policy-analysis/clarifying-freedom-navigation-gulf [https://perma.cc/D4FF-CZHW].

62. *See generally* UNCLOS, *supra* note 6.

63. "'Reservation' means a unilateral statement, however phrased or named, made by a [s]tate, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that [s]tate[.]" Vienna Convention on the Law of Treaties art. 2, 1(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980).

64. Nadimi, *supra* note 61.

65. *See id.*

66. The reason the United States neither signed nor ratified the Convention was because of the seabed regime to which it objected. And in 1983, President Ronald Regan declared that (selectively) the United States would thereafter respect and accept the Exclusive Economic Zone regime as set forth in UNCLOS. *See* Proclamation No. 5030, 3 C.F.R. § 22 (1983).

67. *Statement on United States Oceans Policy*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Mar. 10, 1983), https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy [https://perma.cc/27KK-ZTS6].

to restrict international navigation rights.[68] President Ronald Regan declared in 1983: "The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."[69]

Iran has often criticized the UNCLOS provision about "[i]nnocent passage of warships through territorial waters" and the right of transit passage of warships through international straits.[70] Iran considers this a threat to their national security and has declared that the UNCLOS does not apply to the Strait of Hormuz.[71] It does not believe itself bound by the UNCLOS and insists that the United States cannot hide behind the notion that the UNCLOS is customary international law, because it is an all-or-nothing treaty and a state cannot pick and choose which parts apply and which do not.[72] Iran requires prior authorization for the passage of warships through the Strait, pursuant to a strict Iranian law enacted in 1993, among other constraints,[73] which the United States does not recognize.

Those major elements of international law that have potential impact on events are the law of the sea;[74] the law governing the use of force (or jus

68. *Id.*

69. *Id.*

70. Bagheri, *supra* note 26.

71. *Id.* at 87–88.

72. Kraska, *supra* note 21, at 359.

73. *See* U.S. DEP'T OF STATE: BUREAU OF OCEANS & INT'L ENV'T & SCI. AFFS., LIMITS IN THE SEAS: IRAN'S MARITIME CLAIMS, U.S. DEP'T. OF STATE (1994), https://www.state.gov/wp-content/uploads/2020/01/LIS-114.pdf [https://perma.cc/JG87-ET8Q].

74. *See* REBECCA M.M. WALLACE, INTERNATIONAL LAW 146–86 (Sweet & Maxwell 5th ed. 2005).

ad bellum);[75] the law of state responsibility;[76] the law of reprisals;[77] the law of aggression;[78] and international humanitarian law (or *jus in bello*).[79]

Relations between the United States and Iran have been troubled since the revolution in Iran of 1979.[80] The United States recently pulled out of the Iran Nuclear Deal.[81] We also know that the United States engaged in the extrajudicial killing of the Iranian general,[82] after which the Iranians retaliated.[83] The Iranian attack severely injured dozens of U.S. soldiers.[84] While the Iranians have said they may engage in more military strikes, the United States appears to have said that is enough for now.[85] But the relationship between the two countries has always been a tense one.

Attacks in the region are not limited to the United States and its allies. In 2019, Saudi Arabian oilfields were attacked, and the action was generally

75. *Id*. at 276–77.

76. A general term, "state responsibility" has been defined as the obligations or liability "of one [s]tate to another for the non-observance of the obligations imposed by the international legal systems. A [s]tate may incur liability for injury to the defendant [s]tate itself. This may be, for example, for a breach of a treaty obligation or for injury to the defendant [s]tate's nationals or their property." *Id.* at 187. *See also* VALERIE EPPS, INTERNATIONAL LAW 269–76 (Carolina Acad. Press 4th ed. 2009).

77. WALLACE, *supra* note 74, at 293.

78. *Id*. at 294–99.

79. *Id*. at 305–08.

80. Kristen de Groot*, A History of U.S.-Iran Relations*, PENN TODAY (Jan. 9, 2020), https://www.penntoday.upenn.edu/news/history-us-iran-relations [https://perma.cc/7BA5-8NCV].

81. Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html.

82. Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES, https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html (July 9, 2020).

83. *Iran Retaliates for the Killing of Qassem Suleimani*, ECONOMIST, https://www.economist.com/middle-east-and-africa/2020/01/08/iran-retaliates-for-the-killing-of-qassem-suleimani [https://perma.cc/PDD3-HN96] (Jan. 14, 2020).

84. Bill Chappell, *109 U.S. Troops Suffered Brain Injuries in Iran Strike, Pentagon Says*, NPR (Feb. 11, 2020, 10:39 AM), https://www.npr.org/2020/02/11/804785515/109-u-s-troops-suffered-brain-injuries-in-iran-strike-pentagon-says [https://perma.cc/JLS2-3QRG].

85. *Trump: Iran 'Standing Down' After Missile Strikes*, BBC NEWS (Jan. 9, 2020), https://www.bbc.com/news/world-us-canada-51039520 [https://perma.cc/5TQB-NGER].

attributed to Iran.[86] In January of 2021, Iranian troops boarded and seized a South Korean merchant vessel in the Strait of Hormuz.[87]

The actions of Iran in the region are not limited only to frequent interdiction and generally bellicose activity in and near the Strait, but more broadly in the region they appear to be lashing out at those they consider adversaries, either political or religious.

IV. THE LAW OF STATE RESPONSIBILITY

If a state in violation of the norms of international law causes another state or individual to suffer damages, the violating state has the responsibility of recompensing the harmed state or individual.[88] State responsibility is fundamental in international law, arising out of the doctrine of sovereignty and the equality of states. The doctrine provides that when one state commits an unlawful act under international law, that offense gives rise to responsibility and a requirement for reparation.[89] According to the ICJ, the lack of a court with jurisdiction over the matter does not affect the fact that a binding obligation exists.[90] As early as 1928, the Permanent Court of International Justice in the *Chorzow Factory* case said that the possibility of being held responsible for internationally wrongful acts causing harm was the price a state had to pay for being able to participate in international law.[91] That court early on held that when a state commits an internationally wrongful act against another state, international responsibility is established

86. Humeyra Pamuk, *Exclusive: U.S. Probe of Saudi Oil Attack Shows It Came from North – Report,* REUTERS (Dec. 19, 2019, 10:37 AM), https://www.reuters.com/article/us-saudi-aramco-attacks-iran-exclusive/exclusive-u-s-probe-of-saudi-oil-attack-shows-it-came-from-north-report-idUSKBN1YN299 [https://perma.cc/4EWU-FX59].

87. Jake Kwon, Gawon Bae & Zamira Rahim, *Armed Iranian Troops Boarded South Korean Tanker, Ship's Owner Says*, CNN, https://www.cnn.com/2021/01/05/asia/south-korea-anti-piracy-unit-iran-ship-seized-intl-hnk-mil/index.html [https://perma.cc/RJK3-KNGX] (Jan. 5, 2021, 11:13 AM).

88. *See* EPPS, *supra* note 76.

89. SHAW, *supra* note 1, at 677.

90. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, 46 (Feb. 3).

91. Factory at Chorzów (Claim for Indemnity) (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

"immediately as between the two [s]tates," [92] and the ICJ has applied the concept repeatedly in cases before it.[93]

But under international law as recognized by most of the world, to the extent that a state disrupts shipping traffic, stops shipping traffic, or damages or destroys the commercial ships of another state, such state would be responsible under international law for the indemnification of any damages caused thereby.[94] "Motive and intention are frequently a specific element in the definition of permitted conduct."[95] Even if Iran were to claim that such acts were simply in furtherance of its lawful policing of strait waters under its control, Iran would still be responsible under international law, since a state cannot do what it otherwise can lawfully do if it is for the purpose of political reprisal or retaliation.[96] And action which is unlawful and is sought to be justified as self-defense or necessity is likewise not permitted.[97] Further, the UNCLOS assigns responsibility for damages to the flag state of a warship caused by a warship,[98] and those caused by overzealous enforcement of their rights by coastal states.[99]

A. *Introduction*

"The law of state responsibility plays a central role in international law, functioning as a general law of wrongs that governs when an international obligation is breached, the consequences that flow from a breach, and who is able to invoke those consequences (and how)."[100] This Part will explore the background of the law of state responsibility and apply the doctrine to

92. Phosphates in Morocco (It. v. Fr.), Judgment, 1938 P.C.I.J. (ser. A/B) No. 74, at 28 (June 14). See also S.S. "Wimbledon", Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 30 (Aug. 17); Factory at Chorzów (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26); Ger. v. Pol., 1928 P.C.I.J. (ser. A) No. 17, at 29.

93. *See* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, at 23 (Apr. 9); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 283, 292 (June 27); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, ¶ 47 (Sept. 25).

94. *See generally* BROWNLIE, *supra* note 52, at 433–36.

95. *Id.* at 441.

96. *Id.*

97. *Id.*

98. UNCLOS, *supra* note 6, at art. 31.

99. *Id.* at art. 232.

100. Silvia Borelli, *State Responsibility in International Law*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0031.xml [https://perma.cc/6SSW-J7HH] (June 27, 2017).

the constant disputes and tensions involving commercial shipping traffic in the Strait of Hormuz.

B. *Background*

At its core, the law of state responsibility is a system intended to provide legal recourse against a state to those injured by that state's violation of an international legal obligation.[101] The modern concept of state responsibility first took form following the tragedy of World War I, where activists sought to establish peaceful, legal means to resolve disputes between states to discourage states from resorting to armed conflict to resolve disputes (as had been the norm until that point in history).[102] State responsibility was one of the topics selected for codification by the League of Nations at the Hague Conference of 1930.[103] Tragically, like many efforts of the League of Nations, reality fell short of these lofty aspirations, and the League failed to codify any laws involving state responsibility.[104]

Following World War II, the U.N. again took up the challenge of establishing a system of state responsibility.[105] In 1948, the U.N. General Assembly established the International Law Commission (ILC) and directed the new body to deal with state responsibility among other topics.[106] The work of the ILC continued steadily in subsequent decades, culminating with the draft Articles on Responsibility of States for Internationally Wrongful Acts.[107] On December 12, 2001, the General Assembly adopted Resolution 56/83, confirming the completion of the ILC's work, and formally transmitting the articles to the governments of the U.N.'s member states for their consideration and implementation.[108]

101. *See* JAMES CRAWFORD, ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 8 (U.N. Audiovisual Libr. Int'l L. 2012), https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf [https://perma.cc/E7GA-UGJJ].

102. Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT'L & COMPAR. L.J. 821, 823–24 (1996).

103. Int'l L. Comm'n, *League of Nations Codification Conference*, U.N.: OFF. LEGAL AFFS., https://legal.un.org/ilc/league.shtml [https://perma.cc/5WZB-BVXL] (July 31, 2017).

104. *Id.*

105. *See* CRAWFORD, *supra* note 101, at 1.

106. *Id.*

107. *Id.*

108. G.A. Res. 56/83 (Dec. 12, 2001).

Article I provides that "[e]very internationally wrongful act of a [s]tate entails the international responsibility of that [s]tate."[109] This seems like a simple statement of principle; however, the interpretation and application of this principle is quite complex. This should not come as a surprise, given it took the ILC more than five decades to complete its work.[110] More than half of the articles discuss what in fact constitutes an "internationally wrongful act of a [s]tate."[111] For example, when is a wrongful act considered the act of the "the state," as opposed to the act of individuals?[112] If there is a wrongful act of the state, when is that act justified or excused?[113] Lastly, what is the scope of "international responsibility," or said differently, what are the consequences for the state's bad acts?[114] The articles lay this all out in excruciating detail.

C. *Application*

There are three basic elements to the law of state responsibility: (1) "the existence of an international legal obligation in force as between two particular states;" (2) the violation of such international obligation; and (3) "that loss or damage has resulted from [the violation of that obligation]."[115]

The following case before the ICJ demonstrates how these elements are applied in practice. In November 1979, a group of Iranian student militants seized the U.S. Embassy in Tehran and took more than 66 hostages, including members of the U.S. diplomatic staff.[116] The attack was carried out in apparent retaliation for the United States allowing the former Shah of Iran to enter the United States for medical treatment.[117] What may have started as an independent act by militants evolved into a protracted international crisis.[118] The Iranian government became involved in the dispute and directly confronted the United States. In April 1980, the United

109. *Id.* at art. 1.
110. *See id.*
111. *Id.* at art. 2.
112. *Id.* at arts. 4–5.
113. *Id.* at arts. 20–25.
114. *Id.* at arts. 28–39.
115. SHAW, *supra* note 1, at 591.
116. Annys Shin, *The 444-Day Iran Hostage Crisis Began 37 Years Ago*, WASH. POST (Nov. 10, 2016), https://www.washingtonpost.com/lifestyle/magazine/the-444-day-iran-hostage-crisis-began-37-years-ago/2016/11/08/9dc580f4-9482-11e6-bb29-bf2701dbe0a3_story.html [https://perma.cc/RF2K-JYER].
117. *Id.*
118. *Id.*

States launched a failed rescue attempt.[119] Negotiations between the countries persisted until finally, in January 1981, the remaining 52 hostages were released and the crisis came to an end.[120] Less known than the protracted negotiations and the failed rescue attempt were American efforts to seek legal recourse against Iran at the ICJ.[121] On November 29, 1979, less than a month following the seizure of the embassy, the United States instituted proceedings against Iran at the ICJ seeking "provisional measures" (in effect a preliminary injunction) ordering release of the hostages, return of the embassy property, and reparations for any injury suffered.[122] The Iranians refused to defend themselves before the court, though the Iranians wrote letters to the court arguing that the case was a "secondary" part of a larger and longstanding conflict resulting from persistent interference by the United States in Iranian affairs, and that the remedies sought by the United States were improper.[123] The ICJ considered the petition of the United States and ruled in its favor.[124] In applying the doctrine of state responsibility, the ICJ determined that: (1) Iran had clear obligations under international law to protect the U.S. embassy and diplomatic staff; (2) Iran violated these obligations; and (3) as a result of this violation, the Iranian government was required by international law to immediately restore the embassy property, release the hostages, and make reparations to the United States for its injuries.[125] It is worth noting that though Iran did not mount a defense, the ICJ considered on its own whether Iran should be held responsible for the actions of the student militants.[126] Though it could not be shown that Iran controlled the militants, the ICJ determined that Iran should be held responsible for their actions because it failed to prevent the attack, stop it before it reached completion, and force the militants to release the hostages.[127]

119. *Id.*

120. *Id.*

121. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 4–5 (May 24); *see United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran): Overview of the Case*, INT'L CT. JUST., https://www.icj-cij.org/en/case/64 [https://perma.cc/3KX8-4E84] [hereinafter *Overview of the Case*].

122. *Overview of the Case*, *supra* note 121.

123. U.S. v. Iran, 1980 I.C.J. at 8–9.

124. *Id.* at 41–42.

125. *Id.* at 44–45.

126. *Id.* at 8, 18, 20.

127. *Id*. at 42.

In applying the concept of state responsibility to the conflict in the Strait of Hormuz, this Part will first review the applicable international law governing state efforts to exercise control over the Strait of Hormuz. In doing so, this Part will review and evaluate the applicable doctrines of innocent and transit passage. Then, after establishing the applicable international laws at play, this Part will evaluate whether any of the alleged actions would constitute an "internationally wrongful act" of the Iranian state.

Two principal doctrines of international law must be considered in evaluating the legality of Iran's efforts to impede shipping traffic through the straits: the doctrine of "innocent passage" and the doctrine of "transit passage." While the doctrines are similar, there are important distinctions worth exploring.

The doctrine of innocent passage allows for a foreign flagged vessel to pass through territorial waters of a coastal state so long as the passage is "innocent."[128] This doctrine was developed under customary international law, as outlined in the *Corfu Channel* case, and was first codified by the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (1958 Geneva Convention) and later restated by the UNCLOS in 1982.[129] Under this doctrine, passage of shipping (but not airplanes) through the territorial waters of a coastal state is considered innocent so long as the passage "is not prejudicial to the peace, good order[,] or security of the coastal [s]tate."[130] The UNCLOS goes further to list 12 activities that are considered "prejudicial," many of which are military in nature.[131] This doctrine had the effect of allowing coastal states to restrict passage of foreign-flagged vessels through the territorial waters of a coastal state only during wartime.[132] During peacetime, regulatory rights of the coastal state are limited.[133] The UNCLOS does permit coastal states to adopt laws to regulate innocent passages so long as they fall within certain categories relating to safety, environmental protection, customs, and the maintenance of infrastructure.[134]

128. Oral, *supra* note 21.
129. *Id.*
130. UNCLOS, *supra* note 6, at art. 19(1).
131. *Id.* at art. 19(2).
132. Oral, *supra* note 21.
133. *Id.*
134. Law of the Sea, *Freedom of Navigation*, TUFTS UNIV., https://sites.tufts.edu/lawofthesea/chapter-three/ [https://perma.cc/4W99-ZADK].

In contrast to innocent passage, the doctrine of transit passage specifically applies only to straits.[135] "The right of transit passage is defined as the exercise of the freedoms of navigation and overflight, solely for the purpose of continuous and expeditious transit through an international strait . . . ."[136] The doctrine was developed as a compromise during the negotiation of the UNCLOS.[137] Many states sought to expand their territorial waters from 3 to 12 nautical miles.[138] As a result, territorial waters of the coastal states bordering the Strait of Hormuz and other straits would have been under "the more restrictive innocent passage regime."[139] This was of grave concern to the United States and other maritime powers who feared that this expansion of territorial waters would enable coastal states to unduly restrict shipping traffic through straits.[140] The resulting compromise of transit passage embodied in the UNCLOS preserved broad freedom of navigation through straits.[141] Under the doctrine of transit passage, coastal states have very limited rights to regulate traffic with respect to navigation safety, prevention of pollution, prohibiting fishing, and the unloading of any goods or persons within the coastal state.[142] Coastal states bordering straits are allowed to establish "sea lanes" (which have been implemented within the Strait of Hormuz).[143]

It is also important to note that with respect to military operations, innocent passage is far more restrictive than transit passage.[144] For example, under the doctrine of innocent passage, aircraft are not allowed overflight rights and submarines are required to surface and show their flags.[145] Transit passage does not impose these restrictions.[146] Additionally, naval vessels are not obligated to keep within established sea lanes under the doctrine of transit passage.[147]

135. *Id.*
136. *Id.*
137. Oral, *supra* note 21.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. Law of the Sea, *supra* note 134.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id*.

With the above in mind, we must now consider whether Iranian efforts to impede shipping through the Strait of Hormuz violate these principles of international law. To come to an answer, we need to carefully consider the precise action being taken by Iran. On May 12, 2019, four ships, including two Saudi Arabian oil tankers were attacked in the Persian Gulf, just outside of the Strait of Hormuz.[148] A month later similar incidents happened involving two tankers, one Norwegian and the other Japanese.[149] In each instance, U.S. officials said Iran was responsible for the attacks, which Iran denied.[150] Finally, on July 19, 2019, Iran "seized the British-flagged *Stena Impero* oil tanker, claiming that it was 'violating international maritime rules,'" though Iranian officials suggested that it was a response to the U.K.'s role in seizing an Iranian oil tanker off the coast of Gibraltar earlier in the month.[151]

Were these actions violations of international law? Iran has advanced some arguments that these actions were justified. For example, attacks on the six tankers during May and June of 2019 were carried out just outside of the Strait of Hormuz, where the more permissive doctrine of transit passage may not apply.[152] Moreover, Iran specifically denied involvement in these attacks, implying that they were undertaken by interests not under the direction or supervision of the Iranian government.[153] Likewise, in its defense of the seizure of the *Steno Impero*, Iranian representatives cited unspecified violations of maritime law to provide justification for its actions.[154] Nevertheless, it seems apparent that these most recent actions taken against shipping interests in the Strait of Hormuz were calculated to provide some cover under international law to what would otherwise be unlawful state acts.

148. Patrick Wintour, *Saudi Oil Tankers Show 'Significant Damage' After Attack – Riyadh*, GUARDIAN (May 13, 2019, 8:49 AM), https://www.theguardian.com/world/2019/may/12/uae-four-merchant-ships-reported-sabotaged [https://perma.cc/XD6Y-C3M9].

149. Vasco Cotovio, Helen Regan & Kara Fox, *Two Tankers Struck in Apparent Attack in Gulf of Oman*, CNN (June 13, 2019, 7:04 PM), https://www.cnn.com/2019/06/13/middleeast/sea-of-oman-tanker-intl/index.html [https://perma.cc/5ZZH-LK4B].

