



The Iran-U.S. Dispute, the Strait of Hormuz, and International Law

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I. INTRODUCTION

Throughout the past months, Iran and the United States have been rattling their sabers over nuclear inspections and new sanctions. A potential flashpoint is the waterway Strait of Hormuz, which Iran is threatening to close.¹ The Middle East region supplies 70 percent of the world's energy needs, with about 35 percent of the world's seaborne oil exports shipped through this tight sea passage in the Persian Gulf separating Oman and Iran.² A blockade of the Strait of Hormuz would be fatal for the world economy.³

Since autumn 2011, the United States, United Kingdom, and France have boosted their military presence in the Gulf.⁴ In January 2012, the USS Abraham

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¹ Iran's first Vice President Mohammad Reza Rahimi stated in December 2011 that the Strait of Hormuz could be closed if oil sanctions are imposed on the Islamic Republic. *See Iran Will Close Hormuz Strait in Case of Oil Embargo*, TEHRAN TIMES (Dec. 27, 2011), <http://www.tehrantimes.com/component/content/article/93958>; *see also Talk of Closing Hormuz Strait is a Thing of the Past*, TEHRAN TIMES (Dec. 31, 2011), <http://www.tehrantimes.com/component/content/article/94092>.

² *See Country Analysis Brief: World Oil Transit Chokepoints*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/countries/regions-topics.cfm?fips=WOTC> (last updated Dec. 30, 2011).

³ According to the U.S. Energy Information Administration, on average "14 crude oil tankers per day passed through the Strait in 2011." *Id.* Closing the Strait of Hormuz would require tankers to use longer alternate routes at increased transportation costs. *Id.* "Hormuz is the world's most important oil chokepoint due to its daily oil flow of almost 17 million barrels in 2011, up from between 15.5-16.0 million bbl/d in 2009-2010." *Id.*

⁴ *See* Thom Shanker & Steven Lee Myers, *U.S. Planning Troop Buildup in Gulf After Exit From Iraq*, N.Y. TIMES, Oct. 30, 2011, at A1, *available at* <http://www.nytimes.com/2011/10/30/world/middleeast/united-states-plans-post-iraq-troop-increase-in-persian-gulf.html?pagewanted=all>; David S. Cloud, *U.S. Boosts Its Military Presence in Persian*

Lincoln, a U.S. aircraft carrier, was sent through the Strait to conduct “maritime security operations,” accompanied by a British warship and a French vessel.⁵ According to a statement by the U.K. Ministry of Defense, the move was made “to underline the unwavering international commitment to maintaining rights of passage under international law.”⁶ U.S. Secretary of Defense Leon Panetta recently added in February 2012: “If we have to deal with someone trying to close the Straits of Hormuz, we have the naval and air force capability to be able to do that. We can do that in conjunction with NATO, or we can do it on our own.”⁷

Despite heated press statements, the U.S. administration and the Iranian leadership are aware of the legal arguments for, or against, a possible closure of the Strait of Hormuz. The International Law of the Sea is unambiguous on the matter. It requires maritime straits to remain open. Only in the case of armed conflict, Iran could be entitled as a belligerent to close parts of the water passage temporarily. A blockade of the Strait of Hormuz in reaction to U.S. and EU sanctions would find some, but not sufficient, legal justification in existing customary international law.

II. THE LEGAL FRAMEWORK: U.S. AND IRANIAN INTERPRETATIONS

Given that about ninety percent of world trade is transported by sea, limitations to the freedom of maritime navigation have long been a subject of heightened concern.⁸ Codifying a unified legal framework for the Law of the Sea has been difficult given the challenge of balancing competing interests of States. The United Nations Convention on the Law of the Sea (UNCLOS), which was concluded following the longest continuous international negotiation held in modern times, outlines a legal regime for the ocean,⁹ though, as reflected by the Iran-U.S. dispute about the Strait of Hormuz, the interpretation of rights and restrictions under international law is still contested today.

Gulf, L.A. TIMES (Jan. 12, 2012), <http://articles.latimes.com/2012/jan/12/world/la-fg-us-persian-gulf-20120113>.

⁵ See *After Iran Threat, U.S. Aircraft Carrier Goes Through Strait of Hormuz Without Incident*, CNN NEWS (Jan. 24, 2012), <http://www.cnn.com/2012/01/22/world/meast/us-iran-aircraft-carrier/index.html>.

⁶ *Argyll Escorts American Super-Carrier Through Key Gulf Strait*, ROYAL NAVY (Jan. 23, 2012), [http://www.royalnavy.mod.uk/News-and-Events/Latest News/2012/January/23/120123-Argyll-US-Escort](http://www.royalnavy.mod.uk/News-and-Events/Latest%20News/2012/January/23/120123-Argyll-US-Escort).

⁷ See Leon Panetta, U.S. Sec’y of Def., Remarks (Feb. 4, 2012), available at <http://translations.state.gov/st/english/texttrans/2012/02/20120204144544su0.7067922.html#axzz1mCiROUPP>.

⁸ It is estimated that if the trade growth trend of the last 150 years continues, by 2060 the current eight billion tons of maritime cargo will have grown to twenty-three billion tons. See IMO MARITIME KNOWLEDGE CENTRE, INTERNATIONAL SHIPPING FACTS AND FIGURES: INFORMATION RESOURCES ON TRADE, SAFETY, SECURITY, ENVIRONMENT 7-8 (2011), available at <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf>.

⁹ See ROBERT L. FRIEDHEIM, NEGOTIATING THE NEW OCEAN REGIME, at ix (1993).

Legitimate reactions to sanctions are neither explicitly regulated by positive international law nor clearly shaped by custom; they remain an ad hoc state practice.¹⁰ Nonetheless, codified and customary international law particularly protect international straits, as they are often chokepoints for global maritime traffic.¹¹ Under UNCLOS, all ships enjoy the right of “continuous and expeditious” transit passage through straits that are used for international navigation.¹² Passing ships have to proceed “without delay through or over the strait,” and refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of states bordering the strait.¹³ States bordering straits must abstain from hampering transit and are required to disclose information regarding a possible threat to navigation in the strait.¹⁴ Moreover, coastal States may adopt laws and regulations related to the transit that foreign ships have to comply with, as long as those restrictions are not discriminatory and do not impair the right of transit passage.¹⁵ Overall, transit passage through a strait cannot be suspended.¹⁶

1. Iran’s Perspective on the Right of Transit Passage

The legal dispute between Iran and the United States primarily concerns the scope of international maritime navigation rights, an issue that was at the center of the debate during the drafting of UNCLOS.¹⁷ The Convention extended territorial waters from three nautical miles to twelve nautical miles, whereby the Strait of Hormuz—which is at its narrowest point only twenty-one nautical miles

¹⁰ See Josef L. Kunz, *Sanctions in International Law*, 54 AM. J. INT’L L. 324, 325 (1960).

¹¹ See ANA LOPEZ MARTIN, *INTERNATIONAL STRAITS: CONCEPT, CLASSIFICATION AND RULES OF PASSAGE* (2010). Martin insightfully explains how the interests of coastal States became secondary in the nineteenth century as opposed to more liberal notions of right of way through straits, which is conceived as a natural complement to the freedom of the seas. This change of orientation was related to the emancipation of the Spanish colonies in America, which involved the consolidation of the ‘open door policy’ for trade between Europe and America, with an evident repercussion on the conception of the regime regulating the passage through straits. *Id.* at 3.

¹² See United Nations Convention on the Law of the Sea art. 38, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The exception to the right of transit passage is that ships entering territorial waters of a coastal state while passing through a strait enjoy only the right of innocent passage. *See id.* art. 45 ¶ 2; *see also id.* arts. 17, 18 (describing the innocent passage regime). Iran signed UNCLOS on Dec. 10, 1982, but did not ratify the Convention. *See* U.N. Div. for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Status, U.N. Convention on the Law of the Sea* (Feb. 16, 2011), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>. The United States is not a signatory to UNCLOS, but views most of the UNCLOS rights and obligations, in particular the right of transit passage, as a codification of customary international law. *See* Proclamation No. 5030, 3 C.F.R. 22 (1983).

¹³ *See* UNCLOS, *supra* note 12, art. 39. Foreign ships are only allowed to carry out research or survey activities with authorization. *See id.* art. 40.

¹⁴ *See id.* art. 44.

¹⁵ *See id.* art. 42 ¶¶ 1, 2, 4.

¹⁶ *See id.* art. 44.

¹⁷ *See* Sayed Hassan Amin, *Regime of International Straits: Legal Implications for the Strait of Hormus*, 12 J. MAR. L. & COM. 387 (1981).

wide—became fully covered by Iran and Oman’s territorial seas.¹⁸ Upon signing the Convention on the Law of the Sea in 1982, Iran submitted an interpretative declaration, which clarified its legal understanding of certain provisions concerning straits.¹⁹ Two parts of the declaration are relevant to the current case: first, from the Iranian perspective, the right of transit passage through international straits is only a right “quid pro quo.” Only states that have signed UNCLOS are entitled to benefit from the contractual rights it created.²⁰ Second, Iran perceives that the right of a coastal state to adopt laws and regulations for safeguarding its security interests can also include the requirements of prior authorization for warships.²¹ Oman, Egypt, and Yemen have made equivalent declarations.²² Iran has been particularly sensitive about threats to its sovereignty and territorial integrity after being partitioned and occupied by Britain and Russia during the Second World War.²³ The motivation behind Iran’s quid pro quo declaration is based on the understanding of the Convention as a package deal, whereby universal liberal freedom rights of navigation are balanced in UNCLOS with preferential access of the coastal states to seabed resources.²⁴

2. *The Legal Understanding of the United States*

The United States rejects any restrictions to maritime navigation rights.²⁵ As U.S. legal scholar Michael Reisman made clear in 1980, in the perception of

¹⁸ See UNCLOS, *supra* note 12, art. 3. For a comprehensive overview, see STEVEN GROVES, HERITAGE FOUND., *ACCESSION TO THE U.N. CONVENTION ON THE LAW OF THE SEA IS UNNECESSARY TO SECURE U.S. NAVIGATIONAL RIGHTS AND FREEDOMS* (2011), available at https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf.

¹⁹ In comparison to reservations, a declaration only clarifies a State’s position without excluding the legal effect of a treaty or making its own opinion binding on other contracting parties. See Rep. of the Int’l Law Comm’n on the Work of its 54th Sess., Apr. 29-June 7, July 22-Aug. 16, 2002, U.N. Doc. A/57/10; see also Islamic Republic of Iran, *Interpretative Declaration on the Subject of Straits*, DECLARATION & STATEMENTS, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm (last updated July 12, 2011).