150. Helen Regan, *How the Oman Tanker Attack Played Out*, CNN (June 14, 2019, 6:07 AM), https://www.cnn.com/2019/06/14/middleeast/tanker-iran-us-timeline-intl-hnk/index.html [https://perma.cc/H8AD-GTLA].

151. Haynes, *supra* note 9 (quoting Iranian authorities).

152. *Id.*

153. *See* Regan, *supra* note 150.

154. Haynes, *supra* note 9.

While it may be understandable why Iran would try to lever its control of the Strait of Hormuz to fight back against international sanctions and efforts to isolate them, it is nevertheless clear that these actions violate the rights of transit passage under the UNCLOS and the rights of innocent passage under the 1958 Geneva Convention.[155] Iran could claim that since it has not ratified the UNCLOS and issued a signing statement asserting that only states ratifying the treaty could seek its benefits, that the doctrine of transit passage is not applicable to Iran. In fact, Iran does not recognize transit passage in its territorial waters at all.[156] While on its face this argument appears somewhat attractive, it seems unlikely that Iran would rely on such an argument because, if applied generally, it could deprive Iran itself of the benefit of transit passage through the straits and other shipping channels in the world. Iran could argue that the sanctions regime constitutes a prelude to armed conflict making the passage of certain shipping to be "non-innocent." However, this would not seem to justify attacks on entirely neutral flagged vessels. It is also worth noting that the United States and the U.N. have both gone to great lengths to promote free passage of commercial traffic through the straits during both the Iran-Iraq War and the Persian Gulf War, lending support for the argument that commercial traffic should continue unimpeded through the straits under the doctrine of transit passage.[157]

V. THE INTERNATIONAL LAW OF THE SEA

Of course, there is a treaty governing the law of the sea which shall be referred to herein as the UNCLOS, but because a number of maritime and coastal states are not parties—including both Iran and the United States—and because there is more than one treaty and customary international law which also apply, it is essential to outline the source or sources of the international law of the sea. The law of the sea both confines itself to and generates three main principles: freedom, sovereignty, and the common heritage of mankind.[158] This Article will concern itself with the first two of these principles.

There is no single legislature or other law-making body that can create international law which obliges all states to obey it.[159] Likewise, there is no

155. Nadimi, *supra* note 61.

156. *Id.*

157. *See* Oral, *supra* note 21.

158. TANAKA, *supra* note 46, at 47.

159. Jack Goldsmith & Daryl Levinson, *Laws for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1792, 1792–93 (2009).

court system that can impose its jurisdiction or order attendance of the parties in court.[160] This is because the international system is different from the municipal systems that most of us are accustomed to.[161]

Courts and commentators generally agree that the source (or sources) of international law is as set forth in Article 38(1) of the Statute of the International Court of Justice.[162]

Judges everywhere, in deciding cases, apply the law to the facts and reach a conclusion about how they apply to each other. Domestic court judges in France or Mexico know where to find the law they must apply in the case before them since they are educated in their national legal system. Article 38(1) was designed to tell judges on the ICJ where they should look for controlling law to apply in their cases; it says:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> > a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

160. *Id.*

161. Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 250–52 (1980). In this article, the authors say:

> The making of law is a decision function which may be conveniently described as prescription. By prescription, we refer to a process of communication which creates, in a target audience, a complex set of expectations comprising three distinctive components: expectations about a policy content; expectations about authority; and expectations about control.
>
> . . . .
>
> The concept of prescription is broader, and more precise, than the commonly used term, legislation. Legislation rests on an organic and structural conception, deriving from the assumption that law is made solely or primarily by centralized legislatures. This orientation is patently inadequate for the study of international law with its dearth of centralized legislative bodies.

162. TANAKA, *supra* note 46, at 11; J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION INTO THE INTERNATIONAL LAW OF PEACE 56 (6th ed. 1963). *See also* SHAW, *supra* note 1, at 52; Abdullahi v. Pfizer, Inc., 562 F.3d 163, 175 (2d Cir. 2009). There are, however, some commentators who question this strict adherence to the view that Article 38(1) is the primary or most important source of International Law. *See* BROWNLIE, *supra* note 52, at 5; EPPS, *supra* note 76, at ch. 1.

> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[163]

So the two primary sources are conventions and customary international law. The term "international conventions," as set forth in Article 38, refers also to its virtual synonym: treaties.[164] There are several treaties in connection with the international law of the sea; and conventions or treaties are fairly straightforward, textual in nature, and written down, evidencing the obligations of states.[165] Even though they are sometimes ambiguous, lending themselves to more than one interpretation,[166] one can easily read them and also ascertain who the contracting parties are. And pursuant to the Vienna Convention on the Law of Treaties, those who are signatories—that is, member states of a treaty regime—are bound to follow the obligations set forth in the treaty or convention.[167] It is interesting to note that neither Iran nor the United States are parties to the Vienna Convention on the Law of Treaties.

Customary international law is not always so easy to determine. Customary law comes from the practice and behavior of states.[168] Nevertheless, what states generally do represents "half of the equation needed to determine the obligations provided by customary international law. States must act in a certain way out of the belief that such acts are legally

163. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055.

164. Treaties can be called "Conventions, International Agreements, Pacts, General Acts, Charters . . . . Statutes, Declarations and Covenants." *See* SHAW, *supra* note 1, at 69.

165. *See generally* Vienna Convention on the Law of Treaties, Apr. 24, 1970, 1153 U.N.T.S. 331.

166. *Id.* at art. 32.

167. *Id.* at art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

168. *See* SHAW, *supra* note 1, at 73.

required; in other words, they must act under *opinio juris*."[169] So, it is actions plus *opinio juris* that evidence the law. [170]

When the Charter of the U.N. was initially signed in 1945, there were 50 signatories.[171] International law, because of its origins, was generally Eurocentric and broadly accepted as such.[172] Mostly for this reason, customary international law was developed by countries that, to a large degree, shared a common international legal tradition; they largely did things in a similar fashion on the international stage.[173] However, after 1945, with the moves by the U.N. General Assembly and others to recognize what was then termed the right to national self-determination,[174] a large number of former colonies became states, many joined the U.N., and many of these states did not wish to follow the Eurocentric notions of international law, and unless there was a binding treaty obligating them to some kind of action or behavior, they wished to go their own way.[175]

Nevertheless, where there is no binding treaty on a particular state with respect to a certain matter, customary international law continues to apply.[176] And, since the Vienna Convention codifies existing customary international law, the Vienna Convention is generally considered a reflection of customary international law by non-signatory states who consider themselves bound by it,[177] and by international and domestic tribunals who apply its terms even to treaties entered into decades before its creation.[178] "Today in the United States, where no treaty or 'executive or legislative act

169. Frederick V. Perry, *The Assault on International Law: Populism and Entropy on the March*, 46 SYRACUSE J. INT'L L. & COM. 59, 79 (2018).

170. *Opinio Juris* means that a state follows the behavior because it believes it to be a legal obligation. MARK WESTON JANIS, INTERNATIONAL LAW 49–52 (5th ed. 2008).

171. *Preparatory Years: UN Charter History,* U.N., https://www.un.org/en/about-us/history-of-the-un/preparatory-years#:~:text=The%20UN%20Charter%20was%20signed,UN's%20original%2052%20Member%20States [https://perma.cc/5DZJ-TG87].

172. SHAW, *supra* note 1, at 17–28.

173. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 59–61 (1990).

174. *See* U.N. Charter art. 1, ¶ 2; *see also* G.A. Res. 217, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 1514 (XV), at 66 (Dec. 14, 1960); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

175. SHAW, *supra* note 1, at 28–30.

176. Vienna Convention on the Law of Treaties, *supra* note 165, at art. 38.

177. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 12 (Cambridge Univ. Press 2d ed. 2007).

178. *Id.* at 12–13.

or judicial decision' to the contrary exists, courts can enforce customary international law."[179]

"Customary law has historically been the main source of international law, including the law of the sea."[180] Treaties, as has been stated, are certainly binding on the parties to the treaties, but rules of customary international law are generally accepted as "binding upon all [s]tates in the international community."[181] As an example, the ICJ in the *North Sea Continental Shelf* case said that customary law rules "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour."[182] Of course, the party relying on customary international law has the burden of finding it and proving its existence and control.[183]

Customary international law applies to new states—though they were not involved in its formulation—and when there are no applicable treaty provisions.[184] The only exception to such application is in the case of what is known as the "persistent objector," which is one who does not follow the custom and makes it broadly known that they do not agree with the requirement of nor the prudence of its observance.[185] Under this doctrine:

> [A] [s]tate which objects consistently to the application of a rule of law while it is still in the process of becoming such a rule may be able to 'opt out' of the application of the rule after it has acquired the status of a rule of general customary law.[186]

However, Tanaka, one of the primary experts on the law of the sea, questions the validity of such ability to opt out of a general customary norm,

179. Perry, *supra* note 169 (quoting Al-Qaisi v. U.S., 103 Fed. Cl. 439, 444 n.6 (2012) (emphasis omitted).

180. TANAKA, *supra* note 46, at 12.

181. *Id.*

182. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, 38–39 (Feb. 20).

183. For U.S. approach, see Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

184. TANAKA, *supra* note 46, at 12.

185. *Id.* at 15.

186. *Id. See also* Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18).

and believes the theory is difficult to accept and apply in both theory and practice.[187]

The law of the sea is one of the oldest domains of international law.[188] After all, the Dutch scholar Hugo Grotius, generally considered to be the father of modern international law,[189] was the person who, more than any other, pushed for freedom of the seas; he wrote extolling the virtues, the necessity of—and the legal principle of—freedom of the seas in 1609.[190] Now the needs and the issues have expanded.

> It emerges from the fact that [s]tates exercise sovereignty over territory and the conduct of activities taking place on or in the sea. Its historical development has been driven by political, economic, security, and, in more recent times, scientific and environmental issues. The evolution of technology and science plays a significant part. . . . The discovery of polymetallic nodules and of hydrothermal vents on the deep seabed has been at the root of the development of international law rules for areas and activities hitherto unregulated.[191]

In the twentieth century, the League of Nations began an attempt to codify the law of the sea in 1930 with the Hague Codification Conference.[192] The main issue the Conference concerned itself with was the territorial sea,[193] without reaching agreement. But they did produce a draft on The Legal Status of the Territorial Sea.[194] The obstacle to agreement was the

187. TANAKA, *supra* note 46, at 15. *But see* ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 41–42 (4th ed. 2010).