²⁰ See Islamic Republic of Iran, *supra* note 19, ¶ 1.

²¹ See *id.* ¶ 2. Subsequently, Iran enacted the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea in May 1993, which regulates those exceptions to the innocent passage right. See U.S. DEP’T OF STATE, BUREAU OF OCEANS AND INT’L ENVTL. AND SCI. AFFAIRS, *LIMITS IN THE SEAS: IRAN’S MARITIME CLAIMS* 26 (1994), available at <http://www.state.gov/documents/organization/58228.pdf>.

²² See U.N. Div. for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea, Declarations and Statements*, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm (last updated July 12, 2011).

²³ See Charles G. MacDonald, *Iran’s Strategic Interests and the Law of the Sea*, 34 MIDDLE E. J. 302 (1980).

²⁴ See Mark J. Valencia, *Legal Battle over Transiting the Strait of Hormuz*, JAPAN TIMES (Jan. 9, 2012), <http://www.japantimes.co.jp/text/eo20120109a5.html>.

²⁵ See President’s Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 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.”). Critics have labeled the position of the United States, which geographically does not have control over any key strait of international transit, as a “pick-and-choose attitude.” See Kim Young Koo, *Transit Passage Regime Controversy*

the United States, maritime straits are international waterways, which cannot be impeded or suspended.²⁶ In the beginning of 2012, the U.S. State Department reemphasized this position.²⁷ In previous diplomatic notes, the United States protested Iran's marine legislation, which regulates transit passage rights.²⁸ The United States argued that no coastal state may require prior permission from foreign ships to exercise the right of innocent passage.²⁹ The International Court of Justice (ICJ) had declared in the Corfu Channel Case in 1949 that an authorization is not needed.³⁰ Whereas an authorization in UNCLOS was incorporated for research and survey activities during transit passage, such a provision was not included for ships in innocent passage through the territorial sea of another state.³¹ From the U.S. perspective, the right of transit passage has to be unrestricted in order to minimize conflict.³² Otherwise littoral states would become political "gate keepers."³³

Revisited: An Appraisal and Analysis on the Legal Ambiguities and Recent Trends, 37 KOREAN J. INT'L L. 79 (1992).

²⁶ See W. Michael Reisman, *The Regime of Straits and National Security*, 74 AM. J. INT'L L. 48, 76 (1980).

²⁷ See Victoria Nuland, Spokesperson, U.S. State Dept., State Department Briefing (Jan. 6, 2012) available at <http://translations.state.gov/st/English/texttrans/2012/01/20120106173949su0.201286.html#axzz1n1o18t5R>: ("With regard to the bellicose rhetoric from the Iranian regime on the Straits of Hormuz, the United States considers that the Straits of Hormuz under international law and long standing international practice, are international waters. As such, vessels of all states enjoy transit passage through the Straits. These rights apply to warships, they apply to merchant ships, so any attempt to close the Straits of Hormuz would be inconsistent with international law and we anticipate that the U.S. Navy will continue to play the important role that it's played in helping to maintain freedom of navigation around the world, including through the Straits of Hormuz.")

²⁸ See United States Note to the United Nations, Jan. 11, 1994 (USUN 3509/437), in *LIMITS IN THE SEAS: IRAN'S MARITIME CLAIMS*, *supra* note 2120, at 37.

²⁹ See William L. Schachte, Rear Admiral, Judge Advocate Gen.'s Corps, U.S. Navy Dep't of Def. Representative for Ocean Policy Affairs, Remarks at the 26th Law of the Sea Institute Annual Conference, International Straits and Navigational Freedoms 9 (June 22-26, 1992), available at <http://www.state.gov/documents/organization/65946.pdf>.

³⁰ See *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 28 (April 9) ("It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.")

³¹ See UNCLOS, *supra* note 12, art. 40.

³² The United States does not stand alone with this position, as the principle that transit passage through a strait cannot be suspended was explicitly codified in UNCLOS. See *supra* note 16 and accompanying text.

³³ See Remarks by William L. Schachte, *supra* note 29, at 7 ("[I]t is important to underscore that the regime of transit passage is crucial to the maintenance of world peace and order. By relieving littoral states of the political burdens associated with a role as gate keepers, the transit passage rules minimize the possibility of straits states being drawn into conflicts.")

3. Practical Realities

Since 1983, the U.S. Navy has conducted worldwide naval operations under the umbrella Freedom of Navigation (FON) to assert the U.S.'s understanding of its maritime rights.³⁴ Affirming the right of free passage, U.S. Naval forces engage in FON exercises especially in areas of disputed maritime claims to prevent setting the precedent that the international community has accepted the status quo of “unlawful” claims.³⁵ U.S. vessels regularly transited through the Strait of Hormuz under surveillance of Iranian patrol boats and air control.³⁶ Recently on February 14, 2012, the USS Abraham Lincoln passed through the Strait without any incidents.³⁷

As another practical matter, even if one agrees with the extension of Iran's territorial waters, the Strait of Hormuz also comprises Oman's share of the maritime transit corridor.³⁸ Oman deposited sea lanes and traffic separation schemes for the inbound and outbound maritime traffic with the UN in 1996.³⁹ As the Strait of Hormuz is deeper on the side of Oman than on the Iranian side, vessels do not necessarily enter Iran's territorial waters in the Strait.⁴⁰ However, Iran and Oman recently held joint naval drills to demonstrate their unity and readiness to engage in military maneuvers.⁴¹ In June 2011, Iran and Oman concluded a security agreement.⁴²

³⁴ See *Maritime Security and Navigation*, U.S. DEPARTMENT OF STATE <http://www.state.gov/e/oes/ocns/opa/maritimesecurity/> (last visited Mar. 5, 2012).

³⁵ E.g., U.S. DEP'T OF STATE, BUREAU OF OCEANS & INT'L ENVTL. AND SCI. AFFAIRS, *supra* note 21, at 24 (“[W]arships representing a wide variety of nations pass through Iran's territorial sea in innocent passage without objection from Iran, despite Iran's requirement that prior authorization be obtained for each transit.”).

³⁶ See *Iranian Boats Shadow US Aircraft Carrier in Gulf*, TODAY'S ZAMAN (Feb. 15, 2012), <http://www.todayszaman.com/news-271494-iranian-boats-shadow-us-aircraft-carrier-in-gulf.html>.

³⁷ See *USS Abraham Lincoln in Strait of Hormuz Voyage*, BBC NEWS (Feb. 14, 2012), <http://www.bbc.co.uk/news/world-middle-east-17027768>.

³⁸ See Bahman Aghai Diba, *Is Iran Legally Permitted To Close Strait of Hormuz to Countries That Impose Sanctions Against Iran's Oil?*, PAYVAND IRAN NEWS (Dec. 21, 2011), <http://www.payvand.com/news/11/dec/1216.html>.

³⁹ See Maritime Zone Notifications, Law of the Sea Information Circular, U.N. Div. for Ocean Affairs and the Law of the Sea, New York, N.Y., May 1990, at 21.

⁴⁰ See ROUHOLLAH K. RAMAZANI, *THE PERSIAN GULF AND THE STRAIT OF HORMUZ* 2-3 (1979) (providing a detailed map of the sea traffic in this area). Vessels on trade routes between the Gulf of Oman and the Persian Gulf usually enter Iranian territorial waters at some point. The Persian Gulf inbound shipping lane leads right after the Strait of Hormuz into Iranian territorial water, alongside the Abu Musa and the Greater and Lesser Tunbs islands. The three small islands in the eastern Persian Gulf are administered by Iran but also claimed by the United Arab Emirates. See STATEMENT BY HIS HIGHNESS SHEIKH ABDULLAH BIN ZAYED AL NAHYAN MINISTER OF FOREIGN AFFAIRS OF THE UNITED ARAB EMIRATES, UN General Debate 66th Session (Sept. 26, 2011), available at http://gadebate.un.org/sites/default/files/gastatements/66/AE_en.pdf.

⁴¹ See *Iran, Oman To Hold New Joint Naval Drills*, PRESS TV (Feb. 19, 2012), <http://presstv.com/detail/227494.html>.

⁴² See *Iran Concludes Security Agreement with Oman, Qatar*, IRAN ENGLISH RADIO (June 14, 2011), <http://english.trib.ir/news/political/item/75799-%E2%80%98iran-concludes-security-agreement-with-oman-qatar%E2%80%99>. For a recently published analytical background

III. SCENARIOS

Several scenarios are possible, each comprising a range of actions whose likelihood ultimately depends on the threat perception of the protagonists.⁴³ A concern of the United States has been that Iran could attempt to place mines in the Strait of Hormuz or Persian Gulf, which the U.S. administration considers as an “act of war.”⁴⁴ Randomly mining the Strait of Hormuz would certainly infringe the described rights of free navigation under the Law of the Sea, particularly the right of transit passage. Even under a less severe response, for instance, the planned Iranian naval exercises and military maneuvers, the sea passage has to remain open.⁴⁵ Still, whether Iran has the intention to mine parts of the Strait is speculative, given the impact on its own trade relations.⁴⁶ China, Iran’s major customer for oil and gas besides Europe, already made clear that the Strait of Hormuz must remain open.⁴⁷

1. Closure of the Strait of Hormuz in an Armed Conflict

The Iranian authorities regularly disclaim any intent to close the Strait of Hormuz without reason.⁴⁸ Reports from Tehran have repeatedly warned, however, that merely “in the event of a military attack on the country, [Iran]

note from a U.S. perspective on the U.S. and Iranian competition in the Middle East as well as with regard to the relations between Iran and Oman, see Peter Alsis, Marissa Allison, & Anthony H. Cordesman, *U.S. and Iranian Strategic Competition: The Role of the Southern Gulf States and Yemen* 33 (Ctr. for Strategic & Int’l Studies, Working Paper, Mar. 1, 2012), available at http://csis.org/files/publication/120228_Iran_Ch_VI_Gulf_State.pdf.

⁴³ See, e.g., CONG. RESEARCH SERV., *IRAN’S THREAT TO THE STRAIT OF HORMUZ*, (Jan. 23, 2012), available at <http://www.fas.org/sgp/crs/mideast/R42335.pdf>; see also William D. O’Neil & Caitlin Talmadge, Correspondence, *Costs and Difficulties of Blocking the Strait of Hormuz*, 33 INT’L SECURITY 190 (2009); Tony Capaccio, *Iran Unlikely To Strike First*, U.S. OFFICIAL SAYS, BLOOMBERG (Feb. 16, 2012), <http://www.bloomberg.com/news/2012-02-16/iran-unlikely-to-strike-first-in-conflict-u-s-intelligence-official-says.html>.