188. TANAKA, *supra* note 46, at 3.

189. SHAW, *supra* note 1, at 17. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE] (A.C. Campbell trans., Batoche Books 2001) (1625).

190. HUGO GROTIUS, MARE LIBERUM [THE FREE SEA] (David Armitage ed., Richard Hakluyt trans., Liberty Fund, Inc. 2004).

191. THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1 (Donald R. Rothwell et al. eds., Oxford Univ. Press 2015).

192. HUGO CAMINOS, THE LAW OF THE SEA xiii (Dartmouth Publ'g 2001).

193. The notion of the sovereignty of the coastal state over the territorial sea goes back at least to the Middle Ages. *See* David J. Bederman, *The Sea, in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 359, 363–65 (Bardo Fassbender et al. eds., Oxford Univ. Press 2012).

194. *The Hague Conference for the Codification of International Law (1930)*, INT'L INST. FOR L. SEA STUD. (Apr. 9, 2021), http://iilss.net/the-hague-conference-for-the-codification-of-international-law-1930/ [https://perma.cc/3P4L-DTDP].

breadth of the territorial sea.[195] The naval powers wanted a three-mile limit, which seemed to be losing favor.[196]

Later, the 1958 Geneva Convention on the law of the sea "divided the ocean into three basic categories: internal waters, territorial sea[,] and high seas. Internal waters and the territorial sea are subject to the territorial sovereignty of the coastal [s]tates."[197]

For years there was significant disagreement over the breadth of the territorial sea—at first it was the cannon-shot rule, but later it switched into the three-mile rule.[198] However, there was still much controversy, by the time of the 1982 Geneva Convention on the Territorial Sea, because of universal disagreement, and nothing was established in this regard.[199] Then, in the 1982 UNCLOS, the agreement was to allow all states to claim up to a 12-mile limit.[200] The law of the sea matter in question for this Article is the law regarding international straits, in particular the Strait of Hormuz.

VI. INTERNATIONAL STRAITS[201]

Under international law, at least two parties' rights and obligations are at play regarding international straits: those of the coastal state, which is bordered or touched by the strait, and the maritime—and often distant—state seeking passage through the strait for either commercial or military purposes.[202]

> Straits simultaneously involve interests both near and far. And it is that fact that makes passage through straits a difficult object of negotiations. Although all nations have an interest in efficient shipping, it is particular nations—often far from the straits—that have interests in the unimpeded movement of naval vessels or that directly or through their nationals have interests in the unimpeded movement of commercial vessels. Simultaneously, it is the states with coasts on these

195. TANAKA, *supra* note 46, at 27.

196. *Id.* at 28.

197. *Id.* at 30.

198. SHAW, *supra* note 1, at 422.

199. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 56, at arts. 3–4.

200. UNCLOS, *supra* note 6, at art. 3.

201. Sometimes the word "channel" or "sound" is used to refer to a strait. *Strait*, MERRIAM-WEBSTER, https://www.merriam-webster.com/thesaurus/strait [https://perma.cc/TBH6-CYLV].

202. *See* TANAKA, *supra* note 46, at 116–31.

> straits that most directly face the risks and other costs of such vessel passage. Negotiating solutions to this 'near-far' clash of interests is inherently difficult.[203]

The UNCLOS defines the characteristics of an international strait and creates the legal framework, which defines the rights and obligations of the coastal state and the freedoms of navigation corresponding to maritime states.[204] Unfortunately, perhaps, the UNCLOS does not specify how close or how far apart the water separating the two areas of land must be in order for the body of water to be considered a strait, or when the separating body of water ceases to be a strait and becomes a sea or an ocean or something else.[205] However, in the real world, what seems to matter is the fact that most bodies of water that separate land masses are called, and have been called, straits.[206] But the width of the strait does matter in the law for purposes of defining the rights of navigation within the strait.[207]

For all this, the world needed a specific regime for international straits. Maritime traffic always tried to use the shortest, safe route from port to port.[208] Often that entailed, or even required, using straits that connected one part of the high seas with another.[209] In modern times, the Strait of

203. David D. Caron, *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*, *in* NAVIGATING STRAITS: CHALLENGES FOR INTERNATIONAL LAW 11 (David D. Caron & Nilufer Oral eds., Brill Nijhoff 2014).

204. THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 118–19; *see also supra* Part III.

205. THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 119. For example, the Bering Strait, which separates Russia and the United States, is about 53 miles wide. *Bering Strait*, BRITANNICA, https://www.britannica.com/place/bering-strait [https://perma.cc/642X-M7RG]. The Fram Strait, separating the Arctic Ocean and the Greenland Sea, is roughly 260 miles at its narrowest point. Sina Löschke, *The Pulse of Heat in the North Atlantic*, ALFRED-WEGENER-INSTITUT, https://www.awi.de/en/focus/arctic-ocean/fram-strait.html [https://perma.cc/2PNH-M6MZ] (Feb. 28, 2018). The Florida Strait, connecting the Gulf of Mexico and the Atlantic Ocean (between Florida and Cuba), is roughly 60 miles wide at its narrowest and 100 at its broadest. *Strait of Florida,* SEA-SEEK (Apr. 6, 2012), https://www.sea-seek.com/en/strait-of-florida [https://perma.cc/4RBC-FUA2].

206. THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 119.

207. *Id.*

208. *Id.* at 115.

209. *Id.*

Gibraltar,[210] the Strait of Dover,[211] the Danish straits,[212] the Turkish Straits,[213] the Straits of Malacca and Singapore,[214] the Taiwan Strait,[215] the Strait of Juan de Fuca,[216] the Straits of Florida, and the Strait of Magellan[217] have all taken on significant political and commercial importance because of the

210. The Strait of Gibraltar separates Spain and Morocco, connecting the Atlantic Ocean and the Mediterranean Sea. *Strait of Gibraltar,* BRITANNICA, https://www.britannica.com/place/Strait-of-Gibraltar [https://perma.cc/RH3X-WD2C]. At its narrowest point, the strait is 8 miles wide. *Id.*

211. The narrowest part of the English Channel, the Strait of Dover (in French the *Pas de Calais)* separates Great Britain from Europe and at its narrowest is 18 miles in width. *Strait of Dover*, BRITANNICA, https://www.britannica.com/place/Strait-of-Dover [https://perma.cc/9V34-5UJE].

212. The Danish straits connect the Baltic Sea and the North Sea. These straits are critical to the European crude oil and petroleum trade. *See* Lejla Villar & Mason Hamilton, *The Danish and Turkish Straits Are Critical to Europe's Crude Oil and Petroleum Trade*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (Aug. 18, 2017), https://www.eia.gov/todayinenergy/detail.php?id=32552 [https://perma.cc/6ET6-KUQJ].

213. *See* André Gerolymatos, *The Turkish Straits: History, Politics, and Strategic Dilemmas*, 28 OCEAN Y.B. 58 (2014). The Turkish Straits connect the Aegean and Mediterranean Seas to the Black Sea, and consist of the Dardanelles (.75-mile-wide) and Bosporus (or Bosphorus) (2,300 feet wide), at opposite ends of the Sea of Marmara. They divide European-Turkey from Asian-Turkey. *Id.*

214. The Strait of Singapore is a 105-mile-long waterway connecting the Strait of Malacca in the west and the South China Sea in the east separating Singapore and Indonesia. Vernon Cornelius-Takahama, *Singapore Strait*, SING. INFOPEDIA (2015), https://eresources.nlb.gov.sg/infopedia/articles/SIP_969_2005-01-19.html [https://perma.cc/M68Q-MDMS]. It is 9.9 miles wide at its narrowest. *Id.* The Strait of Malacca, to the west of the Strait of Singapore, is a 550-mile-long waterway between Malaysia and the Indonesian island of Sumatra; the minimum width is 1.7 miles. *Id.* Together they represent the main shipping channel between the Pacific Ocean and the Indian Ocean. *Id.*

215. The Taiwan Strait (the mainland Chinese call it Strait of Fukien or Fujian) is a 100-mile-wide strip of water between mainland China and the island of Taiwan. *Taiwan Strait*, BRITANNICA, https://www.britannica.com/place/Taiwan-Strait [https://perma.cc/UW2C-HQ2B]. It connects the South China Sea (of which it is considered a part) and the North China Sea. *Id.*

216. A 96-mile-long passage of water, 12 to 25 miles wide, which is the outlet to the Pacific Ocean for the Salish Sea. *Strait of Juan de Fuca*, WORLDATLAS, https://www.worldatlas.com/straits/strait-of-juan-de-fuca.html [https://perma.cc/4YTK-3ZPQ]. The boundary between the United States and Canada runs down the center of the strait. *Id.*

217. *Strait of Magellan*, BRITANNICA, https://www.britannica.com/place/strait-of-magellan [https://perma.cc/7XGR-RV7Z]. The Strait of Magellan separates mainland South America to the north and Tierra del Fuego to the south. *Id.* At its narrowest point, the strait is 1.2 miles in width. *Id.*

volume of maritime traffic passing through them.[218] For a very long time, a successful international treaty regarding the passage through straits was elusive.[219] However, there was a successful international conference in 1936 to define the legal regime associated with the Straits of the Dardanelles, the Sea of Marmora, and the Bosporus Strait, with a view both to providing security to Turkey and the other bordering states, as well as to recognize the right of transit by the ships of foreign states.[220] The treaty recognized the right of free passage of commercial vessels in peacetime and restricted the passage of naval vessels, requiring notification to the coastal states.[221]

After World War II, global economic expansion occurred at the same time that the modern law of the sea developed.[222] The sea was the highway for world commerce, and there were four Geneva Conventions on the law of the sea in 1958 and later the UNCLOS in 1982.[223] During this period, new maritime zones were recognized as was the expansion of the width of the territorial sea.[224] Customary international law has always recognized a regime for straits, though it was not until 1949 with the *Corfu Channel* case that the ICJ formally recognized the special role and the regime of straits in customary international law.[225] The case was about the passage of British warships through the Albanian territorial sea in the strait and declared:

> It is, in the opinion of the [c]ourt, generally recognized and in accordance with international custom that [s]tates 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 [s]tate, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal [s]tate to prohibit such passage through straits in time of peace.[226]

218. *See* THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, 114–15.

219. *See id.* at 116.

220. Convention Regarding the Regime of the Straits, Dec. 11, 1936, 173 L.N.T.S 213.

221. *Id.*

222. *See* THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 10.