⁴⁴ See Tony Capaccio, *U.S. Would Block Iran From Mining Hormuz Strait, Commander Says*, BLOOMBERG (Feb. 13, 2012), <http://www.businessweek.com/news/2012-02-13/u-s-would-block-iran-from-mining-hormuz-strait-commander-says.html>; see also SABAHAT KHAN, INST. OF NEAR E. & GULF MILITARY ANALYSIS, *IRANIAN MINING OF THE STRAIT OF HORMUZ: PLAUSIBILITY AND KEY CONSIDERATION* (Jan. 2010), available at <http://www.inegma.com/reports/special%20report%204/Iranian%20Mining%20of%20the%20Strait%20of%20Hormuz.pdf>.

⁴⁵ See *Revolutionary Guard Starts Military Exercise in Iran’s South*, HAARETZ (Feb. 4, 2012), <http://www.haaretz.com/news/middle-east/revolutionary-guard-starts-military-exercise-in-iran-s-south-1.410987>.

⁴⁶ European countries, for instance, collectively account for some 20 percent of Iranian oil exports, which makes it also in Iran’s interest to maintain the existing trade relations. See *Iran Oil Ministry Denies Ending Exports to EU States*, BBC NEWS (Feb. 15, 2012), <http://www.bbc.co.uk/news/world-middle-east-17042855>.

⁴⁷ See Wang Chenyan & Hu Yinan, *China Opposes ‘Extreme Action’ in Strait of Hormuz*, CHINA DAILY (Jan. 20, 2012), http://www.chinadaily.com.cn/cndy/2012-01/20/content_14479613.htm.

⁴⁸ See, e.g., *Iran’s Interests Demand Free Passage of Vessels Through Strait of Hormuz*, TEHRAN TIMES (Feb. 8, 2012), <http://tehrantimes.com/politics/95297-irans-interests-demand-free-passage-of-vessels-through-strait-of-hormuz>.

would not hesitate in taking any necessary measures to protect its sovereignty, one of which would be to shut down the strategic oil cargo passage.”⁴⁹ The U.S. administration is reportedly concerned about a potential preemptive Israeli military strike on Iran’s nuclear facilities.⁵⁰ In the beginning of March 2012, Israel’s Prime Minister Benjamin Netanyahu stated that “all options [are] on the table.”⁵¹

As the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Manual) lays down as a general rule, the rights of transit passage “continue to apply” even “in times of armed conflict.”⁵² Belligerent and neutral ships have transit passage rights through all straits.⁵³ Yet, in the case of an armed conflict, the freedom of navigation is not absolute.⁵⁴ Neutral states are not permitted to suspend, hamper, or otherwise impede the right of transit passage.⁵⁵ Belligerent states, however, may take action to impede

⁴⁹ See *Iran Monitoring Movement of Foreign Forces in Region: Vahidi*, PRESS TV (Feb. 12, 2012), <http://www.presstv.ir/detail/226306.html>.

⁵⁰ See Indira A.R. Lakshmanan, *EU Sanctions Against Iran’s Largest Port Operator Risk Curbing Legal Trade*, BLOOMBERG (Feb. 9, 2012), <http://www.bloomberg.com/news/2012-02-10/eu-sanctions-on-iran-s-largest-ports-will-slash-legal-trade-if-enforced.html>; see also Joel Greenberg & Joby Warrick, *U.S. Officials Concerned by Israel Statements on Iran Threat, Possible Strike*, WASH. POST (Feb. 3, 2012), http://www.washingtonpost.com/world/national-security/us-officials-concerned-by-israel-statements-on-iran-threat-possible-strike/2012/02/02/gIQA9gpflQ_story.html. For more recent commentary, see President Barack Obama, Remarks by the President at AIPAC Policy Conference (Mar. 4, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/03/04/remarks-president-aipac-policy-conference-0>; Guy Azriel, *Israel Weighs Risk, Benefits of Iran Strike*, CNN NEWS (Mar. 9, 2012), <http://www.cnn.com/2012/03/09/world/meast/israel-attack-risk-benefits/index.html>.

⁵¹ See Prime Minister Benjamin Netanyahu, Speech at AIPAC Policy Conference 2012 (Mar. 3, 2012), available at <http://www.pmo.gov.il/PMOEng/Communication/PMSpeaks/speechAIPAC050312.htm>.

⁵² See San Remo Manual on International Law Applicable to Armed Conflicts at Sea art. 27 (June 12, 1994), available at <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce!OpenDocument>. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea, an independent study which was prepared between 1988 and 1994 by a group of legal and naval experts, is one attempt at codifying international law in armed conflict at sea. While not absolutely authoritative, the codification effort has had a significant impact on the content of military manuals. It was described in this way in the investigation report on the Israel-Gaza flotilla incident in 2010. See Human Rights Council, Rep. of the International Fact-finding Mission To Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, ¶ 50, U.N. Doc. A/HRC/15/21 (Sept. 27, 2010), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.PDF.

⁵³ See San Remo Manual on International Law Applicable to Armed Conflicts at Sea, *supra* note 52, art. 28.

⁵⁴ See Wolff Heintschel von Heinegg, *The International Law of Mine Warfare at Sea*, 23 ISRAEL Y.B. ON HUM. RTS. 53, 62, 63 (1994).

⁵⁵ See San Remo Manual on International Law Applicable to Armed Conflicts at Sea, *supra* note 52, art. 29.

access to the straits.⁵⁶ Whereas neutral warships may pass through belligerent international straits, belligerent warships and belligerent merchant vessels can be targets of blockades.⁵⁷ Several legal scholars argue that “vital security interests” can “entitle a belligerent to close an international strait temporarily” in “exceptional cases.”⁵⁸ Nonetheless, it is questionable whether Iran could extend a maritime blockade beyond its territorial waters, if Oman remains non-belligerent. A full closure of an international strait outside coastal state maritime authority is not directly addressed in the San Remo Manual, and could be shaped by state practice. However, the notion of international law applicable to armed conflict at sea covered in the San Remo Manual is meant to safeguard neutral states. As a balance, belligerent ships in transit passage are not allowed to “conduct offensive operations against enemy forces.”⁵⁹ Thus, a full closure of the Strait of Hormuz for belligerent vessels in an armed conflict would only be covered by international law in the case of an alliance between Iran and Oman. Regardless, the right of transit passage could not be annulled for vessels from states that are neutral in the conflict.⁶⁰

2. *Closure of the Strait of Hormuz as a Legitimate Countermeasure To Sanctions?*

Iranian politicians have raised the question whether passing foreign oil tankers can still be included under the regime of “innocent” passage, if Iran’s own oil exports are disrupted by the United States or the European Union due to

⁵⁶ *See id.* (stating explicitly only that “[n]eutral States may not suspend, hamper, or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage”).

⁵⁷ Blockades are a legitimate method of warfare in armed conflict. *See id.* arts. 93-104. Generally, belligerent and neutral surface ships have the right of transit passage over all straits. *Id.* art. 28. (“Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply.”). Belligerent warships, however, may exercise the rights of passage through neutral international straits, *id.* art. 23 (“Belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law.”), only neutral warships may exercise the rights of passage through belligerent international straits, *id.* art. 26 (“Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of passage to the belligerent State.”). Merchant vessels may be targets of blockades. *Id.* art. 98.

⁵⁸ *E.g.*, Von Heinegg, *supra* note 54, at 63 (“It is probable that vital security interests will entitle a belligerent to close an international strait temporarily. Such closure, however, will be legitimate only in exceptional cases and may not last indefinitely.”); *see* 1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 518 (2d ed. 1945); R. R. Baxter, *Passage of Ships Through International Waterways in Time of War*, 31 *BRIT. Y.B. INT’L L.* 187, 202 (1954).

⁵⁹ *See* San Remo Manual on International Law Applicable to Armed Conflicts at Sea, *supra* note 52, art. 30.

⁶⁰ *See id.* art. 26.

their sanctions.⁶¹ Under the UNCLOS framework of international law, a coastal state can generally hinder ships from entering its territorial waters if their passage harms “peace, good order or security,” as they would no longer be innocent.⁶² Though following *lex specialis* for international straits, UNCLOS stipulates that the right of transit passage and innocent passage through straits shall not be suspended.⁶³ Indeed, no state has the legal obligation to accept unilateral restrictions imposed by other states, but international straits are expressly protected from such restrictions.

The closure of a strait would not be unprecedented, although no such case has occurred as a response to sanctions.⁶⁴ In 1950, for instance, the United States imposed a naval blockade in the Strait of Taiwan.⁶⁵ In 1956 and 1967, Egypt established a blockade against Israeli vessels in the Strait of Tiran that created legal controversy.⁶⁶ In 1993, based on numerous UN Security Council Resolutions, NATO and the Western European Union enforced a joint naval blockade in the Adriatic Sea that also included the Strait of Otranto.⁶⁷ Other states have introduced regulations to close a Strait temporarily, as Turkey did in 1994. Those restrictions were approved by the International Maritime Organization (IMO) only on the grounds that the closure of the Strait was not intended to prejudice “the rights of any ship using the Straits under international law.”⁶⁸ In 1997, Italy established a *de facto* Italian naval blockade in the Strait of

⁶¹ See Ali Omid, *Iran's Speculation on Blocking of the Strait of Hormuz: Legal and Political Backings*, TEHRAN TIMES (Dec. 23, 2011), <http://tehrantimes.com/component/content/article/84-perspectives/93823-irans-speculation-on-blocking-of-the-strait-of-hormuz-legal-and-political-backings>. For an overview of the present sanctions against Iran, see *Iran Sanctions*, U.S. DEPARTMENT OF TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx> (last updated Feb. 27, 2012).

⁶² See UNCLOS, *supra* note 12, art. 19 ¶ 1, art. 25 ¶ 1.

⁶³ See *id.* art. 44; *id.* art. 45 ¶ 2.

⁶⁴ For a comprehensive historical overview, see NAVAL COALITION WARFARE: FROM THE NAPOLEONIC WAR TO OPERATION IRAQI FREEDOM (Bruce A. Elleman & S.C.M. Paine, eds., 2008).

⁶⁵ See DEFENSE AND SECURITY: A COMPENDIUM OF NATIONAL ARMED FORCES AND SECURITY POLICIES 152 (Karl DeRouen, Jr. & Uk Heo, eds., 2005).

⁶⁶ See U.N. Secretary General, *Rep. by the Secretary-General*, U.N. Doc. S/7906 (May 26, 1967); Letter dated 27 Sept. 1955 from the Permanent Representative of Israel Addressed to the President of the Security Council, U.N. Doc. S/3442 (Sept. 28, 1955).