223. *Id.* at 13–16; UNCLOS, *supra* note 6.

224. UNCLOS, *supra* note 6, at art. 58 (listing an example of an exclusive economic zone (EEC)); *see* THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 115.

225. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

226. *Id.* at 28.

While the court in *Corfu Channel* characterized the passage of the British warships as "innocent," it did not define innocent passage.[227] The term was later defined in 1958 by the Geneva Convention on the Territorial Sea and the Contiguous Zone (CTS)[228] which generally reflects customary international law.[229] The United States signed and ratified the treaty.[230] Iran has signed it, but not ratified it.[231] The treaty defined innocent passage as:

> 1. Subject to the provisions of these articles, ships of all [s]tates, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
>
> 2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
>
> 3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.
>
> 4. Passage is innocent so long as it is not prejudicial to the peace, good order[,] or security of the coastal [s]tate. Such passage shall take place in conformity with these articles and with other rules of international law.
>
> 5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal [s]tate may make and publish in order to prevent these vessels from fishing in the territorial sea.
>
> 6. Submarines are required to navigate on the surface and to show their flag.[232]

The treaty does not permit the coastal state to hamper innocent

227. *See generally id.*

228. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 56, at art. 14.

229. BROWNLIE, *supra* note 52, at 186–89.

230. *See* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 56, at arts. 1–2.

231. *See id.*

232. *Id.* at art. 14.

passage through its territorial sea,[233] and requires the coastal state to provide notice of any dangers to navigation of which it is aware.[234]

But as mentioned above, there is a need for a reconciliation of the desires and rights of the maritime states and those of the coastal states bordering the strait.[235] Accordingly, the CTS also provided:

> 1. The coastal [s]tate may take the necessary steps in its territorial sea to prevent passage which is not innocent.
>
> 2. In the case of ships proceeding to internal waters, the coastal [s]tate shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.
>
> 3. Subject to the provisions of paragraph 4, the coastal [s]tate 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.
>
> 4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign [s]tate.[236]

Since many straits are in the territorial waters of the coastal states, there are some controls: "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal [s]tate in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation."[237] The foregoing rights, obligations, and restrictions apply to all ships, not simply merchant ships.[238]

By the time the next UNCLOS convened, the law respecting claims on territorial sea had expanded from 3 nautical miles (the traditional cannon-

233. *Id.* at art. 15.
234. *Id.*
235. *See supra* Part IV.C.
236. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 56, at art. 16.
237. *Id.* at art. 17.
238. *Id.* at art. 14.

shot approach) or less to many states claiming 12 nautical miles from their coasts' baseline.[239]

> For centuries states had disagreed about the breadth of the territorial sea. The Western industrialized states had generally claimed three nautical miles, the Scandinavian countries had claimed four nautical miles and certain South American countries had claimed up to two hundred nautical miles. Before the 1982 Convention, which for the first time permitted coastal states to claim up to two hundred nautical miles as an exclusive economic zone, the territorial sea was seen primarily in security terms or in terms of providing and exclusive fishing zone for the coastal state. . . . Once it was clear that the 1982 Convention was going to have a provision for a much expanded exclusive fishing (and other resources) zone it was easier to reach the compromise of twelve nautical miles as the breadth of the territorial sea.[240]

This also presented a potential problem, however. With the expansion of the territorial sea, over which the coastal state has sovereignty[241]—though the exercise of that sovereignty is subject to the Convention and to other rules of international law, so there are some restrictions[242]—international straits were now often completely within the territorial sea of the coastal states.[243] For example, "there are 52 international straits less than 6 [nautical miles] in width, 153 international straits between 6 and 24 [nautical miles] in width, and 60 other international straits in excess of 24 [nautical miles]."[244] This means not only that many international straits fall within the territorial sea of the coastal states, but also that the jurisdiction of more than one state overlaps with respect to many straits, as in the case of the Strait of Hormuz, which has a minimum width of 21 nautical miles.[245]

239. The baseline is the standard point from which the territorial sea extends seaward. Generally, the baseline "for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal [s]tate." UNCLOS, *supra* note 6, at art. 3.

240. EPPS, *supra* note 76, at 183–84 (citations omitted).

241. UNCLOS, *supra* note 6, at art. 3.

242. *Id.* at arts. 4–7.

243. This of course means that many international straits are not in the strictest sense "international" since they are the sovereign territory of the coastal state or states. They are international only inasmuch as they represent an "international highway."

244. OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 119 (citing ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 207–08 (A.R. Thomas & J.C. Duncan eds., 1999)).

245. EIA II, *supra* note 4.

The right of ships to navigate through an international strait is slightly different from their right to navigate through the territorial sea of a coastal state. A ship enjoys the right of innocent passage through the territorial sea and the right of transit passage through the international strait unless the strait is wide enough for a strip of the high seas to exist down the middle of the strait.[246] Very wide straits, those which exceed twice the claimed territorial sea of the two coastal states, do have a strip of high seas in the strait, between the territorial seas of such coastal states.[247] The United States is not a party to the UNCLOS, but has continually sought to uphold the regime of transit passage through international straits (under the notion that the UNCLOS also represents customary international law).[248]

For "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,"[249] "all ships and aircraft enjoy the right of transit passage, which shall not be impeded."[250] For purposes of this provision:

> Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a [s]tate bordering the strait, subject to the conditions of entry to that [s]tate.[251]

A ship or aircraft engaged in transit passage is obligated as follows:

1. Ships and aircraft, while exercising the right of transit passage, shall;

(a) proceed without delay through or over the strait;

(b) refrain from any threat or use of force against the sovereignty, territorial integrity[,] or political independence of [s]tates bordering the

246. *See* UNCLOS, *supra* note 6, at art. 35.

247. Frank Nolta, Comment, *Passage Through International Straits: Free or Innocent? The Interests at Stake,* 11 SAN DIEGO L. REV. 815, 819 (1974).

248. *See* William L. Schachte, Jr. & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms,* 33 VA. J. INT'L L. 527, 548–49 (1993).

249. UNCLOS, *supra* note 6, at art. 37.

250. *Id.* at art. 38.

251. *Id.*

> strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
>
> (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
>
> (d) comply with other relevant provisions of this Part.
>
> 2. Ships in transit passage shall:
>
> (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
>
> (b) comply with generally accepted international regulations, procedures[,] and practices for the prevention, reduction[,] and control of pollution from ships.
>
> 3. 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.[252]

VII. THE RIGHTS OF COASTAL STATES OVER TERRITORIAL WATERS

Under the UNCLOS, the territorial sea is under the sovereign control, and in fact belongs to, the coastal state.[253] And that territorial sea extends up to a distance not to exceed 12 nautical miles.[254] The territorial sea is an

252. *Id.* at art. 39.

253. *Id.* at art. 2.

254. *Id.* at art. 3. The UNCLOS allows states to claim up to this limit; some claim 3, some more, but none are allowed more than 12. Around 137 states who are parties to the UNCLOS have claimed 12 miles, around 10 states who are parties have claimed less than 10. TANAKA, *supra* note 46, at 103.

extension of the land of a state,[255] and the sea is under its exclusive control.[256] This exclusive control, and the 12-mile limit, are now also considered to be customary international law,[257] and as such, binding on all, even non-parties to the UNCLOS.[258] That control is, however, subject to limits set by the UNCLOS and other rules of international law.[259] And one of those limits is the right of innocent passage.[260] Transit passage arguably gives a vessel more rights of passage.

VIII. IRAN STOPS SHIPPING IN THE STRAIT

More than 20 percent of the world's oil and petroleum products, and more than 25 percent of the world's natural gas flow through the Strait of Hormuz.[261] And even though Iran's bellicose activities in the Strait of Hormuz seem to be targeted at the United States and the West in general in response to sanctions,[262] most of the oil that flows through the strait goes to Asia, and especially China,[263] a country friendly to the Iranian regime.[264]

Iran has on more than one occasion used force against commercial vessels and, in the case of the United States, against warships.[265] Iran has "arrested" foreign commercial ships, stopped, damaged, and destroyed

255. *Judicial Decisions Involving Questions of International Law*, 4 AM. J. INT'L L. 204, 231 (1910).

256. TANAKA, *supra* note 46, at 103.

257. *Id.*

258. *See id.* at 12–15.

259. *Id.* at 104–05.

260. *Id*.

261. EIA II, *supra* note 4.

262. *'We Will Not Tolerate It': U.S. Talks Tough with Iran over Threat to Close Oil Shipping Lane Following Nuclear Arms Row,* DAILY MAIL, https://www.dailymail.co.uk/news/article-2079287/Iran-threatens-close-key-oil-shipping-lane-Strait-Hormuz-US-sanctions.html [https://perma.cc/RT3L-UFUY] (Dec. 29, 2011, 8:20 AM).

263. EIA II, *supra* note 4 ("EIA estimates that 76 [percent] of the crude oil and condensate that moved through the Strait of Hormuz went to Asian markets in 2018. China, India, Japan, South Korea, and Singapore were the largest destinations for crude oil moving through the Strait of Hormuz to Asia, accounting for 65 [percent] of all Hormuz crude oil and condensate flows in 2018.").

264. *See China to Continue Friendly Relations with Iran*, ISLAMIC REPUBLIC NEWS AGENCY (Sep. 4, 2019, 11:50 PM), https://en.irna.ir/news/83465700/China-to-continue-friendly-relations-with-Iran [https://perma.cc/XB66-5PG9].

265. Kraska, *supra* note 21*,* at 333.

foreign commercial ships, and threatened and damaged foreign and U.S. warships passing through the Strait of Hormuz.[266] Is such activity lawful?

IX. THE USE OF FORCE[267]

The very first principle of relations among Member States of the U.N. is set forth in Article I of the Charter:

> The Purposes of the U.N. are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.[268]

We can break down the use of force as it relates to the matters in question here, into at least four categories: (1) the use of force under the Charter of the U.N.; (2) the use of force under the Law of the Sea; (3) the use of force under customary international law; and (4) the law of aggression.

266. *Id.* at 332–35; Bagheri, *supra* note 26, at 99.