⁶⁷ For details, see Charles Ingraio, *Western Intervention in Bosnia: Operation Deliberate Force*, in NAVAL COALITION WARFARE, *supra* note 64, at 172.

⁶⁸ In January 1994, the Turkish government adopted new “Maritime Traffic Regulations for the Turkish Straits and the Marmara Region.” The International Maritime Organization approved these regulations, despite objections raised by Russia, Greece, Cyprus, Romania, Ukraine, and Bulgaria. See Maritime Traffic Regulations for the Turkish Straits and the Marmara (entered into force July 1, 1994), available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1994_Regulations.pdf; see also Int'l Maritime Org., Ships' Routeing, Res. A.827(19) adopted on 23 November 1995, Doc. A19/Res.827/Rev.1 (Aug. 1, 1996), available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=23907&filename=827-REV1\(19\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=23907&filename=827-REV1(19).pdf). For further details, see Ann Ellen Danseyar, *Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty*, 5 B.C. INT'L & COMP. L. REV. 127 (1982).

Otranto during the Albanian uprising. The legitimacy of that blockade under international law, however, remains disputed.⁶⁹

A blockade of an international strait as a reaction to sanctions is also arguably not permitted as a legitimate countermeasure under the non-binding International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁷⁰ Under the Draft Articles, "an injured State may take countermeasures only against a State which is responsible for an internationally wrongful act."⁷¹ Whether U.S. and EU sanctions against Iran are such a "wrongful act" breaching an international obligation is a question of perspective.⁷² From the U.S. and EU points of view, it is actually Iran that has failed to comply with its international obligations by not fully cooperating with the International Atomic Energy Agency (IAEA) and not addressing all requests concerning the Iranian nuclear program.⁷³ From Iran's perspective, the wrongfulness of Iran's compliance or noncompliance with international obligations is disputable—a question that would be clearer if the recent sanctions were imposed by the UN Security Council.⁷⁴ After a series of decisions issued since 2006, the Security Council adopted its last resolution concerning Iran's nuclear program in June 2010.⁷⁵

⁶⁹ See John Tagliabue, *Albania Envoy Accuses Italy in Sinking of Refugee Boat*, N.Y. TIMES (Mar. 31, 1997), <http://www.nytimes.com/1997/03/31/world/albania-envoy-accuses-italy-in-sinking-of-refugee-boat.html>.

⁷⁰ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Rep. of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, art. 2, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

⁷¹ See *id.* art. 49(1). As the ILC commentary on the Draft Articles reveals, the term "countermeasure" was chosen as an umbrella term instead of the term "reprisal," which is "now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force." See *id.* art. 22, cmt ¶ 3.

⁷² For the definition of an "international wrongful act," see *id.* arts. 2-3.

⁷³ See, e.g., Press Release, Council of the European Union, Council Conclusions on Iran (Jan. 23, 2012), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/127446.pdf ("The recent start of operations of enrichment of uranium to a level of up to 20% in the deeply buried underground facility in Fordow near Qom further aggravates concerns about possible military dimensions to Iran's nuclear programme. Iran's acceleration of enrichment activities is in flagrant violation of six UNSC Resolutions and eleven IAEA Board resolutions and contributes to increasing tensions in the region. . . . Iran continues to refuse to comply with its international obligations and to fully co-operate with the IAEA to address the concerns on its nuclear programme, and instead continues to violate those obligations. In this context and in accordance with the Council conclusions of 1 December 2011, the Council has agreed [sic] additional restrictive measures in the energy sector, including a phased embargo of Iranian crude oil imports to the EU, in the financial sector, including against the Central Bank of Iran, in the transport sector as well as further export restrictions, notably on gold and on sensitive dual-use goods and technology, as well as additional designations of persons and entities, including several controlled by the Islamic Revolutionary Guards Corps (IRGC).").

⁷⁴ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 70, arts. 16, cmt ¶ 9.

⁷⁵ See S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/396/79/PDF/N1039679.pdf?OpenElement>.

Regardless of the legality of the U.S.-EU sanctions against Iran, indispensable transit rights for international straits remain as a special regime.⁷⁶ The ILC Draft Articles deliberately excluded countermeasures for international *lex specialis* responsibilities.⁷⁷ Allowing the closure of an international strait as a countermeasure would risk weakening the nonsuspendable right of transit passage and eventually degrade the freedom of navigation through crucial trade routes, which could harm peace and security worldwide.⁷⁸

IV. CONCLUSION

Diplomatic tensions regularly tempt Iran and the United States to flex their muscles in the Persian Gulf. The Strait of Hormuz persists as a symbolic flashpoint between both countries. Lately, in 2008, five Iranian speedboats required three U.S. Navy vessels to take evasive measures, creating a situation that the United States claimed was a “serious incident.”⁷⁹ The Iranian authorities responded that the U.S. administration had tried to gain political benefits during then-President George W. Bush’s Middle East visit in 2008—which occurred, like the present dispute, during the U.S. presidential election season.⁸⁰ Following the presentation of conflicting video footage by the United States and Iran,

⁷⁶ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 70, art. 55.

⁷⁷ See *id.* art. 55, cmt ¶ 5 (pointing to transit provisions as a case of *lex specialis*).