267. For purposes of this Article, the term "use of force" refers to the use of armed force.

268. U.N. Charter art. 1, ¶¶ 1–4.

In analyzing the current state of the law regarding the use of force,[269] one must start with the Charter of the U.N., which outlaws the use of force except in only two situations: (1) if the Security Council authorizes the use of force in order to "maintain or restore international peace and security[,]"[270] or (2) unless it's for self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security."[271] In this language, the Charter is clearly recognizing customary international law, inasmuch as it refers to an "inherent right" of self-defense, one that already exists, and that is not set forth in a treaty.[272] Aside from the foregoing, the use of force is outlawed: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[273] The use of force would be action in a "manner inconsistent with the Purposes of the United Nations."[274]

269. The vast majority of the states in the world in 1928 entered into the Kellogg-Briand Pact, known as the Paris Peace Pact, pursuant to which they renounced war. The operative language is:

> *Article I.* The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another. *Article II.* The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

This treaty is still in effect. *See* BROWNLIE, *supra* note 52, at 730–31; *see also* James M. Lindsay, *TWE Mailbag: Is the Kellogg-Briand Pact Still in Effect?*, COUNCIL ON FOREIGN RELS. (Sep. 7, 2011, at 7:11 PM), https://www.cfr.org/blog/twe-mailbag-kellogg-briand-pact-still-effect [https://perma.cc/64T3-HSAM]. The treaty provided the basis for the conviction and execution of defendants in the Nuremberg War Crimes trials and in the Tokyo War Crimes trials, and it provided inspiration for the Charter of the United Nations. *See* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 212–14 (Simon & Schuster 2017) (referring to the Kellogg-Briand Pact as the "Peace Pact").

270. U.N. Charter art. 42.

271. U.N. Charter art. 51.

272. *See id.*; *see also* Perry, *supra* note 169, at 78 (stating that customary law is not written).

273. U.N. Charter art. 2, ¶ 4.

274. *Id.*

X. REPRISAL OR SELF-DEFENSE?

Can the Iranians attribute their actions in the Strait of Hormuz to legally justified reprisals? Although the language of the U.N. Charter is neither broad nor clear, international lawyers and states alike acknowledge a right of self-defense,[275] and normally—no matter the circumstances—when states do use force, they use self-defense as a justification.[276]

> Commentators agree on a few, basic, uncontroversial principles on self-defen[s]e in response to an armed attack: necessity and proportionality mean that self-defen[s]e must not be retaliatory or punitive; the aim should be to halt and repel an attack. This does not mean that the defending state is restricted to the same weapons or the same numbers of armed forces as the attacking state; nor is it necessarily *limited to action on its own territory*.[277]

Additionally, self-defense now includes the use of force against states that freely shelter or support terrorists.[278]

Reprisals are defined as acts which are illegal but used by one state in retaliation for a previously carried out illegal act by another state.[279] Reprisals have to be peaceful, and generally the state engaging in reprisal is entitled to engage in the action only after not receiving satisfaction and after telling the other state of its intended actions.[280] And the use of force in reprisal is unlawful,[281] and it has been condemned by the Security Council as "incompatible with the purposes and the principles of the United Nations."[282]

275. Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259–63 (1989).

276. *Id.* at 259; *see, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 176 (June 27).

277. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 159–60 (Oxford Univ. Press 4th ed. 2018) (emphasis added).

278. MICHAEL BYERS, WAR LAW 67 (2005); *see also* S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1378 (Nov. 14, 2001).

279. SHAW, *supra* note 1, at 859.

280. MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 233–36 (2008) (citing OMER YOUSIF ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW 6–12 (Oxford Univ. Press 1988)).

281. *See* G.A. Res. 2625 (XXV), The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, ¶ 1 (Oct. 24, 1970).

282. S.C. Res. 188, ¶ 10 (Mar. 28, 1964).

> The difference between the two forms of self-help [that is, between self-defense and reprisal] lies essentially in their aim or purpose. Self-defense is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence—upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection.[283]

An example of Security Council action authorizing the use of force under Article 42 of the U.N. Charter is Security Council Resolution 678, after the Iraqi invasion and occupation of Kuwait, which authorized states to work with Kuwait "to use all necessary means" to get rid of the Iraqi troops and "to restore international peace and security[,]"[284] the United States used self-defense as its reason for invading Afghanistan after the Al-Qaeda attacks of September 11, 2001,[285] and Security Council resolutions appeared to allow for such action.[286]

But could Iranian action against foreign shipping in the Strait of Hormuz be lawfully based on some notion of self-defense, for example: anticipatory or preemptive self-defense? In order to argue that this is so, one must resort to a conception of customary international law, since the language of Article 2 of the U.N. Charter does not provide for it and appears to outlaw it:

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

283. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972).

284. S.C. Res. 678 (Nov. 29, 1990).

285. *See* Permanent Rep. of United States of America to the U.N., Letter Dated Oct. 7, 2001 from the Permanent Rep. of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), https://digitallibrary.un.org/record/449476?ln=en [https://perma.cc/CYJ8-3UB6].

286. *See* BYERS, *supra* note 278, 56–67.

> independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[287]

XI. SELF-DEFENSE

The only way to justify the use of force outside Security Council sanction is to argue self-defense.[288] To do that, one must define the action in terms of the customary international law of self-defense.[289] The concept that customary international law allows for anticipatory self-defense in the modern sense likely dates back to its articulation in the case of the *Caroline* in 1837.[290] The *Caroline,* a U.S. ship that had been used to supply arms to an armed rebellion in Canada, was seized and destroyed by British armed forces in U.S. territory; sailors were killed.[291] The U.S. Secretary of State, Daniel Webster, sent a letter of protest to the British government, demanding that the British government show:

> [N]ecessity of self-defen[s]e, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities in Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defen[s]e, must be limited by that necessity, and kept clearly within it.[292]

The British government, in its response to Webster, did not dispute the principles laid down by Webster.[293] Thereafter, during the nineteenth century, this notion of self-defense justification was broadly accepted, and political leaders used the terms "self-preservation," "self-defense," "necessity," and "necessity of self-defense" interchangeably.[294] In that time, in other words, the idea was self-preservation.[295] It is unclear whether the law

287. U.N. Charter art. 2, ¶¶ 3,4.

288. *See id.* art. 51.

289. BROWNLIE, *supra* note 52, at 733–34; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 1–21 (Dec. 19).

290. BROWNLIE, *supra* note 52, at 733–34.

291. *Id.*

292. *Id.* at 734 (quoting Letter from Daniel Webster to Henry Stephen Fox (Apr. 24, 1841), *in* 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841–1843 (Kenneth E. Shewmaker, Kenneth R. Stevens & Anita McGurn eds., 1983)).

293. *Id.*

294. *Id.*

295. *See id.*

of self-defense continued with such flexibility up until 1945, the time of the Charter.[296]

The ICJ has been judicious, hesitant, and critical in accepting the argument that states actually did engage in either collective self-defense[297] or individual self-defense.[298]

Maritime disputes between Iran and the United States in this region are not new. During the Iran–Iraq war (1980–1988), both Iran and Iraq attacked commercial and military vessels of various nationalities in the Persian Gulf.[299] Kuwait, a neutral, asked various countries to re-flag its vessels for protection.[300] Eleven were flagged by the United States, and in 1987, the United States provided naval escorts in the Persian Gulf to all U.S. flagged vessels.[301] Other countries did the same.[302] Nonetheless, a number of vessels and naval ships were attacked.[303] One such vessel carrying the U.S. flag was hit by a missile in October 1987, while in Kuwaiti waters.[304] After its determination that Iran was responsible, U.S. forces warned two Iranian oil platforms to evacuate, and then attacked them.[305] At the same time the United States sent a letter to the Security Council, claiming it was acting in self-defense under Article 51 of the Charter, claiming those platforms had been used for military purposes.[306]

Then, "on April 14, 1988, the U.S. naval vessel USS Samuel B. Roberts was struck by a mine in international waters" in the Persian Gulf.[307] A few days later, after once more determining that Iran was responsible, U.S. forces, again after evacuation warning, attacked two more Iranian oil platforms, and then for a second time, sent a letter to the Security Council.[308]

296. *Id.*

297. *See, e.g.,* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 35 (June 27).

298. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 106–46 (Dec. 19).

299. William H. Taft, IV, *Self-Defense and the* Oil Platforms *Decision,* 29 YALE J. INT'L L. 295, 296–97 (2004).

300. *Id.* at 296.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 296–97.

306. *Id.* at 297.

307. *Id.*

308. *Id.*

As a result, in 1992, Iran filed the *Oil Platforms Case* against the United States.[309] The court found that there was insufficient evidence to show that Iran had caused or initiated the attacks, and the United States' attacks on the oil platforms were not necessary; and even if Iran were responsible, the destruction by the United States of two Iranian frigates and other naval vessels and aircraft were out of all proportion to the mining and damage of a single vessel.[310]

In consequence, "The concepts of necessity and proportionality are at the heart of self-defense in international law."[311] What is necessary and what is proportionate will always depend on the circumstances.[312] The state claiming self-defense has the burden of proof in these matters.[313]

A further issue surrounds the matter of preemptive or anticipatory self-defense. The clear language of the Charter appears not to allow such action, since it allows self-defense only "if an armed attack occurs against a Member. . . ."[314] Some states, however, have expanded this permission. On June 8, 1981, Israeli warplanes destroyed the Iraqi atomic reactor Osirak near Baghdad, claiming preemptive self-defense.[315] A unanimous U.N. Security Council resolution condemned the raid.[316] Then, in 2007 Israeli warplanes destroyed a nuclear reactor in Syria, claiming the same reasoning, but only when the raid was disclosed some ten years later.[317]

309. *Id*.

310. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 77 (Nov. 6).

311. SHAW, *supra* note 1, at 868.

312. *See id.* at 862–63.

313. *Id.* at 862 (citing Iran v. U.S., 2003 I.C.J. at ¶ 57).

314. U.N. Charter art. 51.

315. David K. Shipler, *Israeli Jets Destroy Iraqi Atomic Reactor; Attack Condemned by U.S. and Arab Nations,* N.Y. TIMES (June 9, 1981), https://www.nytimes.com/1981/06/09/world/israeli-jets-destroy-iraqi-atomic-reactor-attack-condemned-us-arab-nations.html [https://perma.cc/SF46-SQC5].

316. S.C. Res. 487, ¶ 1 (June 19, 1981).

317. Stephen Farrell, *Israel Admits Bombing Suspected Syrian Nuclear Reactor in 2007, Warns Iran*, REUTERS (Mar. 20, 2018, 10:30 AM), https://www.reuters.com/article/us-israel-syria-nuclear/israel-admits-bombing-suspected-syrian-nuclear-reactor-in-2007-warns-iran-idUSKBN1GX09K [https://perma.cc/6GCB-86PG].

In March 2003, the United States attacked Iraq,[318] justifying the attack on this new doctrine, which at the time many believed to be of its own invention: preemptive self-defense.[319] The U.N. Security Council refused to sanction the invasion, and Germany, France, and Russia opposed it, saying it would not be lawful.[320] The Parliament of India passed an anti-war resolution at the time.[321] Before the Iraq invasion, some had defended the notion of preemptive self-defense when an attack was imminent, but the preemption doctrine, announced by the United States,[322] stretched that doctrine beyond recognition and beyond any reasonable prohibition of the use of force.[323]

Indeed, some view this new U.S. view of self-defense as wrongheaded, and believe that the "willingness to use force to address 'emerging threats before they are fully formed' takes the already controversial doctrine of anticipatory self-defense a step further into the realm of subjectivity and

318. David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein,* N.Y. TIMES (Mar. 20, 2003), https://www.nytimes.com/2003/03/20/world/threats-responses-white-house-bush-orders-start-war-iraq-missiles-apparently.html; *'Shock and Awe' Campaign Underway in Iraq,* CNN (Mar. 22, 2003, 3:58 AM), https://edition.cnn.com/2003/fyi/news/03/22/iraq.war/ [https://perma.cc/M62F-HAP8].

319. President George W. Bush said that waiting for the Iraqi menace to further develop and be carried out would be "suicide," and that "[a] change in the current Iraqi regime would eliminate an important source of support for international terrorist activities." Sanger & Burns, *supra* note 318. The regime then claimed that earlier Security Council resolutions authorized the use of force in this instance. *Id.* On March 22, 2003, Donald Rumsfeld, U.S. Secretary of Defense, declared that some of the objectives of the invasion "included defending Americans against Iraq's alleged weapons of mass destruction, ridding the Gulf country of such illegal weapons, liberating the Iraqi people, and ending the regime of Iraqi President Saddam Hussein." *'Shock and Awe' Campaign Underway in Iraq*, *supra* note 318.

320. Jon Henley, Gary Younge & Nick Paton Walsh, *France, Russia and Germany Harden Stance*, GUARDIAN (Mar. 6, 2003, 3:39 AM), https://www.theguardian.com/world/2003/mar/06/russia.iraq [https://perma.cc/YYA2-879D].

321. *India Passes Antiwar Resolution,* CNN (Apr. 8, 2003, 9:28 AM), https://www.cnn.com/2003/WORLD/asiapcf/south/04/08/india.iraq/index.html [https://perma.cc/2YAC-HEHR].

322. *See* George W. Bush, *V. Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*, WHITE HOUSE PRESIDENT GEORGE W. BUSH (June 1, 2002), https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/print/nss5.html [https://perma.cc/L7RQ-K5PA].

323. *See* Lori Fisler Damrosch & Bernard H. Oxman, Editors' Introduction, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553, 555 (2003); *see also* EPPS, *supra* note 76, at 406–07.

potential danger."[324] Accordingly, defending a policy of preemptive self-defense in an international tribunal may be difficult, and as already pointed out, courts are wary even of the self-defense justification for the use of force. And "almost all uses of anticipatory self-defen[s]e . . . were condemned" by the Security Council, suggesting "the weakness of such a doctrine."[325]

XII. THE RIGHTS AND OBLIGATIONS OF COASTAL STATES RESPECTING INTERNATIONAL STRAITS

The UNCLOS gives the coastal state certain rights of control of passage in the strait to which the transit vessel must adhere, and the transit vessel has certain other general obligations.[326] These obligations include:

> (a) proceed without delay through or over the strait;
>
> (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of [s]tates bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
>
> (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
>
> (d) comply with other relevant provisions of this Part.[327]

Further, the UNCLOS requires transit vessels to comply with general international maritime regulations,[328] refrain from carrying out research or surveys without prior authorization of the coastal states,[329] respect applicable sea lanes,[330] and comply with the law and regulations enacted by the bordering states respecting transit passage.[331] These can include "customs

324. Miriam Sapiro*, Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 599 (2003) (quoting Bush, *supra* note 322). *But see id.* at 600–03 (discussing differing views on preemptive self-defense, including the view of the U.S. government at the time).

325. GRAY, *supra* note 277, at 128.

326. *See* UNCLOS, *supra* note 6, at art. 39, ¶ 1.

327. *Id.*

328. *Id.* at art. 39, ¶ 2.

329. *Id.* at art. 40.

330. *Id.* at art. 41, ¶ 7.

331. *Id.* at art. 21, ¶ 1.

[regulations], fiscal, immigration, . . . sanitary[,]"[332] and environmental laws.[333]

The coastal states must publish such laws and regulations, which cannot discriminate among foreign ships or "have the practical effect of denying, hampering[,] or impairing the right of transit passage. . . ."[334] The right of enforcement includes violations of maritime safety, traffic regulations, and environmental laws,[335] as well as the foregoing customs, fiscal, immigration, and sanitary laws.[336] The question becomes: how does the coastal state do that? To what extent may they enforce these laws, some of which are municipal and some international? Who determines that an actual violation has taken place?

According to Tanaka, one of the foremost authorities on the law of the sea, the cumulative effect of the principles set forth in the UNCLOS "seems to suggest that [s]tates bordering straits are not allowed to directly deny the right of transit passage merely on grounds of breach of their municipal law."[337] However, the UNCLOS does allow coastal states to enforce violations of environmental laws and regulations respecting safety of navigation and maritime traffic.[338] If these violations occur, "the [s]tates bordering the straits may take appropriate enforcement measures. . . ."[339] But the UNCLOS does not clarify the level of enforcement measures a coastal state may take.[340] What, in other words, is appropriate?

Another view on the use of force in connection with rights of enforcement is that of Professor Donald R. Rothwell. He believes that there can be multiple scenarios.[341] For example, if a vessel is in breach of the requirements of transit passage and its activities are threatening to the coastal state, or it is not engaging in "normal mode" passage, a coastal state does have its right of self-defense under international law and could rely on that right to counteract a hostile action by a transiting vessel.[342] And,

332. *Id.* at art. 21, ¶ 1(h).
333. *See generally id.* at arts. 41, 42.
334. *Id.* at art. 42, ¶ 2.
335. *Id.* at art. 233.
336. *Id.* at art. 21, ¶ 1.
337. TANAKA, *supra* note 46, at 127.
338. UNCLOS, *supra* note 6, at art. 42.
339. *Id.* at art. 233.
340. THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 123.
341. *Id.*
342. *Id*.

according to Professor Rothwell, a coastal state can prohibit passage to a ship that is not "engaging in transit passage in conformity with Part III" of the UNCLOS.[343] The right of transit does not include the right or obligation on the part of the maritime state to patrol the strait.[344] At times it appears that this is what the U.S. warships have attempted, unless it can be argued that the action is in defense of nationals or in collective self-defense.[345]

Transit vessels found in violation of the criminal laws of the coastal state within the coastal state's territorial sea are within the sovereign jurisdiction of the coastal state.[346] There is a limited right to board a ship in such case.[347]

This is because, as stated, a state may enforce such laws in the territorial sea,[348] and the Strait of Hormuz is within the territorial sea of the coastal states, since it is so narrow.[349] If a coastal state attempts to enforce its criminal laws, what if the offending vessel flees, leaving the strait or territorial sea toward and into the high seas? "Hot pursuit is the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing [s]tate committed by the vessel within the marine spaces under the pursuing [s]tate's jurisdiction."[350]

In order to engage in hot pursuit, the competent authorities of the coastal state must have good reason to believe that the ship has violated the laws and regulations of that state.[351] It can only commence after the authorities of the coastal state have notified the offending vessel before pursuit, and it must commence in waters under the jurisdiction of the coastal state or its contiguous zone.[352] The pursuit must be continuous after it leaves

343. *Id.; see supra* Part III (outlining the legal regime for International Straits).

344. *See* UNCLOS, *supra* note 6, at art. 38.

345. *See* Taft, *supra* note 299.

346. THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 123; UNCLOS, *supra* note 6, at arts. 27, 28.

347. UNCLOS, *supra* note 6, at art. 27; THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 191, at 123.

348. UNCLOS, *supra* note 6, at art. 33.

349. Kraska, *supra* note 21, at 324, 330.

350. TANAKA, *supra* note 46, at 202.

351. UNCLOS, *supra* note 6, at art. 111.

352. *Id.* A contiguous zone is an area claimed by the costal state over which it will have restricted jurisdiction to prevent infringement of customs, immigration, or sanitary laws, or to conserve fishing stocks or to allow the coastal state to collect the resources of the zone. SHAW, *supra* note 1, at 429–30. States must claim such a zone, and it is limited

such area and must stop if the pursued vessel enters its own jurisdiction or that of another state.[353] Hot pursuit may only be exercised by "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."[354]

To what extent may the coastal state use force to stop, board, or arrest a ship suspected of criminal violations? That is unclear. What is clear is that force must be measured.[355] Under the UNCLOS, the rule is that, even in those cases where force is justified:

> the Convention[] requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.[356]

It seems that the principles set out in the *Caroline* case have not changed much.[357]

XIII. THE LAW OF AGGRESSION

In the use of force by warships or coastal batteries against naval vessels, can Iran—or indeed the United States—be guilty of the crime of aggression? Aggression or aggressive behavior are words that are fairly common; indeed, they are often used in psychological diagnoses.[358] In international affairs, the first time the notion of a crime of aggression appeared in writing in international law was in the "crimes against peace" section of the Charter of the International Military Tribunal,[359] pursuant to which Nazi war criminals

to 12 nautical miles, so if the coastal state claims a territorial sea of 12 miles, there is no contiguous zone. *Id.* at 430.

353. UNCLOS, *supra* note 6, at art. 111.

354. *Id.*

355. SHAW, *supra* note 1, at 460–61.

356. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, ¶¶ 61–62. The case found that not only had elements of the Guinean coast guard attempted to enforce laws contrary to international law but used excessive and indiscriminate force in detaining and arresting the Saiga and its crew. *Id.* at ¶¶ 67, 72.

357. *See* BROWNLIE, *supra* note 52, at 733–34.

358. *See* CHARLES STANGOR, RAJIV JHANGIANI & HAMMOND TARRY, PRINCIPLES OF SOCIAL PSYCHOLOGY 420–60 (1st Int'l H5P ed. 2022).

359. Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet

were convicted in the Nuremberg war crimes trials.[360] In speaking of such a crime, the Tribunal said: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[361] Finally, in 2010, the world agreed on a definition of aggression and made it a crime by making it part of the Rome Statute of the International Criminal Court.[362]

> Article 8 *bis*:
>
> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a [s]tate against the sovereignty, territorial integrity or political independence of another [s]tate, or in any other manner inconsistent with the Charter of the United Nations.[363]

Such actions include "(d) An attack by the armed forces of a [s]tate on the land, sea or air forces, or marine and air fleets of another [s]tate[.]" [364]

So there are two matters to discuss in order to bring the aggressive behavior in the Strait of Hormuz under the terms of the Rome Statute respecting a crime of aggression: do the activities of the Iranians in attacking or impeding commercial vessels in the strait amount to a "manifest violation of the Charter of the United Nations;" and does attacking, damaging, or

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Socialist Republics Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. ("[N]amely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]").

360. *International Tribunal's Summary of Its Judgement on the Actions and Leadership of Nazism,* N.Y. TIMES, Oct. 1, 1946, at 12.

361. The Nurnberg Trial, 6 F.R.D. 69, 86 (Int'l Mil. Tribunal 1946).

362. NOAH WEISBORD, THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS 105–10 (Princeton Univ. Press 2019).

363. Rome Statute of the International Criminal Court art. 8. *bis* (1)–(2), July 17, 1998, 2187 U.N.T.S. 90.

364. *Id.* at art. 8 *bis* (2)(d).

impeding the naval vessels of another state amount to either a "manifest violation of the Charter of the United Nations" or a violation of subparagraph (d) above?[365]

No court has yet rendered a definition or an interpretation of the term "manifest violation of the Charter of the United Nations."[366] What can it mean? What does "manifest" mean? It appears to have been a word in the English language since sometime between 1350 and 1400, but the definition has remained the same, and the dictionary definition of the term "manifest" is "readily perceived by the eye or the understanding; evident."[367] While *Black's Law Dictionary* does not have a definition for the word "manifest" by itself, it is part of other definitions, such as "manifest error," which is defined as: "An error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record."[368]

It seems that the word "manifest" simply means readily discernible.[369] So this section of the Rome Statute seems to say "if it clearly is a violation of the Charter of the U.N."[370] The Rome Statute goes on to clarify that article 8 *bis,* section 1 means: "the use of armed force by a [s]tate . . . in any . . . manner inconsistent with the Charter of the United Nations."[371] We know that the Charter requires that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[372] And that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[373]

365. *See id.* at art. 8 *bis* (1).

366. *See generally id.* at art. 8.

367. *Manifest,* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001).

368. *Manifest Error*, BLACK'S LAW DICTIONARY (8th ed. 2009).

369. *See* Rome Statute of the International Criminal Court, *supra* note 363, at art. *8 bis*. In French, the language in the Rome Statute, article 8 *bis* says: "*violation manifeste de la Charte des Nations Unies*." *Id.* In Spanish, the text is: "*una violación manifiesta de la Carta de las Naciones Unidas.*" *Id.* The words "manifeste" in French and "manifiesto" in Spanish have the same meaning as "manifest" in English.

370. *Id.*

371. *Id.*

372. U.N. Charter art. 2, ¶ 3.

373. *Id.* at art. 2, ¶ 4.

The use of force therefore appears to be a violation of the Rome Statute section 8 *bis*, the crime of aggression, or at least a court could conceivably find it to be so.[374] In fact, the use of force is likely unlawful in most circumstances.

Assuming that Iran has violated an international legal obligation, we must explore who could bring a claim against Iran (i.e., identifying the injured state) and the possible scope of reparations.

Finding a party for a suit in the ICJ is not as simple as it would appear. Only states may be parties to contentious cases in the ICJ.[375] Finding an injured state may prove difficult. We cannot isolate the problem to a single or limited group of countries. For example, a tanker may be flagged in one country.[376] It may be owned by a company based in another country.[377] It may deliver its oil to a third country, and its crew is most likely multinational.[378] The victims of these attacks may not be states at all, but rather the international oil market, which suffers from supply and price volatility as a result of the acts.[379] Nevertheless, the entire group of states could argue that Iran's actions have damaged their commercial interests generally, have caused injuries to their citizens and business entities, and have resulted in costs to protect its commercial shipping interests.[380]

Another barrier to a possible suit at the ICJ against Iran is the requirement under customary international law that before international proceedings are instituted that remedies provided by a local state be exhausted.[381] Such a rule would require that injured individuals and corporations seek recourse against Iran and its interests in local courts before a case could be brought by an affected state internationally.[382]

374. Rome Statute of the International Criminal Court, *supra* note 363.

375. *How the Court Works,* INT'L CT. JUST., https://www.icj-cij.org/en/how-the-court-works [https://perma.cc/E696-MFJC].

376. *See* Anjil Rayal, *Shipping Industry Grapples with Threat in Strait of Hormuz*, FIN. TIMES (Jul. 21, 2019), https://www.ft.com/content/0eb38854-aafd-11e9-8030-530adfa879c2.

377. *See id.*

378. *See id.*

379. *See id.*

380. *Id.*

381. BROWNLIE, *supra* note 52, at 492.

382. *Id.* at 492–93.

However, this requirement would not apply to a direct breach of international law by one state against another.[383]

Assuming an injured state can be identified, and a claim is brought and successfully pursued at the ICJ, what are the consequences to Iran? There are two basic remedies available to the injured state against the responsible state: (1) cessation; and (2) reparation.[384] Cessation is straight forward—Iran could be ordered to cease its efforts to harass shipping in the straits. Iran would also be required to "make full reparation for the injury caused by the internationally wrongful act" which " includes any damage, whether material or moral, caused by the internationally wrongful act of a [s]tate."[385] Full reparation under the ILC is extraordinarily broad, requiring restitution (that the injured state be placed back in the situation it was in before the wrongful act of Iran occurred), compensation for damages (including damage to ships and lost profits resulting from the disruption to shipping), and satisfaction (including an expression of regret or apology).[386]

An injured state is not limited only to a suit in the ICJ. Perhaps more valuable is the right of the injured state to employ countermeasures against the responsible state.[387] "Countermeasures" are reprisals (i.e., punishments) imposed by the injured state against the responsible state.[388] The right to impose countermeasures is subject to certain limitations. First, the reprisals generally preclude the use of force unless justified by the doctrine of self-defense. Second, the countermeasures must be necessary, meaning that they must be in response to a prior wrongful act and because of a refusal of the responsible state to remedy such act.[389] Lastly, the countermeasures must be taken against the state committing the wrongful act and be proportional.[390] With this in mind, the affected states could take steps such as arming or supplying military escorts for commercial vessels. The affected states may also explore non-military countermeasures against Iran, such as further sanctions or other financial or diplomatic punishments.

383. *Diplomatic Protection v. Delocalization,* JEAN MONNET CTR. INT'L & REG'L ECON. L. & JUST., https://jeanmonnetprogram.org/archive/papers/97/97-13-Part-2.html [https://perma.cc/T3KN-EEV5].

384. Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at arts. 30–31 (2001).

385. *Id*. at art. 31.

386. *Id.* at art. 34–37.

387. *Id.* at art. 34–39.

388. *See supra* Part X*; see also* SHAW, *supra* note 1, at 601–02, 907.

389. SHAW, *supra* note 1, at 602.

390. *Id.*

XIV. CONCLUSION

Different cultures and different peoples often see similar matters in a different way, and generally there are two sides to any disagreement. However, when a state becomes a state, recognized as such by the international community, and when it signs up to become a member of that community and agrees to adhere to the letter and the principles of the Charter of the U.N., it ought to conduct its behavior in line with international norms. Iran's conduct in this regard is questionable.

The law of state responsibility could play a crucial role in the ongoing saga for the control over the Strait of Hormuz.[391] It appears that Iran carefully calculates its actions so as to preserve its position that it remains in compliance with international law.[392] This position may be of dubious value; however, it illustrates the importance that Iran places on remaining legally within certain international norms.

As a practical matter, whatever the law has to say about the use of force, we know that such things are difficult to control, since the use of force is almost invariably a political decision or a policy decision. While international law works and constrains in a whole variety of issue areas—because what is discussed in this Article often is infused with politics and policy—difficulties will arise, both in predicting behavior and in enforcing legal culpability. Whatever states' actions may be, they almost invariably do not verbally flout international law, rather they creatively argue that their actions are condoned by international law.

One hundred years ago Elihu Root wrote:[393]

> It is manifest that the differences of thought and feeling and selfish desire which separate nations in general have to be dealt with in particular in the multitude of controversies which are sure to arise between them and between their respective citizens in a world of universal trade and travel and inter-communication. The process of such adjustment without war is the proper subject of diplomacy. During some centuries of that process many usages have grown up which have been found necessary or convenient for carrying on friendly intercourse, and

391. *See* Kraska, *supra* note 21, at 338, 352.

392. *Id.* at 359; Bagheri, *supra* note 26, at 85.

393. Elihu Root was a famous diplomat, domestic and international lawyer, who served as Secretary of War under President William McKinley and Secretary of State under President Theodore Roosevelt, and later served as a U.S. Senator.

> many of these have hardened into generally accepted customs in manners or in morals which no longer require to be discussed but which every nation has a right to assume that other nations will observe.
>
> . . . .
>
> This great fact of the community of nations is not involved at all in any question about the "League of Nations" or any other association of nations founded upon contract. The "League of Nations" is merely a contract between the signers of the instrument by which they agree to super-add to the existing usages, customs, laws, rights, and obligations of the existing community of nations, certain other rights and obligations of the existing community of nations, certain other rights and obligations which shall bind the signers as matter of contract. Whether a country enters into that contract or not, its membership of the community of nations continues with all the rights and obligations incident to that membership.
>
> . . . .
>
> . . . One of the most useful and imperative lessons learned by all civilized governments in the practice of international intercourse has been the necessity of politeness and restraint in expression. Without these, the peaceful settlement of controversy is impossible. This lesson should be learned by every free democracy which seeks to control foreign relations.[394]

All states should try this approach, including the democracies.

394. Elihu Root, *A Requisite for the Success of Popular Diplomacy,* FOREIGN AFFS., Sept. 1922, at 3, 7–9.