⁷⁸ Also a targeted blockade against only U.S. and EU vessels or other low-level reactions by Iran, such as slowing shipping through the Strait of Hormuz, would effect economic growth and increase the oil prices. See, e.g., STANDARD & POOR’S, CREDIT FAQ: CLOSING THE STRAIT OF HORMUZ: THE RISKS FOR CORPORATE AND INFRASTRUCTURE ISSUERS 2 (Feb. 15, 2012), available at <http://www.thegulfintelligence.com/uploads/pdf/HormutzgetPDFdo.pdf> (“Aside from increasing the cost of shipping insurance and causing selective delays in oil deliveries, low-level antagonism by Iran would in our opinion likely cause global oil prices to remain elevated, reflecting the increased geopolitical risk. The unlikely event of a severe disruption of oil supplies from the Gulf could ultimately affect the fragile global economic recovery, in our view—especially if it were to continue over several months.”).

⁷⁹ Jim Garamone, *Iranian Boats Provoke ‘Serious Incident’ in Strait of Hormuz*, AMERICAN FORCES PRESS SERV. (Jan. 7, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=48579>. Pentagon spokesman Bryan Whitman said, “Small, Iranian fast boats made some aggressive maneuvers against our vessels and indicated some hostile intent This required our vessels to issue warnings and conduct some evasive maneuvers. The U.S. Navy vessels were prepared to take appropriate actions.” *Id.* The U.S. ships traveled in international waters within the Strait of Hormuz and complied with appropriate protocols, Whitman said. *Id.*

⁸⁰ Brigadier General Ali Fadavi, Acting Commander of the Islamic Revolution Guards Corps explained: “The US administration seeks to achieve certain political gains during Bush’s Middle East visit which will obviously bear no fruit The US footage is clumsily faked.” *Iran Slams US Media Hype*, PRESS TV (Jan. 10, 2008), <http://edition.presstv.ir/detail/38240.html>. He added: “The Iranian patrol boats carried out a routine identification check in line with The United Nations Convention on Law of the Sea (UNCLOS) which has been in force since 1982. The convention calls on littoral states to facilitate the safe transit of ships.” *Id.*

subsequent reports stated that objects dropped from the Iranian speedboats were not of any apparent threat.⁸¹

The presence of U.S. warships in the Strait of Hormuz has been a sensitive issue for Iran since the Iran-Iraq war in the 1980s.⁸² In October 1987, the U.S. Navy destroyed an Iranian oil platform after an Iranian missile hit a U.S. oil tanker.⁸³ In April 1988, in what is considered the largest confrontation between surface fleets since the Second World War, the United States sunk two Iranian warships and several speedboats.⁸⁴ In July 1988, the USS Vincennes shot down the civilian airliner Iran Air Flight 655, which ranks among the deadliest disasters in aviation history.⁸⁵

The U.S.-based ratings agency Standard & Poor's recently posited that any high-level military response of Iran to the U.S.-EU embargo could boost oil prices to \$150 per barrel.⁸⁶ Slowing down shipping through the Strait of Hormuz due to imposed tanker inspections or controls of merchant ships by Iranian authorities would keep oil prices at their current high cost.⁸⁷ Beyond international law, the question remains how long the United States and Iran can continue with what the other side interprets as a provocation, while keeping the economic impact low and deterrence high. The Strait of Hormuz is a proxy for the larger dispute concerning Iran's nuclear program, over which U.S. and Iranian sabers will continue to rattle.

⁸¹ See Robin Wright & Ann Scott Tyson, *Objects From Iranian Boats Posed No Threat*, *Navy Says*, WASH. POST (Jan. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/11/AR2008011103730.html>.

⁸² For a chronology of events in the Strait of Hormuz, see Fred Attewill, *Timeline: The Strait of Hormuz*, GUARDIAN (Jan. 7, 2008), <http://www.guardian.co.uk/world/2008/jan/07/iran1>.

⁸³ See *Oil Platforms (Iran v. U. S.)*, 2003 I.C.J. 161 (Nov. 6), available at <http://www.icj-cij.org/docket/files/90/9715.pdf>.

⁸⁴ See CRAIG L. SYMONDS & WILLIAM J. CLIPSON, *THE NAVAL INSTITUTE HISTORICAL ATLAS OF THE U.S. NAVY* 224 (1995).

⁸⁵ In 1996, the United States and Iran reached "an agreement in full and final settlement of all disputes, differences, claims, counterclaims" relating to the incident at the International Court of Justice. Settlement Agreement, Aerial Incident of 3 July 1988 (Iran v. U.S.) (Feb. 9, 1996), available at <http://www.icj-cij.org/docket/files/79/11131.pdf>.

⁸⁶ See *S&P Rpts Assess the Economic and Credit Impact of Rising Tensions in the Gulf*, REUTERS.COM (Feb. 13, 2012), <http://www.reuters.com/article/2012/02/14/markets-ratings-gulftensions-idUSWNA012620120214>.

⁸⁷ See *supra* note 79 and accompanying text. For oil-producing countries such as Bahrain, Kuwait, Oman, Saudi Arabia, Qatar, and the United Arab Emirates, higher oil prices would actually be beneficial. See *Iran Oil Embargo Can Push Economies into a Recession*, *S&P says*, TEHRAN TIMES (Feb. 14, 2012), <http://www.tehrantimes.com/economy-and-business/95462-iran-oil-embargo-can-push-economies-into-a-recession-sap-says>.